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DOMINICK DIMINNI,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff-Appellant,	:	DOCKET NO. A-002859-23T01
V.	:	ON APPEAL FROM FINAL ORDER ENTERED BY THE SUPERIOR COURT
SEASIDE HEIGHTS PLANNING BOARD and ONE OCEAN TERRACE, LLC,	:	OF NEW JERSEY, LAW DIVISION-CIVIL PART, OCEAN COUNTY (OCN-L-1062-23); CIVIL ACTION; SAT BELOW: HON. FRANCIS R. HODGSON, JR., A.J.S.C.
Defendants-Respondents.	:	SUBMITTED AUGUST 15, 2024

PLAINTIFF-APPELLANT'S MERITS BRIEF

On the brief: Edward F. Liston, Jr.
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PROCEDURAL HISTORY [1]

On December 12, 2022, defendant One Ocean Terrace, LLC (the Applicant) filed a development application (Pa7 to Pa16) with defendant Seaside Heights Planning Board (the Board). A hearing in connection with same was conducted on February 27, 2023 (1T3-1 to 1T85-20); at the conclusion, there was a motion and a unanimous vote to approve the proposal (1T84-20 to 1T85-18). The Board's March 27, 2023 memorializing resolution is at Pa18 to Pa27.

On May 9, 2023, Dominick DiMinni appealed by filing an action in lieu of prerogative writs in the Superior Court of New Jersey, Law Division-Civil Part, Ocean County. See Pa1 to Pa5 (complaint). The Board answered the complaint on June 20. See Pa32 to Pa34. The Applicant filed answer and counterclaim (Pa35 to Pa39) on July 5; the counterclaim was dismissed on July 31. See stipulation at Pa40.

On August 17, 2023, Mr. DiMinni filed a motion for summary judgment. See Pa41 to Pa43 (notice of motion). The Honorable Francis R. Hodgson, Jr., A.J.S.C., denied the motion on September 22. See order at Pa44 to Pa45.

On October 2, 2023, a pretrial order (Pa46 to Pa47) issued. The matter was tried before Judge Hodgson on April 5, 2024. See 2T4-25 to 2T30-15. On

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[1] Transcript references: 1T__-___ (February 27, 2023 Seaside Heights Planning Board hearing); 2T__-__ (April 5, 2024 Ocean County Law Division trial).

April 11, 2024, the Court entered an order (Pa48) dismissing the complaint with prejudice. The accompanying written opinion is at Pa49 to Pa71.

On May 20, 2024, Mr. DiMinni appealed to the Superior Court, Appellate Division. See Pa72 to Pa75 (notice of appeal).

STATEMENT OF FACTS

The property in question is Seaside Heights Borough Tax Map Block 1, Lots 7, 10 and 19.02, also known as 9 & 11 Ocean Terrace and 24 Porter Avenue. See 1T9-17 to 1T9-21 (Board Attorney Steven Zabarsky). Ocean Terrace runs north-south and Porter Avenue runs east-west; to the east of Ocean Terrace is the Boardwalk. See testimony of the Applicant's engineering-planning witness, Matthew Wilder (1T32-6 to 1T32-7; 1T42-11 to 1T42-12). See also the historic aerial photographs in Exhibit A-5 (Pa104).

Formerly the site of Frankie & Johnnie's Bar, the 18,564-sf rectangular parcel (+/- 110' along Ocean Terrace, +/- 167' along Porter Avenue) is currently used as a parking lot. Wilder (1T31-8 to 1T31-21); Pa10 (Application Section Two-A). In the historic (1920-2012) aerial photographs (Pa104), the bar building first appears in the 1963 photograph -- there are no buildings or other improvements in the 2012 photograph. Thus, the property had been a vacant lot for more than 10 years prior to the development application at issue.

The land is in the R (Residential) and RB (Retail Business) zoning districts. See Pa19 (resolution at ¶ 2). Mr. DiMinni's property (30 Porter Avenue) is to the west. See 1T75-24 to 1T75-3 (Denise Carlin (resident of 40 Porter)).

The Applicant gave public notice that it was seeking site plan approval with variance relief:

> The applicant is seeking Board approval of this major preliminary and final site plan with variances. The site plan includes three (3) structures which will house a total of seventeen (17) residential townhomes. The applicant seeks the following variances:
>
> - Front yard setback on Porter Avenue
> - Front yard setback on Ocean Avenue
> - Height
> - Lot area/unit
>
> Pa103.

The public was advised that "[c]opies of the application and plans are available for review at the Borough of Seaside Heights Municipal Offices, 901 Boulevard & Sherman Avenue . . . ." Ibid.

Prior to the hearing commencing, counsel for Mr. DiMinni objected to deficiencies in the notice; besides being vague about the proposal, the application and plans were not at 901 Boulevard. See colloquy at 1T4-14 to 1T15-9. A Board Member advised that he

> walked outside about ten minutes ago. On those doors outside that Mr. Liston was referring to, it directs people to go to 100 Grant Avenue for general municipal business.
>
> 1T19-12 to 1T19-16.

The Board declared itself as having jurisdiction (1T20-21 to 1T22-12), and the application proceeded.

The Applicant sought approval for seventeen residential units, to be contained in three buildings. See 1T33-8 to 1T33-17 (Wilder). Several variances were sought. (At Pa49, the trial court incorrectly states that a "use" variance was requested).

For multifamily residential use, Borough Ordinance Sec. 246-36B(2)(b)[1] [2] requires a minimum of 1,200 sf per unit. Developing seventeen units would result in 1,062 sf per unit. See 1T37-19 to 1T37-21 (Wilder). According to Mr. Wilder, "[t]he most obvious problems" associated with excess density "would be traffic and parking" (1T40-13 to 1T40-14). Wilder claimed that the Applicant "mitigated those issues" by providing two parking spaces per unit "per the Borough ordinance [3] " (1T40-14 to 1T40-17). However, that off-street parking is not for the public but for the private residents; the complex would replace an off-street parking lot used by the public (including persons enjoying the boardwalk and beach on the other side of Ocean Terrace). As for on-street parking, the proposal would result in a net loss of one space (see

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[2] The Borough's Zoning and Land Use ordinances are online: ecode360.com/11353122#11353122

[3] This may refer to the site plan design requirement in Sec. 246-51Q(6)(b): "The following regulations and rules shall apply concerning off-street parking in each and every district in the Borough of Seaside Heights[:] * * * * Apartment houses, efficiency motel units, and residential condominium developments: parking spaces for two motor vehicles for every one living unit in such apartments, efficiency motel units, and residential condominium developments."

colloquy at 1T40-20 to 1T41-10); although Mr. Wilder referred to this as somehow "minimizing the loss" (1T40-18), it is a loss nevertheless. Wilder never explained how the Applicant is mitigating what he acknowledges to be a traffic problem. The Board acknowledged the witness's testimony that "[t]he density requirement is 1,200 square feet and each unit will have approximately 1,092 square feet" (Resolution, paragraph 5L (Pa21)), but the Board never actually justified this variance.

In every Borough zoning district, "[t]he front setback line is hereby fixed, and no building [4] or structure [5] shall be constructed any closer than 10 feet from the front property line." Sec. 246-44A(1)(a). Since Frankie & Johnny's was demolished years ago, there is no "building" or "structure" on the "vacant parcel" (Exhibit A-3 at 1). The Applicant sought variances so that its buildings would only be set back 5 feet along both Ocean Terrace and Porter Avenue. 1T37-6 to 1T37-8. In this regard, Mr. Wilder employed a "prevailing setbacks"

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[4] "Any structure having a roof supported by columns, piers or walls, or having other support, including tents, lunch wagons, trailers, dining cars, camp cars or other structures on wheels, intended for the shelter, housing or enclosure of any person or use." Sec. 246-5.

[5] "A combination of materials to form a construction for occupancy, use or ornamentation, whether installed on, above or below the surface of a parcel of land, including among other things buildings, stadia, reviewing stands, platforms, stagings, observation towers, radio towers, tanks, trestles, open sheds, shelters, fences over six feet in height and display signs." Sec. 246-5.

argument: because other properties along Ocean and Porter are "are pretty much built up to the property line," that supposedly justifies development within the "pretty well established prevailing setback for all the existing structures in this area." See 1T38-2 to 1T38-9.

The Applicant proposed to "set our structures back slightly to just provide a little bit of room for landscaping and to provide a little bit of room for architectural facade elements that sort of provide depth to the property or to the building" (1T38-13 to 1T38-17). Mr. Wilder failed to explain how that supposed benefit could not be accomplished via buildings with conforming setbacks. Indeed, 10-foot setbacks would necessarily provide more room for the landscaping and façade elements than 5-foot setbacks.

Mr. Wilder's representation that the proposal "actually increased our setback" (1T39-6) is demonstrably false. This is a vacant parcel with no building or structure as defined by the Borough. The Applicant has a clean slate to develop within the 10-foot setbacks; the proposal represents a decreased setback, along two different streets.

Wilder perceived "no detriment associated with these setback variances" (1T39-2 to 1T39-3), but he failed to articulate a benefit in violating Sec. 246-44A(1)(a). The Applicant could "provide sufficient space in appropriate locations for a variety of uses, including residential" (1T39-15 to 1T39-17) with

10-foot setbacks. Whether or not a parking lot "leave[s] a lot to be desired from an architectural or aesthetic standpoint" (1T39-22 to 1T39-23), this was not a choice between uses: the Applicant proposed multi-family, and the question was whether there were special reasons to deviate from the 10-foot setbacks. The "absolute benefit to the aesthetics of this area" (1T39-25 to 1T40-1) could be advanced by developing a multifamily that is compliant with 244-44A(1)(a).

The proofs supporting the height variance made no sense at all.

> So, this property is a stone's throw from the boardwalk and the boardwalk is generally five to six feet in elevation above this subject property. And this part of the boardwalk is quite unique in that we actually have development on the east side of the boardwalk in this area at the elevation of the boardwalk. As you get further into Seaside Heights, you have a lot of development on the west side of the boardwalk that's at street level. In this area you actually have development on the east side of the boardwalk at boardwalk level.
>
> You also have some buildings to the north and to the west that are generally around 38 feet.
>
> 1T42-11 to 1T42-25.

Development on the easterly side of Ocean Terrace isn't unique to this property. The entire Boardwalk has been fully developed since 1963. See the aerial photographs at Pa104. The owner of every parcel on westerly Ocean Terrace could make the Applicant's argument and elevate to 48 feet, 49 feet, 50 feet, etc., at the expense of the neighbor. And the Applicant would have no

reason to build upward in violation of the height restriction, if it did not insist upon seventeen units in violation of the density restriction.

Nonsensically, Wilder extols "the uniqueness of the design that I was referencing and with the architectural design what we've done is the top floor, the fifth floor, is actually a slightly smaller floor when compared to the floors below it" (1T42-25 to 1T43-4). Making the top floor slightly smaller than the floor beneath it is not a unique architectural innovation and (again) it means that the neighbors can elevate to 50-55' or more if only they make the lower stories slightly larger.

LEGAL ARGUMENT

I. THE TRIAL COURT COULD NOT HAVE AFFIRMED THE BOARD'S VARIANCE GRANT BASED ON THIS RECORD. (Order at Pa48; opinion at Pa58 to Pa71).

Because variances are to be granted sparingly, a board's factual findings are accorded less deference on an appeal from the grant of variance than from a denial. See, e.g., Kinderkamack Road Assocs. v. Mayor and Council, Oradell, 421 N.J. Super. 8, 21 (App. Div. 2011). N.J.S.A. 40:55D-10(g) requires written "facts and conclusions . . . in each decision on any application for development"; the failure to make adequate findings for appellate review will generally warrant a remand for proper findings. See Smith v. Fair Haven Zoning Bd. of Adj., 335 N.J. Super. 111, 123 (App. Div. 2000). When the Board makes findings, the Court must review the record to ensure that there is competent evidence to support them; if a finding is not supported by competent evidence, the Court should vacate same as being an arbitrary, capricious and unreasonable board decision. See Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 290-91 (1965).

At Pa58, the trial court touts the Applicant's expert testimony as "uncontroverted." That does not mean that the evidence is legally competent to support the Board's findings. In Tomko v. Vissers, 21 N.J. 226 (1956), the applicant's proofs, while uncontroverted, were legally insufficient to support the

variance relief sought. The Supreme Court held that the variance could not be granted on the record created by the applicant.

> Where the applicant fails to fulfill his responsibility in setting before the local agency the evidence necessary for it to exercise a seasoned discretion the failure is fatal . . . .
>
> Id. at 239.

At Pa65 to Pa66, the trial court discusses the standard for (d)(1) use variances. Again, this application does not involve a use variance.

At Pa62, the trial judge states: "There is significant overlap in the stated reasons for the variances as set forth in the proofs, I will therefore, address the analysis for all of the variances together." At Pa66, the court states: "The evidence supporting the (c) and (d) variances overlaps and will be addressed together." But, as discussed below, the standard for a (c) bulk variance is very different from those for density ((d)(5)) and height ((d)(6)) variances. The opinion is for that reason unhelpful and confusing. For example, at Pa67, the court cites (c)(2), (d)(5) and (d)(6) and announces: "the design would advance the goals of the MLUL by providing for light, air and open space as well as provide for a desirable visual environment through good civic design." For a (c)(2), it is the variance -- not "the design" -- which must advance N.J.S.A. 40:55D-2 goals in order to pass muster under the MLUL.

The undersigned will attempt to the discussion of each variance separately in Subpoints A, B and C.

A. THE (C)(2) SETBACK VARIANCES WERE INSUFFICIENTLY SUPPORTED. (Opinion at Pa59; Pa62 to Pa63; Pa68).

A bulk/dimensional variance (such as that for a setback violation) is governed by N.J.S.A. 40:55D-70(c); a "(c)" variance requires the applicant to establish the positive and negative criteria. Subsection (c)(l) refers to hardship, i.e., a condition of the land not created by the owner which renders it nonconforming. See Jock v. Zoning Bd. of Adjustment of Wall, 184 N.J. 562 (2005) (isolated undersized lot). There is no setback hardship concerning this rectangular, vacant parcel; the Applicant is creating the condition. Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 470 (App. Div. 2015) (developer cannot create (c)(1) hardship by voluntarily reducing parking spaces). At Pa62 n. 6, the trial court acknowledges that the Applicant failed to establish N.J.S.A. 40:55D-70(c)(1) grounds for relief.

Subsection (c)(2) refers to "special reasons" whereby variances advance a zoning purpose even though they violate the zoning ordinance standard. See Kaufmann v. Plan. Bd. of Warren, 110 N.J. 551 (1988) (subdividing parcel to make lots which, while deficient, advance conformity with community's

development plan [6]). The negative criteria refer to lack of substantial detriment to the public good (generally the neighborhood) and the intent of the ordinance and zoning plan. Ten Stary Dom Partnership v. Mauro, 216 N.J. 16, 30 (2013).

1. THE FINDINGS ON THE POSITIVE CRITERIA ARE LEGALLY UNTENABLE AND IN ANY EVENT FACTUALLY UNSUPPORTED.

N.J.S.A. 40:55D-70(c)(2) permits bulk variance relief

> where in an application or appeal relating to a specific piece of property the purposes of this act . . . . would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow depailure from regulations . . . .

"[T]he test to be applied by the local agency in considering a variance application under this section is whether the grant of approval will 'actually benefit the community in that it represents a better zoning alternative for the property."' Valenti v. Plan, Bd., City of Absecon, 246 N.J. Super. 77, 83 (App. Div. 1990) (quoting Kaufmann, 110 N.J. at 563).

> The [Kaufmann] Court was . . . careful to emphasize that in prescribing a "better zoning alternative" test, it was not according the local board a license to act in abrogation of the intent and plan of the zoning ordinance even though a board, by definition, acts contrary to the letter of the ordinance whenever it grants variance relief.
>
> Id.

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[6] In Lang v. Zoning Bd. of Adjustment, North Caldwell, 160 N.J. 41 (1999), the Court found that a variance to locate in-ground swimming pool around lawfully existing structures could warrant variance relief based on both hardship and special reasons.

Thus, the suggested benefit must inure to the public, and it must also take into account the intent and plan of the zoning standard being violated.

In Kaufmann, 110 N.J. at 563-66, the proposed subdivision created lots with a width deficiency, but it did so to create smaller lots that were more consistent with the zoning and planning intended for the area. In Lang, 160 NJ. at 60, an above-ground swimming pool was to be replaced with an in-ground pool; although setback and coverage variance relief would be required, the aesthetic benefit of an inground pool justified the deviation. In Jacoby, 422 NJ. Super. at 471, an office complex with fewer parking spaces was proposed, in order to make room for trees and other visual buffers that would hide the complex from public view. In Green Meadows at Montville, L.L.C. v. Plan. Bd. of Twp. of Montville, 329 NJ. Super. 12 (App. Div. 2000), the court held that the developer was entitled to variance relief creating two misshapen lots; the lot sizes were consistent, and the expressed reason for denial (density) was belied by the fact that the lots complied with the density standards.

By contrast, in Wilson v. Brick Twp. Zoning Bd., 405 NJ. Super. 189, 199-200 (App. Div. 2009), bulk variances based on visual enhancement would be rejected where the aesthetic benefit solely benefited the owner -- the improvements conferring the benefit were hidden from public view. In Cicchino v. Township of Berkeley Heights Plan. Bd., 237 N.J. Super. 175, 180-81 (App.

Div. 1989) the ostensible benefit of undersized lots contradicted the intent of the planning and zoning of the municipality which (unlike the situation in Kaufmann) was calling for larger lots.

> [T]he application for a variance under C2 requires:
>
> (1) [that it] relates to a specific piece of property; (2) that the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirement . . . .
>
> [William M. Cox, New Jersey Zoning and Land Use Administration, § 6-3.3 at 143 (Gann 2008)]
>
> Wilson, 405 N.J. Super. at 198.

Neither of these positive-criteria elements was supported by competent evidence.

First, Mr. Wilder's "prevailing setback" testimony (1T38-2 to 1T38-9) established that the setback was not specific to the Applicant's lot. The testimony was that other properties long Ocean Terrace and Porter Avenue had deficient setbacks, and, therefore, this property should too. Not only do the setback variances lack site specificity, by Wilder's logic the exception to Sec. 246-44A(1)(a) ought to be the rule because other property owners have violated the 10-foot minimums.

Wilder urged that parking lots "leave a lot to be desired from an architectural or aesthetic standpoint" (1T39-22 to 1T39-23) and "are not an aesthetically pleasing improvement" (1T45-2 to 1T45-3). The witness

misunderstood the nature of flexible (c) variances. The applicant must prove "that the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirement" (Wilson, 405 N.J. Super. at 198). (C)(2) is not a choice between a multifamily use and a parking lot use -- it is rather a choice between a multifamily use with setbacks complying with the zoning ordinances, and a multifamily use with setbacks in "deviation from the zoning ordinance requirement." When the (C)(2) standard is properly understood, the Board's findings beg the question:

> 1. The Application for Development will promote the public health, safety, morals and general welfare.
>
> 2. The Application for Development will secure from fire, flood, panic and other natural and man-made disasters.
>
> 3. The Application for Development provides for adequate light, air and open space,
>
> 4. The Application for Development promotes a desirable visual environment through creative development techniques and good civic design.
>
> 5. The Application for Development promotes the construction of single-family residential dwellings consistent with current base flood elevation and FEMA requirements and is a substantial benefit to the general welfare of the community.
>
> 6. The site is particularly suited for the subject development as being consistent with the Borough of Seaside Heights Vision Plan.
>
> Pa23 to Pa24.

The question is how 5-foot setbacks promote public health, safety and welfare in a way that 10-foot setbacks do not. The issue is whether 5-foot setbacks provide a public benefit in terms of light, air, desirable visual environment, FEMA compliance, etc., which benefits are not achieved via 10-foot setbacks. Wilder's comments about the Seaside Heights Vision Plan are meaningless because he does not cite language therein identifying public benefits that can be realized with smaller setbacks but not larger setbacks.

Wilder praises his client for including 5-foot setbacks because the public benefits from landscaping and facades. However, that serves only to destroy the Applicant's argument because 10-foot setbacks would provide more of said benefit, not less.

The only perceptible benefit in reducing these setbacks is that it permits the Applicant to squeeze more residential development on the lot. The problem is that this is to the developer's private advantage, not a public one. Wilson.

At Pa59, the trial judge lauded Wilder's testimony that "furthermore the benefits of the deviation substantially outweigh the detriment." It is unnecessary to address the detriment because Wilder never identified the benefit. How does a five-foot setback provide a public benefit whereas a ten-foot setback does not? The witness, the Board and the court are silent on this issue because -- at least on this record -- the argument is untenable.

At Pa62 to Pa63, the court correctly represents the (c)(2) standard. The problem is that neither the judge nor the Board ever applied that standard below.

"As to the (c)(2) bulk variance, Mr. Wilder testified that in his opinion based on the above facts, he saw no detriment in the project and that the benefits of the deviations substantially outweigh any detriment." Pa68. The Board had no basis for reaching the issue of detriment since the Applicant failed to satisfy the positive criteria.

2. THE NEGATIVE CRITERIA WERE NOT ESTABLISHED AND THE FINDINGS ON SAME ARE DEFICIENT AS A MATTER OF LAW.

The negative criteria are that "the variance can be granted without substantial detriment to the public good" and that "the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance." Wilson, 405 N.J. Super. at 198. Flexible (c)(2) variances involve an inquiry as to whether "the benefits of the deviation would substantially outweigh any detriment." Id. The Applicant has not established any MLUL-based benefit. Relaxing the bulk standards harms the public with an encroaching structure that would also exceed the permitted density and height in the zone. And Wilder's "prevailing setback" theory would upend the zoning purpose that all buildings/structures ought to be set back 10 feet absent site-specific reasons -- the exception (variance) would become the rule (planning/zoning intent).

B. THE (D)(5) FINDINGS WERE NONEXISTENT BECAUSE THERE WAS NO COMPETENT EVIDENCE TO SUPPORT THE DENSITY VARIANCE. (Opinion at Pa61 to Pa62; Pa64).

"A density variance seeks a departure from certain regulations applicable to a use the municipality has chosen to permit, not prohibit, in the zone." Grubbs v. Slothower, 389 N.J. Super. 377, 388 (App. Div. 2007). "[I]n considering such applications, zoning boards of adjustment should focus their attention on whether the applicant's proofs demonstrate 'that the site will accommodate the problems associated with a proposed use with [a greater density] than permitted by the ordinance.'" Ibid. (quoting Randolph Town Center Assocs., L.P. v. Twp. of Randolph, 324 N.J. Super. 412, 417 (App. Div. 1999)). This requires an examination of " purpose of restricting density in a particular zone." Id. at 389. "'The MLUL explicitly recognizes the regulation of the density of development as a general purpose of zoning that contributes to 'the well-being of persons, neighborhoods, communities and regions and preservation of the environment.'" Ibid. (quoting N.J.S.A. 40:55D-2(e)). "Density restrictions . . . serve to limit the intensity of the use of the land to be developed." Ibid. "A successful applicant for a density variance therefore must show that despite the proposed increase in density above the zone's restrictions, and, thus, the increased intensity in the use of the site, the project nonetheless served one or more of the purposes of zoning and was consistent with the overall goals of the MLUL." Ibid.

The Applicant's 18,564-sf property is zoned for multi-family, but the Borough regulates density by requiring minimum-1,200-sf units (15 units). The Applicant proposes to cram two additional units into the site, and the question is whether the Board had sufficient evidence under the (d)(5) standards identified above. Mr. Wilder's testimony failed in that regard:

> Moving on to the density variance, again, we are seeking a variance to permit 1,092 square feet per unit where 1,200 square feet is required. So, a variance for density is subject to a weighing analysis. That is, the applicant must demonstrate that the site can accommodate the problems typically associated with a use with a greater density. The most obvious problems that you would see would be traffic and parking.
>
> 1T40-6 to 1T40-14.

The word "traffic" appears only one other time in the entire Board hearing transcript. 1T50-17 to 1T50-20 ("[W]e didn't want to propose a gate between the buildings or restricting access, because the vehicles would be cueing on Ocean Terrace. The last thing we want to do is stop traffic."). Each residential unit adds two cars of the occupants, in addition to the vehicles of invitees and guests, to the traffic congestion just across the street from the Boardwalk. No traffic studies were submitted. Wilder had no basis for opining that the traffic increase would be "mitigated" (1T40-15) -- and he offered no such opinion.

And the Applicant is not "minimizing the loss in on street parking" (1T40-18 to 1T40-19). Indeed, the application itself displaces an entire parking lot,

leaving that many more vehicles on the streets -- where the Applicant eliminates more parking.

> [MR. WILDER]: * * * [W]e're able to add an additional space on Ocean Terrace. So, we are losing two on Ocean Terrace. We're adding one back on Ocean Terrace south of the proposed driveway and then we are adding one on Porter Avenue where we eliminate the existing driveway that serves the parking lot.
>
> MR. ZABARSKY: There's a net loss of one.
>
> MR. WILDER: There's a net loss of one.
>
> 1T41-2 to 1T41-12.

This is all the Applicant gave the Board to work with in deciding whether to grant a density variance. "[W]hether the action was unreasonable, arbitrary or capricious must be decided upon the basis of what was before the . . . board." Antonelli v. Plan. Bd., Waldwick, 79 N.J. Super. 433, 440-41 (App. Div. 1963).

Unsurprisingly, the Board's resolution fails to articulate a basis for granting the (d)(5). The Board merely acknowledges Mr. Wilder's testimony that "[t]he density requirement is 1,200 square feet and each unit will have approximately 1,092 square feet." Resolution, paragraph 5L. The Board's own findings are set forth at paragraphs 6-7:

> 1. The Application for Development will promote the public health, safety, morals and general welfare.
>
> 2. The Application for Development will secure from fire, flood, panic and other natural and man-made disasters.

> 3. The Application for Development provides for adequate light, a[r and open space,
>
> 4. The Application for Development promotes a desirable visual environment through creative development techniques and good civic design.
>
> 5. The Application for Development promotes the construction of single-family residential dwellings consistent with current base flood elevation and FEMA requirements and is a substantial benefit to the general welfare of the community.
>
> 6. The site is particularly suited for the subject development as being consistent with the Borough of Seaside Heights Vision Plan.
>
> Pa23 to Pa24.

These bare-bones 'findings' do not relate in any way to the (d)(5) proofs set forth by Mr. Wilder. The Board cannot find what the Applicant did not prove.

> The primary responsibility of the applicant is to supply competent and credible evidence . . . . The responsibility of the board is then to weigh the evidence submitted and reach basic factual determinations . . . .
>
> Tomko, 21 N.J. at 239.

"Likewise, in addressing the so-called negative criteria, the applicant would need to demonstrate that the increase in density would not have a more detrimental [e]ffect on the neighborhood than construction of the project in a manner consistent with the zone's restrictions." Grubbs v. Slothower, 389 N.J. Super. 377, 390 (App. Div. 2007). For obvious reasons, the Applicant made no such demonstration and the Board made no such finding. Stuffing in two extra

units -- 13% more than the permitted density -- is exacerbating the traffic and parking problem. There would be no net loss of street parking were it not for the Applicant intensely developing seventeen units accessing two different streets.

At Da61 to Da62, the judge adopts the Board's reasons why the height and density variances should be granted. The "public health," FEMA, the Seaside Vision Plan and the other goals could just as easily be advanced with fewer units (which would obviate the need to build higher than the permitted maximum height).

C. THE (D)(6) HEIGHT VARIANCE SHOULD BE VACATED.
(Opinion at Pa61 to Pa62; Pa64 to Pa65).

"[A] request to erect a principal structure equal to or beyond ten percent higher than the maximum zoned height requires a special reason or D variance." Shri Sai Voorhees v. Twp. of Voorhees, 406 N.J. Super. 497, 504 (Law Div. 2009). The maximum permitted height is 41 feet and the Applicant seeks to develop more than 7 additional feet above.

"[T]he applicant for a (d)(6) variance on grounds of hardship must show that the height restriction in effect prohibits utilization of the property for a conforming structure." Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 51 (App. Div. 2004). The record is bereft of hardship evidence.

"[S]pecial reasons necessary to establish a height variance must be tailored to the purpose for imposing height restrictions in the zoning ordinance." Id. at 52.

> Very early on, courts recognized the relationship between height restrictions and the public welfare because the height of a building could impact traffic congestion, fire hazards, public health, adequate light and air, and population density. E.g., Pritz v. Messer, 149 N.E. 30, 31 (Ohio 1925), overruled on other grounds, Village of Hudson v. Albrecht, Inc., 458 N.E.2d 852, 855-56 (Ohio), appeal dismissed, 467 U.S. 1237 (1984).
>
> Height restrictions like restrictions on density, bulk or building size, can also be a technique for limiting the intensity of the property's use.
>
> Id. at 52-53.

As previously demonstrated, Mr. Wilder presented no opinion evidence regarding the alleviation of traffic congestion. The premise underlying the proposed (d)(6) -- Applicant's buildings should be taller because the easterly Boardwalk across the street is built up -- cheats the westerly property owners of their light and air. The witness said as much:

> So, in order to promote and maximize those water views, we have had to go up an additional height with the units.
>
> 1T44-5 to 1T44-7.

The Applicant's private, selfish interest in having superior views, far from benefiting the public, will merely necessitate elevating the neighboring buildings.

Finally, it bears repeating that the height restriction is required for the very purpose of adding units in spite of the density restriction. By facilitating the use intensity, (d)(6) relief is contrary to the admonition in Grasso.

The trial court applauds Wilder's testimony "that the design would advance the goals of the MLUL" (Pa67). The design could advance those goals without the variance.

II. THE APPLICANT'S NOTICE DID NOT SET FORTH "THE LOCATION . . . AT WHICH ANY MAPS AND DOCUMENTS FOR WHICH APPROVAL IS SOUGHT ARE AVAILABLE"; AS A MATTER OF LAW, THE BOARD LACKED JURISDICTION TO HEAR THE APPLICATION. (Order at Pa48; opinion at Pa53 to Pa55).

"[A] board's decision regarding a question of law ... is subject to a de novo review by the courts, and is entitled to no deference since a zoning board has 'no peculiar skill superior to the courts' regarding purely legal matters.'" Dunbar Homes, Inc. v. Zoning Bd. of Adj., Twp. of Franklin, 233 N.J. 546, 559 (2018) (quoting Chicalese v. Monroe Twp. Plan. Bd., 334 N.J. Super. 413, 419 (Law Div. 2000)). One such question of law is "whether [the board] has jurisdiction over a matter." Pond Run Watershed Association v. Twp. of Hamilton Zoning Bd. of Adj., 397 N.J. Super. 335, 350 (App. Div. 2008). The board's decision "is subject to de novo review by the courts and thus is afforded no deference." Ibid.

The Municipal Land Use Law (N.J.S.A. 40:55D-1 to -163) requires that notice of "applications for development" be given to the public, N.J.S.A. 40:55D-12(a), and to owners of properties within 200 feet of the property that is the subject of the hearing, N.J.S.A. 40:55D-12(b). It is impossible to overstate "the importance of the public notice requirements" since "such notice is jurisdictional." Perlmart, Inc. v. Lacey Twp. Plan. Bd., 295 N.J. Super. 234, 237 (App. Div. 1996). "'[U]nless notice is given as required by statute the [B]oard

lacks the power to hear or consider an application even if the subject matter is within its statutory power.'" Twp. of Stafford v. Stafford Twp. Zoning Bd. of Adjustment, 154 N.J. 62, 79 (1998) (quoting William M. Cox, New Jersey Zoning and Land Use Administration, § 4-2.1 (1997)). The applicant and the board must

> exercise extreme caution in observing the rules governing notice. It is one of the most critical functions performed by the applicant's attorney -- and the one which will do the most harm to the client if not done properly . . . . [T]he applicant must comply with the strict letter of the statute and with the spirit of the statute requiring disclosure.
>
> 36 N.J. Prac., Land Use Law § 14.4 (David J. Frizell and Ronald D. Cucchiaro) (3d ed., October 2023 Update).

According to N.J.S.A. 40:55D-11:

> Notices pursuant to [N.J.S.A. 40:55D-12] and [N.J.S.A. 40:55D-13] shall state the date, time and place of the hearing, the nature of the matters to be considered and, in the case of notices pursuant to [N.J.S.A. 40:55D-12], an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office, and the location and times at which any maps and documents for which approval is sought are available pursuant to [N.J.S.A. 40:55D-10].

At Pa53 to Pa54, the trial court relies on language from Perlmart. To be sure, there are gray areas where courts may differ as to whether an applicant has adequately described "the nature of the matters to be considered"; that portion of the notice requires a "'common sense description of the nature of the

application, such that the ordinary layperson could understand its potential impact upon him or her.'" Pond Run, 397 N.J. Super. at 352 (quoting Perlmart, 295 N.J. Super. at 239). However, under N.J.S.A. 40:55D-11 notice requirements are black-and-white; the applicant either did or did not comply (the "date" is either right or wrong, the "time" is either right or wrong, etc.). While unpublished, Pavlovsky v. Gurin, 2009 WL 3459663 (App. Div. 2009) [7] , is instructive. Gurin and Kallins sought variance relief to add a second floor and roof deck to their home. While Pavlovsky appealed the Zoning Board of Adjustment's approval on the substantive merits, the decision was void for lack of jurisdiction.

> Notices required by N.J.S.A. 40:55D-12 "shall state the date, time and place of the hearing, the nature of the matters to be considered and ... the location and times at which any maps and documents for which approval is sought are available pursuant to [N.J.S.A. 40:55D-10.]" N.J.S.A. 40:55D-11.
>
> N.J.S.A. 40:55D-9(b) requires that notice of "all regular meetings and all special meetings" of a municipal agency "shall be given in accordance with municipal regulations." Moreover, N.J.S.A. 40:55D-10(b) provides that all "maps and documents for which approval is sought at a hearing shall be on file and available for public inspection ... during normal business hours in the office of the administrative officer." The "administrative officer" is "the clerk of the municipality, unless a different municipal official ... [is] designated by ordinance or statute." N.J.S.A. 40:55D-3.
>
> The Perth Amboy zoning ordinance in effect at the time of defendants' application designated the "[z]oning [o]fficer" as the

[7] Pa94 to Pa7.

> "administrative officer." Perth Amboy, N.J., Zoning and Land Dev. Code, c. 430 (2005). Therefore, the trial judge ruled, defendants' notice identifying the "Municipal Clerk" as the office where their application was available for inspection, was improper under the statute. This failure to comply with the statutory notice requirements deprived the Board of jurisdiction to hear defendants' application.
>
> Pa95 * 1-2.

Affirming, the appellate panel quoted with approval the trial court's observation that "[a]ppropriate notice to the public . . . is jurisdictional. Defective notice does not vest the [B]oard with jurisdiction to hear the application." Pa95 * 2. Thus, even though members of the public could have viewed the application at the municipal clerk's office (per the notice), and even though anyone going to the 'wrong' place could have been directed to the right 'place,' the fact remained that the applicants failed to identify the location as required by N.J.S.A. 40:55D-11.

Whereas Mary Ellen Pavlovsky did not seem concerned about the jurisdictional issue, counsel for Mr. DiMinni specially brought the defective notice to the attention of the Board and the Applicant. Instead of adjourning the proceedings so that proper notice could issue, the defendants stubbornly proceeded in violation of a crucial MLUL requirement.

The trial court opinion does not address Pavlovsky. Rather, at Pa55 n. 6, the judge cited Quick Plus Realty, LLC v. City of Bridgeton Zoning Bd., No. A-

4S09-17T4, 2019 N.J. Super. Unpub. LEXIS 1360, at *8 (Super. Ct. App. Div. June 13, 2019). Cf. Rule. 1:36-3. Quick Plus Realty was not "attached" to the slip opinion (see Pa55 n. 6) [8] ; the undersigned was unaware of the case. Quick Plus is in any event distinguishable. There, the notice stated that documents were "on file with the . . . Board" (Pa105 * 1); the jurisdictional argument was rejected because "[c]ommon sense dictates that any member of the public concerned about the application could easily find the address of the Board." In the present case, the public was directed to the wrong address.

[8] The Westlaw version is at Pa105 to Pa109.

III. THE NOTICE WAS INSUFFICIENT. (Order at Pa48; opinion at Pa55 to Pa58).

As outlined in Point II, the notice must provide a "'common sense description of the nature of the application, such that the ordinary layperson could understand its potential impact upon him or her.'" Pond Run, 397 N.J. Super. at 352 (quoting Perlmart, 295 N.J. Super. at 239). Appended hereto is the recent opinion in Lakewood Realty Associates, LLC v. Twp. of Lakewood Planning Bd., No. A-1899-21 (App. Div. October 5, 2023). The hotel developer gave notice of "138 rooms along with the following amenities: (1) Meeting rooms (2) Food prep area/kitchen (3) Lounge (4) Bar area (5) Dining area (6) Pool & (7) Exercise Room" (slip op. at 7), but did not identify the proposed banquet facility. The approval was void based on the panel's application of Pond Run and Perlmart.

> Counsel at oral argument on the appeal suggested that the 833-guest figure was inaccurately calculated, and that far fewer banquet guests would be expected to use the facility. That assertion overlooks the point that a banquet facility is designed to draw substantial numbers of guests who would be traveling to and from the facility for banquet events and who would not necessarily be staying in a room at the hotel.'
>
> Id. at 14.

In the present case, counsel for Mr. DiMinni expressed concern over the sufficiency of the Applicant's notice, particularly as it relates to the variance for "Lot area/unit" (Pa103).

> Front yard setback on Porter Avenue. How much is it? How much is required? How much is going to be right to the line or back two feet rather than 20 feet or that's important. I think it's important here, because it talks about the intensity of the use and how intense is it beyond that which your ordinance provides.
>
> The second one, front yard setback, same thing, how far is it? Is it going to be close to what is required or is it way off? The third one, height, height is a D variance and D variances, as noted in the case of Pond Road Water Shed versus Hamilton Township Zoning Board must be very specific. He doesn't tell us how high it's going to be. He just says height variance. It turns out I think it's about eight, ten feet, I'm not sure.
>
> T11-10 to T11-25.
>
> [L]ot area unit. I don't know what that means. I have no idea what it means. The reason I don't know what it means is because it's not specific. It doesn't talk about density. It doesn't refer to the statute. It just refers to your ordinance. If that were in here, I wouldn't have a problem with it, but it's not.
>
> 1T12-22 to 1T13-3.

At Pa55 to Pa58, the trial court dismisses Mr. DiMinni's concerns by (again) relying on 'common sense.' At Pa57, the Judge uses Wikipedia to interpret "Lot area/unit." The ordinary layperson envisioned in Perlmart and Pond Run should not be required to conduct online research to understand the nature of the variance being sought. The Court in Perlmart stressed that it is that information, however, which informs the public of the nature of the application in a commonsense manner such that the ordinary layperson could intelligently determine whether to object or to seek further information. Without the basic

information that is required in the notice, the Court in Perlmart indicated that it could not be assured that the general public understood the nature of the application. See Cox and Koenig, New Jersey Zoning and Land Use Administration (2024 Edition) Sec. 18-1.2 at page 242. Considering the vagueness of the applicant's notice and the nuanced nature of the variance relief being sought, it is clear that the language of the notice almost seems designed to obfuscate and simplify the complex aspects of the application so as to discourage a layperson from bothering to further inquire about the application in order to understand its true impact on surrounding properties.

This condition could easily have been remedied by the applicant by indicating in the notice the deviations involved in the variances sought for a front yard set back on Porter Avenue and Ocean Avenue, the extent of the height variance which required a higher level of proof, and the meaning of the term lot area/unit which means density, and could have been explained in a much more understandable manner simply by indicating that the number of units exceeded the maximum number allowed on the subject property and how that came about.

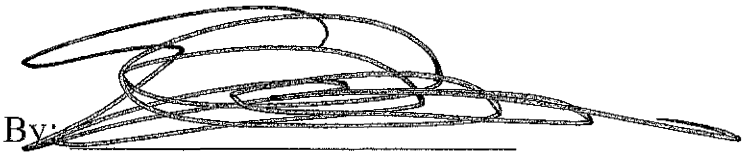
CONCLUSION

For the foregoing reasons, the order dismissing plaintiff's action in lieu of prerogative writs should be reversed, and the Board's approval of the Application's development application should be vacated.

Date: August 15, 2024

Respectfully Submitted,

EDWARD F. LISTON, JR., L.L.C.
Counsel for Plaintiff

By: 
Edward F. Liston, Jr.

EFL/dg

Superior Court of New Jersey

Appellate Division

Docket No. A-002859-23T01

DOMINICK DIMINNI,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM THE
Plaintiff-Appellant,	:	FINAL ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	OCEAN COUNTY
	:	
SEASIDE HEIGHTS PLANNING BOARD and ONE OCEAN TERRACE, LLC,	:	DOCKET NO. OCN-L-1062-23
	:	
	:	Sat Below:
	:	
	:	HON. FRANCIS R. HODGSON, JR.,
Defendants-Respondents.	:	A.J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT ONE OCEAN TERRACE, LLC

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Date Submitted: September 16, 2024

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APPENDIX TABLE OF CONTENTS

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[1] The excerpt from the brief is included because it is germane to the issues on appeal and falls within the exception to the Rule 2:6-1(a)(2).

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PROCEDURAL HISTORY

The Procedural History set forth in the Appellant's submission on behalf of Dominic DiMinni is acceptable to this defendant.

STATEMENT OF MATERIAL FACTS

This case involves application # 22-27 before the Seaside Heights Planning Board. The application numbers 10 pages. Pa007a – Pa016a.

The property is identified as Block 1, Lots 7, 10 and 19.2. The street addresses are 9 and 11 Ocean Terrace and 24 Porter Avenue. These lots span the R and RB zones in Seaside Heights. The name of the project is One Ocean Terrace and the applicants name is One Ocean Terrace, LLC. The application was filed along with the appropriate maps and architectural renderings. Pa007a – Pa016a

The application identifies the proposed use of this property as three residential structures with a total of 17 townhomes.

The application also identifies requirement for relief from various ordinances in Seaside Heights including

- Front yard setback on Ocean Terrace
- Front yard setback on Porter Avenue
- Height

- Lot area/unit. **(Please note that the words Lot Area/Unit appear at the bottom of Pa010a. The application does not use the term "density" regarding this variance.)** Pa007a – Pa016a

The application specifically identified the variances that were needed. The application and the map supporting the application indicate that the proposed use of this property included a five foot setback on Ocean Terrace and Porter Avenue where 10 feet was required. Furthermore, the application specifically identified the proposed height of the structure at 48.83 feet where the ordinance allowed 41 feet. The total square footage of the property was 18,564 feet. The proposal called for 17 townhomes. In Seaside Heights there is an Ordinance with regard to lot area/unit. The Ordinance required at least 1,200 feet/unit. When you divide 18,564 by 17 units, the total lot area/unit is 1,092 feet thus requiring a variance for lot area/unit. This variance is also known as a density variance. Pa007a – Pa016a

Appellant does not contest whether or not the notice was appropriately served.

The hearing before the Seaside Heights Planning Board was conducted on February 27, 2023. Testimony was provided by Mathew Wilder of Morgan Engineering and Jason Hanrahan of Mode Architects. Transcript of February 27, 2023 Borough of Seaside heights Planning Board meeting T1 – T86. At the

conclusion of the hearing, the Board voted unanimously to approve the application. This approval was subsequently memorialized in a resolution dated March 27, 2023. Pa018a-Pa027. The resolution was published on March 31, 2023. Pa029-Pa031.

Counsel for the plaintiff, Dominic DiMinni filed the Complaint in Lieu of Prerogative Writs May 9, 2023. Pa001a-Pa005a. The appropriate answers were filed. Pa032a-Pa039a.

On August 27, 2023 counsel for Mr. DiMinni filed a motion for summary judgment. Pa041a-043A. That motion was opposed by counsel for the applicant and counsel for the Seaside Heights Planning Board and ultimately was denied by the Honorable Francis R. Hodgson, AJSC on September 22, 2023. Pa044a-045a.

Plaintiff in this matter generally contends that the Board's decision to approve this application and grant the required variances was arbitrary, capricious and unreasonable. Further, plaintiff argues that the Notice in this matter was deficient as being too vague and not properly identifying the location of the application and maps for review by the general public.

The applicant's engineer testified that:

- The prior uses of this parcel included a bar with a residential element and a parking lot. T 31-10 to 31 -21.

- He emphasized the location as the southern gateway to Seaside Heights. It is the very first property that you see in Seaside Heights.T31-23.
- He discussed the parcel's proximity to the ocean and boardwalk. Both are signature points of interest in Seaside Heights. T32-7
- He emphasized the borough's desire to maximize its ability to take advantage of branding opportunities. T32-15.
- He pointed out the tremendous redevelopment that has taken hold in Seaside Heights (T32-19 to T32-24) and the borough's desire for redevelopment and branding as part of its Master Plan and Vision Plan. T44-17 to T45-6.
- He emphasized the care taken in design particularly with the rooftop design which was scaled back to allow views of the ocean and bay without creating an imposing structure. T43-1 to T43-12. He also describe the plan as including 3 separate structures leaving open space for light and air in between as opposed to a singular structure. T44-7 to T44-16.
- He explained that each unit would include 2 off street parking spots and only one on street spot would be lost as a result of this development plan. He further explained that a different development plan with exclusively single family homes would have caused a loss of between 6 and 9 on street parking spots.T40-15 to T41-14.

- He described the future landscaping to that occupy the front yard setback created by this plan.T40-1 to T40 -16.
- He provided additional exhibits to the board which revealed the current front yard setbacks of the surrounding development (T38-1 to T 38-19) and explained that this plan pushes the structure back 5 feet on Ocean Terrace and 8-9 feet on Porter Avenue at the street level. T60-2 to T60-24.
- He discussed the legal criteria for the c.2 variances for front yard setback, the d. (5) criteria for density/ lot area per unit and d. (6) criteria for height. T37 – T45.
- He referred to the front yard setback variances as c(2) variances subject to the flexible variance criteria. T38. He explained that a c(2) variance can be granted when a plan advances the MLUL and the benefits of the deviation substantially outweigh the detriment.
- He testified that there was no detriment related to the front yard setback variances because the surrounding properties were built to the property line and this plan allowed for a 5 foot setback. T39.
- He explained that several goals of planning would be advanced by granting the variance, including G. to provide sufficient space for residential use which is in line with the Borough's master plan and zoning

plan and I. to promote a desirable, visual environment though good civic design and arrangement. T39.

- He emphasized that this was a highly visible property with substantial aesthetic and architectural appeal superior to the vacant lot that existed at the time.
- He testified that none of the variances in this application caused substantial detriment to the public good and did not substantially impairing the intent or purpose of the zone plan or ordinance. T45-7 to T45-11.
- He discussed the lot area/unit variance also referring to it as a density variance. T.40. He described this as a weighing analysis to determine if the site can accommodate the issues raised by intensifying the number of units from 15 to 17 at this location. T40.
- He discussed the height variance referring to the *Coventry Square v Westwood Zoning Bd. Of Adjustment*, 138 *NJ* 285 (1994) criteria. T41. He explained that the focus shifts from the impact of the use to the impact of the deviation, requiring an applicant to demonstrate that the height variance can be granted without substantial detriment to the public good and that the variance will not impair the intent or purpose of the zone plan or zoning ordinance. T42.

- He again emphasized this unique property which was a gateway to Seaside Heights, sat across from the boardwalk area which had an elevation 5-6 feet above the subject property, including development on the boardwalk commencing at the boardwalk level rather than the street level. T42.
- He emphasized the unique design of the proposed structures which stepped back the top floor. T43.
- He discussed goals G and I of the MLUL which were previously addressed explaining that goal A was also promoted by this plan. He opined that the general welfare was enhanced since Seaside Heights is a shore town seeking to maximize water views to the east and west through redevelopment. T43.
- He referenced the Master Plan and the Vision Plan which included an overarching theme of revitalization and branding especially underutilized properties such as this vacant dirt lot.T44.

The board armed with intimate knowledge of the borough's master plan and future vision certainly had adequate information to grant the variances. There is overlap between the testimony provided regarding meeting the requirements for all of the variances including front yard setback, height and density variances.

LEGAL ARGUMENT

POINT I

THE DECISION TO GRANT THE VARIANCE WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE

Here the burden of proof rests with the appellant and the standard of review is whether the decision can be found to be arbitrary, capricious, or unreasonable. *Kramer v Bd. Of Adjustment of Sea Girt*, 45 *NJ* 268 (1965). The boards, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated decision. *Ward v Scott* 15 *NJ* 16, 23 (1954). In sum, "the challenger must show that the Board engaged in willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is valid when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. *Northgate Condo v. Borough of Hilldsale Planning Bd.* 214 *NJ* 120, 145 (2013).

Here as required by *N.J.S.A.* 40:55D-10(g) the Board reduced the decision to writing in the form of a resolution that includes findings of fact and conclusions of law. Resolution #2023-17 was adopted by the Board on March 27, 2023.The Resolution contains the uncontroverted testimony of the applicant's experts. The Board considered the application, the documents marked into evidence and the testimony. The Board determined that the purpose

of the MLUL was advanced by the requested deviations from the ordinances and that the requested variances could be granted without substantial detriment to the public good, and the plan of the Borough.

The Resolution [Resolution, Pl. Ex. B, pp. 6-7.] reflects the Board's determination that special reasons exist to grant the variances for height and density for the townhomes to be constructed for the following reasons:

1. The Application for Development will promote the public health, safety,

morals and general welfare.

2. The Application will secure from fire, flood, panic and other natural and manmade disasters.

3. The application for Development provides for adequate light, air and open

Space.

4. The Application promotes a desirable visual environment through creative development techniques and good civic design.

5. The Application promotes the construction of single-family residential dwellings consistent with current base flood elevation and FEMA requirements and is a substantial benefit to the general welfare of the community.

6. The site is particularly suited for the subject development as being consistent with the Borough of Seaside Heights Vision Plan.

Based upon the evidence presented it was well within the Board's power to find that the height and density variances did not cause substantial public detriment and did not substantially impair the intent of the zone plan. On the contrary, it was well within the Board's power to find this development to comport with the overall public good, the borough's plan and the land use law. This development represents a clear improvement to the borough as a whole.

In *Lang v. Zoning Board of Adjustment of the Borough of West Caldwell*, 160 *NJ* 41 (1999) the court explained that subsection C(2) provides that

> **"wherein an application or appeal relating to a specific piece of property, the purposes of this act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, (the board) may grant a variance to allow departure from the regulations pursuant to Article 8 of this act."**

This section contemplates that even in the absence of a hardship pursuant to subsection C(1), a bulk or dimensional variance that advances the purposes of the MLUL can be granted if the benefits of the deviation outweigh any detriment.

The variances in this matter are related to height and lot area per unit are considered special reasons variances pursuant to *N.J.S.A.* 40:55d-70(d). That section states,

> **"in particular cases, for special reasons, 'a variance to allow the departure from regulations may be granted to permit: (5) in increase in the permitted density as defined in §3.1 of P.L. 1975, c. 291 (c.40:55d-4) except as applied to the required lot area for a lot or lots or detached one or two family unit dwellings, which lot or lots are either an isolated undersized lot or lots resulting from a minor subdivision or (6) a height of a principle structure that exceeds by 10 feet or 10% of the maximum height permitted in the district for a principle structure."**

N.J.S.A. 40:55d-4 defines density to mean,

> **"the permitted number of dwelling units per gross area of land to be developed."**

Any variance granted under *N.J.S.A.* 40:55d-70(d) shall be she granted only by affirmative vote of at least five members. Here, the Appellant maintains that the grant of the height variance is not supported by the evidence. The application here was made under *N.J.S.A.* 40:55d-70(d)(6) which allows variance for structures that exceed the maximum height permitted in the relevant zone provided that (1) the applicant can show special reasons for the increased height and (2) the increased height will not cause substantial detriment to the public good and will not substantially impair the intent and the purpose of the

zoning plan and zoning ordinance. That is *Grasso v. Borough of Spring Lake Heights,* 375 *N.J. Super*. 41 (2004). These requirements are referred to as the positive criteria and negative criteria. Here, because the proposed use is not in an inherently beneficial use, the applicant must show

> **"that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought."**

Smart SMR v. Borough of Fair Law Board of Adjustment, 152 NJ 309, 323 (1998) *Medici v. BPR Co.,* 107 NJ 1, 4 (1987).

The MLUL includes several accepted bases to satisfy the requirement of advancing the public good and evaluating these variances. Some of these purposes are as follows,

> **"(A) to encourage a municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals and general welfare: (E) to promote the establishment of appropriate population densities and concentrations that will contribute to the wellbeing of persons, neighborhoods, communities and regions and the preservation of the environment: (G) to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens: (I) to promote a desirable visual environment through creative development techniques and good civic design and arrangement: (J) to promote the conservation of**

> **historic sites and districts, open space, energy resources and valuable natural resources in the State and to prevent urban sprawl and degradation of the environment through improper use of land."**

Here, it is clear that the Board accepted the testimony of the applicant's experts, Mr. Wilder and Mr. Hanrahan, an engineer and architect respectively. No experts were presented by the objector\appellant and as a result, the Board did not need to assess the credibility of the applicant's witnesses. Respectfully, the evidence in this case supporting the C and D variances overlapped. All of this information is spelled out in the Statement of Facts attributed primarily to Mr. Wilder. Similarly, as the C2 Bulk Variance, Mr. Wilder testified that there was no detriment and the benefits of the deviation substantially outweighed any detriment.

Clearly, the evidence and the testimony reveal that this project proposed a zoning alternative to the existing vacant dirt parking lot. A portion of the application regarding height is bolstered by unique proximity that this property has to the boardwalk which elevated and contains structures that are elevated above the street level. Here, efforts were made to avoid the bulk of a singular large structure on this corner property. Instead, three structures were built with the intention of creating access and parking for the future owners, but also allowing open space for views, light and air through the corridor separating the

buildings. Mr. Wilder identified a number of bases to permit the height variance in this matter.

DENSITY

Similar, with regard to density, Mr. Wilder testified that this property could accommodate the minor increase in density from 15 units to 17 units with minimal impact on the surrounding area. Again, this was seen as an overall benefit compared with the parking lot that existed. Furthermore, the Board found that the applicant met the negative criteria in that the variances requested for height and density could be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

This particular area is zoned for multifamily residence and business which was consistent with the plan that was submitted. There was testimony that the plan allowed for light air and open space along with a desirable visual environment through good civic design. The testimony also emphasized the desires of the master plan and vision plan were important here, especially at this critical location.

It is respectfully submitted that there was sufficient evidence before this Board to grant all of the variances that were presented. Therefore, the Board

did not err or act in an arbitrary or unreasonable manner in granting the bulk variances, the lot area per unit variance or the height variance.

POINT II

ADEQUATE NOTICE

Plaintiff's counsel also maintains that the Notice in this case was inadequate. He believes the Notice was inadequate because it was too vague and did not specifically identify the address where the application and maps were held. This was the subject of the summary judgment motion in this matter. Respectfully, the same arguments that were put forth at the time of the summary judgment motion shall be put forth now.

It is understood and agreed that the MLUL requires applicants to give notice to the public, N.J.S.A. 40:55D-12A and to owners of property within 200 feet of the property that is the subject of the hearing, N.J.S.A. 40:55D-12B.

At the meeting on February 27, 2023, counsel for the plaintiff appeared and made the argument that the notice was insufficient for a few reasons. Primarily, he argued that the notice lacked specificity, in his opinion, pursuant to the *Perlmart of Lacey, Inc. vs. Lacey Township Planning Board* 295 N.J. *Super.* 234, 237 (App. Div. 1996) and *Pond Run Water Shed Association vs. Township of Hamilton Zoning Board of Adjustment* 397 N.J. *Super.* 335:350

(App. Div. 2008). Those cases maintain that the notice must fairly apprise the public and the neighboring property owners of the nature and character of the proposed development so that they can make an informed determination as to whether they should participate in the hearing or at least look more closely at the plans or other documents on file. The cases further state that the notice should be viewed from the perspective of the,

> **"ordinary layman, and not as it would be construed by one familiar with the technicality solely applicable to the laws and rules of the Zoning Commission".**

Respectfully, there is no question that the notice provides adequate information under the case law with regard to Notice. Any individual reading the Notice would clearly be aware of the property in question, the date, time and place of the hearing along with the plans for this property. The application specifically states,

> **The applicant is seeking Board approval of this major preliminary and final site plan with variances. The site plan includes three structures which will house a total of 17 residential townhouses. The applicant seeks the following variances:**
>
> - **Front yard setback on Porter Avenue;**
> - **Front yard setback on Ocean Terrace;**
> - **Height**
> - **Lot area per unit.**

At the meeting, the plaintiff argued that this information was insufficient because, for example, it did not detail the size of the front yard setback variance sought, the overall height of the proposed structure or the discrepancy between the lot area per unit that is permitted and the lot area per unit that was being sought. Respectfully, the case law including the *Perlmart* case and the *Pont Run Water Shed Association* case specifically indicate that it is not necessary to provide those types of details in the notice. Certainly, those details are provided in the application.

In addition in *QuickPlus Realty, LLC vs. City of Bridgeton Zoning Board*, 2019 WL 2480152 is an unpublished Appellate Division opinion from June 13, 2019. A portion of this opinion deals with the notice requirements under the MLUL. In the *QuickPlus Realty, LLC* the notice indicated that the application and documents were on file with the Board and maybe inspected during business hours by all interested parties prior to the meeting. Effectively, the notice directed interested parties to the Board office without providing an address. The Appellate Panel in that case indicated,

> **"the MLUL only requires 'a common sense description of the nature of the application, such that the ordinary lay person could understand its potential impact on him or her…(*Perlmart* 295 *N.J. Super*. @ 239)"**

The Court found that the notice in the *QuickPlus Realty, LLC* matter achieved that. The Court stated,

> **"common sense dictates that any member of the public concerned about the application could easily find the address of the Board."**

It is respectfully submitted that this is on point at to the portion of the Appellant's argument that the notice was inadequate since it identified Planning Boards offices prior location.

In addition, plaintiff relies upon an unpublished opinion, specifically *Lakewood Realty Associates, LLC vs. Township of Lakewood Planning Board and RD Lakewood, LLC*. Respectfully, this case echoes the previously well-known case law that is set forth in *Pond Run Watershed Association vs. Township of Hamilton Zoning Board of Adjustment,* 397 *N.J. Super.* (App. Div. 2008) and *Perlmart of Lacey, Inc. vs. Lacey Township Planning Board*, 295 *N.J. Super.* 234 (App. Div. 1996). Plaintiff persists in the argument that the application was vague on its face in that it did not specifically describe the size of the front yard setback variance sought or the size of the height variance sought or the measurements related to the lot area per unit. Respectfully, this case does not require that type of detail. The Appellate Division panel in the *Lakewood Realty Associates, LLC* case on two occasions identified the Notices being inadequate because it did not specifically identify the type of use that was going

to occur. Specifically, in the first application, the Notice omitted the developer's plan to include a restaurant and a banquet facility at the hotel and to obtain a liquor license. The Appellate Division panel found that notice to be inadequate because it lacked specificity as to the use of the property. When that application came back in its second form, the notice did not include the fact that the applicant intended to have a banquet facility at the location. Once again, the Appellate Division panel struck that Notice down as being inadequate because the use of the property was not identified.

In this instance, there is no issue that the use of this property was specifically identified. The application and the Notice specifically indicates that this was going to be a three structure development with 17 residential units. Therefore, it is respectfully submitted that that aspect of the plaintiff's application should be denied and the court should uphold the Planning Board's decision.

Plaintiff's counsel seems to add a new argument here indicating that the Notice does not include the word density. Respectfully, both the application and the Notice specifically include information about lot area per unit. Lot area per unit is also known as density. They are synonymous. The statutory definition of density is,

> **"the permitted number of dwelling units per gross area of land that is subject to an application for development."**

Frankly, if the Notice said density, it is likely that plaintiff would argue that it should have said lot area per unit. Under the circumstances, it is respectfully submitted that it makes no difference. Overall, I am requesting that the court uphold the decision of the Planning Board and dismiss plaintiff's complaint.

Therefore, it is respectfully submitted that there is no basis to find merit in any aspect of plaintiff's complaint.

During the meeting, after the Notice was read by counsel for the Planning Board, the plaintiff then argued on page 10 of the transcript that the Notice was sufficient because it referred to the location of the Planning Board Office as being located at 901 Boulevard and Sherman Avenue, Seaside Heights, New Jersey. Plaintiff attempted to argue at the meeting and now argues in this motion that by February 27, 2023 the Planning Board office had moved into a different structure. Respectfully, I am not sure of the exact date that the Borough of Seaside Heights offices from the Municipal Complex located at 901 Boulevard and Sherman Avenue, Seaside Heights, New Jersey to 100 Grant Avenue, Seaside Heights, New Jersey. Obviously, this issue with the notice has no impact on the ability of an individual to attend the meeting as the meeting did in fact take place at the location set forth in the notice.

Rather, plaintiff argues that the information set forth in the Notice prevented individuals who may have had interest in this application from having an opportunity to review the documents prior to the meeting because they would not have been able to find the Planning Board office based upon the notice. Obviously, by now, the court has had the opportunity to review the transcript and is aware of the detailed discussion that went into these issues. Specifically, when this issue was raised for the first time by the plaintiff in the midst of the meeting on February 27, 2023, it was pointed out by a Board Member that the doors of what was previously the Borough's offices at 901 Boulevard and Sherman Avenue, Seaside Heights, New Jersey had markings which would direct people who were present at that location for non-police business to the general municipal business office at 100 Grant Avenue. It was also pointed out that the telephone number on the Notice was in fact accurate. These items are identified on pages 19 and 20 of the transcript.

It is clear from the picture that the doors to the area of the George E. Tompkins Municipal Complex, that were previously the home of the Borough offices now indicate that these offices house the Seaside Heights Police Department. Da1-Da3. The doors further indicate that this is a secure area for employees only. The doors also indicate that all other departments are located at 100 Grant Avenue. I would point out that this information is permanently

attached to the doors with professional lettering and appears on both the easterly and westerly doors.

Under the circumstances, it is respectfully submitted that the plaintiff's complaint on this issue should fail. Obviously, there is no issue with the application in terms of inhibiting any interested individual from appearing at the meeting. Furthermore, there are two ways that individuals would seek to review the plans in this matter. One, they would make a phone call to the Planning Board Secretary in an effort to identify how to review the plans or, alternatively, they would appear at the address on the location and be faced with the fact that the Borough offices had moved one block to the south. They would be well aware of the fact that this occurred because of the large markings on the door directing them to 100 Grant Avenue.

Therefore, there is no possibility that any individual who wanted to have the opportunity to review the plans would have been deprived of that opportunity prior to the meeting.

CONCLUSION

It is for the foregoing reasons, the decision by the Board was not arbitrary, capricious or unreasonable. The finding of fact and conclusion of law is supported by the record and therefore the decision of the Board should be affirmed.

GROSSMAN, HEAVEY & HALPIN
Attorneys for Defendants,
One Ocean Terrace, LLC

By: ***/s/ Matthew J. Heagen***

Dated: September 16, 2024

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DOMINICK DIMINNI,	: SUPERIOR COURT OF
	: NEW JERSEY
Plaintiff,	: APPELLATE DIVISION
	: DOCKET No.: A- 002859-23
v.	:
	: On Appeal from the Orders
SEASIDE HEIGHTS PLANNING BOARD and ONE OCEAN TERRACE, LLC	: entered by the Superior Court of New Jersey, Law Division, Civil Part: Ocean County
	:
Defendants.	: Docket No. Below: OCN-L-1062-23
	:
	: Sat Below: Hon. Francis R. Hodgson, Jr., A.J.S.C.
	:

BRIEF OF DEFENDANT-RESPONDENT, SEASIDE HEIGHTS PLANNING BOARD

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LIST OF PARTIES

Party Name	**Appellate Designation**	**Trial Court Party Role**	**Trial Court Party Status**
Dominick DiMinni	Appellant	Plaintiff	Participated Below
Seaside Heights Planning Board	Respondent	Defendant	Participated Below
One Ocean Terrace, LLC	Respondent	Defendant	Participated Below

Appellate Division Docket Number: A-002859-23 **APPELLATE BRIEF**

TABLE OF TRANSCRIPTS

Transcript Number	Proceeding Date	Proceeding
1T	February 27, 2023	Hearing before the Board.
2T	April 11, 2024	Trial in action in lieu of prerogative writs in the Superior Court, Ocean County.

PRELIMINARY STATEMENT

One Ocean Terrace, LLC (the "Applicant") is the owner of property located at 9 and 11 Ocean Terrace and 24 Porter Avenue, also known as Block 1, Lots 7, 10, and 19.02, as designated on the Official Tax Map of the Borough of Seaside Heights (the "Property"). The Applicant applied on or about December 12, 2022 to the Seaside Heights Planning Board (the "Planning Board") for Preliminary and Final Major Site Plan Approval to construct two buildings with four dwelling units each and one building with nine dwelling units with driveway access from Ocean Terrace for a total of 17 residential units necessitating a N.J.S.A. 40:55D-70(d)(5) special reasons variance for density wherein each unit will have approximately 1,092 square feet wherein 1,200 square feet is required, and a special reasons variance for height pursuant to N.J.S.A. 40:55D-70(d)(6) of approximately 48.83 feet wherein 40 feet is the maximum allowable height; and bulk variances for a front yard setback of 5 feet wherein 10 feet is required to Ocean Terrace and Porter Avenue; and a driveway width of 24 feet wherein 16 feet is the maximum allowable.

The Planning Board held a public hearing on February 27, 2023, and based upon all of the evidence presented, the exhibits reviewed, and the testimony, granted the application, determining that the Applicant would

suffer undue hardship by strict application of the Zoning Ordinance. In particular, the Planning Board accepted the uncontroverted testimony of the Applicant's experts, Matthew Wilder, an engineer and planner, and Jason Hanrahan, an architect. Mr. Wilder noted, in conjunction with the testimony of Mr. Hanrahan, how the application satisfied both the positive and negative criteria under (c)(2) and (d)(5) and (6). Mr. Wilder testified that the height variance incorporates features that takes into account the raised elevation of the surrounding boardwalk properties, and in engineering the proposed structures shrinking the top floor to maximize views for the western neighbors. Mr. Wilder further testified that the design is also in line with the neighborhood properties and actually provides a larger setback than the adjacent properties to provide for landscaping.

As to density, Mr. Wilder testified that the proposed development would have minimal impact on parking and traffic on the surrounding neighborhood. There was no evidence to the contrary, as the objector did not provide evidence, such as a traffic study, which would challenge the evidence presented and that the proposed development would negatively impact the surrounding neighborhood. As to the (c)(2) bulk variance, Mr. Wilder testified that he saw no detriment in the project and that the benefits of the deviations substantially outweigh any detriment. Mr. Wilder testified

that the design would advance the goals of the Municipal Land Use Law by providing for light, air and open space as well as provide for a desirable visual environment through good civic design, and testified that he believed several goals of the Municipal Land Use Law would be advanced by the project, including N.J.S.A. 40:55D-2(a), (e), (g), and (i). Mr. Hanrahan also testified that the balconies are designed to be open air so as not to infringe upon the light, air and space of adjoining properties. The decision was memorialized by "Memorializing Resolution of the Borough of Seaside Heights Planning Board Application No. 2022-27, Resolution #2023-17," adopted by the Board on March 27, 2023.

The trial court issued a written opinion and Order for Judgment on April 11, 2024, affirming the Board's decision and dismissing the Plaintiff's Complaint with prejudice. First, the Court confirmed that notice was proper under the Municipal Land Use Law and supporting case law. Second, the trial court found that the Board made reasonable and sound factual determinations based upon the evidence presented by all witnesses and applied the correct statutory criteria for reaching its decision. The trial court found that the clear import of the evidence and testimony is that the project proposes a better zoning alternative than the existing parking lot.

STATEMENT OF FACTS

The Defendant Board is a duly constituted Planning Board pursuant to N.J.S.A. 40:55D-23 and Section 246-22 of the Borough Ordinances of the Borough of Seaside Heights. It has all the powers of a Board of Adjustment pursuant to N.J.S.A. 40:55D-25(c)(1). The municipal offices of the Borough of Seaside Heights and the Seaside Heights Planning Board are located at 100 Grant Avenue, Seaside Heights, NJ 08751.

On or about December 12, 2022, One Ocean Terrace filed a Development Application No. 2022-27 (Pa6-16) with the Defendant Board seeking a use variance for density wherein each unit will have approximately 1,092 square feet wherein 1,200 square feet is required; a special reasons variance for height of approximately 48.82 feet wherein 40 feet is the maximum allowable height; and bulk variances for a front yard setback of 5 feet wherein 10 feet is required to Ocean Terrace and Porter Avenue; and a driveway width of 24 feet wherein 16 feet is the maximum allowable.

A Notice of Hearing dated February 13, 2023, was published in the newspaper and provided pursuant to N.J.S.A. 40:55D-12 by the applicant. (Pa28-31; 1T 9:18-24). Although the notice states "Copies of the application and plans are available for review at the Borough of Seaside Heights Municipal Offices, 901 Boulevard & Sherman Avenue, Seaside Heights,

New Jersey, during normal business hours" the notice is clear that they are available for review at the Borough of Seaside Heights Municipal Offices, which are located one block away at 100 Grant Avenue, Seaside Heights, NJ 08751. The municipal offices of the Planning Board were previously located at 901 Boulevard & Sherman Avenue, which location now houses the Seaside Heights Police Department and is adjacent to the Fire Department building. Since the Planning Board moved the physical location of its offices, there has been a notice on the door of the old location at Boulevard & Sherman Avenues indicating the new location of the municipal offices had moved to 100 Grant Avenue. Specifically, there is a lettered notice on the door of the Police Department stating "Seaside Heights Police Department – Secure Area Employees Only – All other departments are located at 100 Grant Ave." This is the same lettering that existed at the time of the February 27, 2023, hearing with regard to the subject application. Therefore, any member of the public would be able to discern the location of the Municipal Offices if they were to go to the Boulevard & Sherman Avenue address as the new address is clearly posted. (2T 19:1-19).

The notice further identifies that the application is for Block 1, Lots 7, 10, and 19.02 as shown on the Borough of Seaside Heights tax map and is located at 9 and 11 Ocean Terrace and 24 Porter Avenue, Seaside Heights,

Ocean County, New Jersey. The notice states that the applicant is seeking Board approval of this major preliminary and final site plan with variances. The notice specifies that the site plan includes three structures which will house a total of 17 residential townhomes. The notice identifies that the applicant seeks the following variances: Front yard setback on Porter Avenue, front yard setback on Ocean Terrace, height, lot area/unit, meaning per unit. (Pa31; 1T 9:9-10:15).

The Board held a public hearing on February 27, 2023. The Board considered the Application and documents filed by One Ocean Terrace, LLC, heard the testimony on behalf of the Applicant, examined the exhibits submitted and heard the testimony of all interested parties having received public comment, and all exhibits marked into evidence.

As a preliminary matter, Plaintiff challenged the jurisdiction of the Board to consider the application on the basis of notice. Specifically, counsel for Plaintiff represented to the Board the following:

> **Mr. LISTON: Just listening to that called my attention to the fact that I went to the corner of Sherman Avenue and Boulevard today and I couldn't find the Planning Board office. That was in a different spot. So, that, again, you have to be specific in these notices and that's the one thing which is not specific here. It gives the wrong address to go looking for plans. People go looking for plans who are from out of this area, who are not familiar with the recent changes in Seaside Heights. They**

> **may do what I did, I look and see the police headquarters took over the whole building. I had to go in and ask at the police headquarters where the other building was.**
>
> **[1T 10:16-25; 11:1-4]**

The Board considered that the notice of the new location was currently posted for any member of the public who went to the 901 Boulevard & Sherman Avenue location and accepted that jurisdiction was proper over the application:

> **Mr. Heagen, the only thing I'll ask you to comment on is Mr. Liston's observation that copies are available at the Borough of Seaside Heights Municipal Offices, 901 Boulevard and Sherman Avenue and the municipal offices of the Borough of Seaside Heights, if I'm not mistaken, is 100 Grant Avenue; is that correct?**
>
> **BOARD MEMBER: Correct. And to state, if I may, I just walked outside about ten minutes ago. On those doors outside that Mr. Liston was referring to, it directs people to go to 100 Grant Avenue for general municipal business.**
>
> **MR. ZABARSKY: Right. So, I was going to say I think that might have been an older description of the address that was used, but, in any event, it does say the municipal offices of the Borough of Seaside Heights and, of course, as Mr. Liston he noted he was able to ask and said where's the office. I think the municipal offices are actually . . .**
>
> **BOARD MEMBER: On the corner of Grant and – literally across the street.**

MR. ZABARSKY: Literally across the street.

BOARD MEMBER: And also the phone number is correct.

MR. ZABARSKY And the phone number is correct according to our Chairman. So, under those circumstances, Mr. Heagen, I'd ask you if you want to comment on that or how you feel about whether you need to renotice under those circumstances. It's also Mr. Vaz is on the record there's a notice on the door that directs you to the municipal offices at 100 Grant Avenue. So, if you did come here, the sign tells you where to go. So, I'll leave it to you. That's my observation.

MR. HEAGEN: I have no comment.

MR. ZABARSKY: Okay. Board members, are you satisfied to take jurisdiction of this matter and proceed with the hearing?

BOARD MEMBER: Yes.

MR. ZABARSKY: Okay. Let's have a roll call vote on whether or not the Board retains jurisdiction based on the argument of Mr. Liston that the notice is deficient . . .

[1T 19:5-20:24]

As to the merits of the application, Matthew Wilder is a professional engineer and professional planner. (1T 23:11-20). Mr. Wilder testified that the property is comprised of Lots 7, 10 and 19.02 within Block 1. The street addresses are 9 Ocean Terrace, 11 Ocean Terrace and 24 Porter Avenue. The property is a corner lot located at the intersection of Ocean Terrace and

Porter Avenue. The property is generally rectangular 110 feet by 167 feet. The property currently has a parking lot on it. (1T 31:3-10). The Property is located in the R-Residential Zone District and in the RB (Retail Business) Zone District which permits multi-family buildings.

Mr. Wilder described the Property as located at the very southern end of Seaside Heights. He noted that Porter Avenue is the division line between Seaside Heights and Seaside Park. Therefore, he testified this is the very first property one would see in Seaside Heights for anyone traveling north on Ocean Avenue. Additionally, due to the property's proximity to the boardwalk, pedestrians would see this property every single day. Mr. Wilder opined that this is a highly seen, highly visible property. (1T 31:22-32:10). Mr. Wilder testified that the present use of the property is as a commercial parking lot. Historically, dating back to the 1920s, McKelvy's Bar and Frankie and Johnny's Bar with apartments above it, was located on the subject site. (1T 31:10-21).

The Application consists of three buildings, five stories in height, with ground level parking area and 17 townhomes. Mr. Wilder testified the north building will contain nine units and the two buildings to the south will contain four units each. (1T 32:9-12; 32:25-33:2; 33:8-17).

As to parking, Mr. Wilder testified there will be two parking spaces for each townhome. There is no variance requested for parking as the development does comply with the Borough's requirements for two off-street parking spaces per unit. (1T 33:18-19; 34:1-3). Access to the site is provided via a new driveway onto Ocean Terrace. All the proposed units will have addresses consistent with Ocean Terrace. (1T 34:4-8). The Application for Development will create the net loss of one public metered parking space. (1T 34:14-15).

As to lighting, Mr. Wilder testified there will be lighting provided inside the garage and on the interior driveway. There will be no lighting on any side of the buildings that are adjacent to neighboring residential structures. (1T 35:8-22).

Mr. Wilder testified the Applicant was seeking four variances: two five-foot front setbacks to Porter and Ocean Terrace, where ten feet is required; and requesting variances for density and for building height. (1T 37:5-11). For building height, 41 feet is permitted, and 48.83 feet is proposed. Mr. Wilder testified that all elevations are relative to the curb line adjacent to the building, which is how the Borough measures building height. (1T 37:14-18). For density, Mr. Wilder testified the Applicant proposed a lot area of 1,092 square feet per unit where 1,200 square feet per

unit is required. He explained it is "a slight increase in the density, 9 percent . . ." (1T 37:19-22).

As to the proposed front yard setbacks, Mr. Wilder testified the proposed development is consistent with other structures in the neighborhood:

> **I shared page three of the Exhibit A-5 to sort of show the prevailing setbacks in the area. As you can see, as you go up along Ocean Terrace on the west side of the road and along Porter Ave., again, on the north side of Porter Ave., all of the existing uses are pretty much built up to the property line. So, there is a pretty well established prevailing setback for all the existing structures in this area.**
>
> **[1T 38:1-9]**

Mr. Wilder explained that the surrounding uses "are essentially built up to the property line. So, we've set our structures back slightly to just provide a little bit of room for landscaping and to provide a little bit of room for architectural façade elements that sort of provide depth to the property or to the building. We don't want it to feel like a blank wall that is sort of over whelming to the property." (1T 38:11-19). Mr. Wilder further explained that the proposed development required two front yard setbacks because under the Borough's zoning ordinance the property is a corner lot, "it has two front yards and two side yards." (1T 69:14-15).

Mr. Wilder testified as to the criteria for the grant of a (C)(2) variance, that pursuant to N.J.S.A. 40:55D-70(C)(2) the proposed development would advance the Municipal Land Use Law and furthermore the benefits of the deviation substantially outweigh the detriment. "I see no detriment associated with these setback variances. This would be in line with all the other properties up and down Porter and Ocean Terrace. And we've actually increased our setback and incorporated some landscaping, which many of the other properties don't' have. So, based on the sort of prevailing condition of the adjacent property than what we've proposed, I see no detriment associated with these setbacks." (T38:20-39:11).

Mr. Wilder further testified:

> **I do believe that several goals of planning would be advanced by the granting of these variances, specifically goals G and I. Goal G of the MLUL is to provide sufficient space in appropriate locations for a variety of uses, including residential. Based on the Borough's Master Plan, zoning plan, this is where development like this should be located. Goal I is to promote a desirable, visual environment through good civic design and arrangement. Parking lots are, they serve a purpose. They leave a lot to be desired from an architectural or aesthetic standpoint. I believe the building that's being proposed this evening is an absolute benefit to the aesthetics of this area. Again, when I talked about the property and where it exists, this is a very highly visible and highly seen property by both motorists and pedestrians.**

[1T 39:12-T40:5]

As to the height variance, Mr. Wilder testified that a special reasons variance for height of 48.13 feet is being requested wherein 41 is the maximum height. Mr. Wilder concluded that this will not be a detriment to the surrounding properties. He noted that the existing lot is directly across the street from the Boardwalk which is elevated 5 feet above the subject property. He further noted the buildings on the Boardwalk are built at Boardwalk level and the proposed Application for Development will integrate with that condition. Thus he opined the design of the buildings are unique in that the top floor is smaller than the rest of the building which will soften the overall appearance. Further, he concluded the height of the buildings will also maximize water views. (1T 41:19-42:8).

Mr. Wilder continued as to the proposed (d)(6) height variance:

> **You also have some buildings to the north and to the west that are generally around 39 feet. While we are above that, the uniqueness of the design that I was referencing and with the architectural design what we've done is the top floor, the fifth floor, is actually a slightly smaller floor when compared to the floors below it. So, what we've done we've sort of shrunk that top floor from the outside in so that it doesn't have the appearance of just a gigantic building. So, we have a lot of the façade elements that you see that provide depth and variety to the building elements and we also have a top floor that is inset. So, I believe that the increase in setbacks to that top floor softens the overall building height.**

[1T 42:23-43:12]

Mr. Wilder testified as to the proposed special reasons height variance under (d)(6), many of the special reasons overlap in support of the application:

> **And, again, the same goals of planning I believe are advanced by the density variance and the height variance that were advanced for the front setback variance, again, goals G and I. But, I believe that the height variance also promotes goal A of the Municipal Land Use Law, which is to promote the general welfare. So, any shore town, especially Seaside Heights, wants to maximize water views, especially through redevelopment. Seaside Heights is a unique Borough in that you have bay views to the west side, ocean views to the east side. And in this circumstance to have water views to the east, there are a few corridors that you're dealing with, but mainly you're dealing with the beach club that was recently approved, that again received a height variance that it built to the elevation of the boardwalk.**
>
> **[1T 43:13-44:4]**

Mr. Wilder further testified that the proposed development would not block light or air. ". . .I think it is important to note that the buildings are not connected. This is not just one large massive building. You have a drive aisle in between the two and the two buildings to the west with the way the building is situated will get sun when the sun comes up. It's not going to

block, the property to the west will not continually be in the shadow of this building. (1T 44:5-16).

Mr. Wilder testified that he specifically reviewed the 2005 Master Plan and the 2009 Vision Plan:

> **The overarching theme that I got from the Vision Plan was just revitalization. For the bayside it spoke to underutilized properties. For the boardwalk district, it spoke about the branding that is provided to the Borough. I look at this development as checking two options. Again, as I indicated, parking lots are not an aesthetically pleasing improvement. This development will continue the revitalization that you see through the Borough and it also provides the branding that the Borough is looking for. With all that being said, I believe the variances this evening can be granted without detriment to the public good and without substantially impairing the intent or purpose of the zone plan or zoning ordinance.**
>
> **(T44:17-T45:11)**

Mr. Wilder testified as to the proposed special reasons density variance. He noted the density requirement is 1,200 square feet and each unit will have approximately 1,092 square feet. "So, a variance for density is subject to a weighing analysis. That is, the applicant must demonstrate that the site can accommodate the problems typically associated with a use with a greater density. The most obvious problems that you would see would be traffic and parking. But, I believe we've mitigated those issues. Again, we're

providing the parking that's required per the Borough ordinance, again two parking spaces per unit, and we're minimizing the loss in on street parking." (1T 40:6-19).

Jason Hanrahan is an architect with MODE Architects and submitted the plans which were supervised by Daniel Condatore, a New Jersey licensed architect. (1T 56:12-24). Mr. Hanrahan testified to Board Exhibits A-6, architectural rendering and A-7, elevations. The proposed building is three and a half stories above a garage level. The top level is one-third of the floor below. (1T 58:19-25). Mr. Hanrahan testified the majority of the extra height is set well beyond the pedestrian walkway to minimize the impact of the height. "Obviously we wanted to keep it pedestrian friendly, keep it kind of in line with the upscale, touristy kind of design feature, but also make it kind of acceptable to the community. So, we kind of created the pedestrian friendly walkway. We have the frontage on Porter will have their main entrances so it feels like more of a neighborhood." (1T 59:4-11). Mr. Hanrahan testified to the infringement on the setback to Porter Avenue "that infringement is just the open air balconies. So, in essence, it's not that overpowering building on the streets. And, again, we're trying to kind of create this front area that accepts the entry and accepts kind of, like, a pedestrian friendly option." (1T 60:2-9).

Plaintiff-Appellant Dominick DiMinni is the owner of property at 30 Porter Avenue, adjacent to the subject property. Notably, Mr. DiMinni did not provide any evidence in the record to rebut the testimony of the applicant's experts. Mr. DiMinni did not provide his own expert testimony, nor did he present such evidence as a traffic study, which would challenge the evidence presented by the applicant that the proposed development would negatively impact the surrounding neighborhood.

The Board, after carefully considering the testimony of all witnesses and exhibits contained in the Board file and marked into evidence, approved the variance application. (Pa17-27). The Board determined that the application can be granted without a substantial detriment to the public good and will not substantially impair the intent and purpose of the Zone Plan, Master Plan, and/or Land Use Ordinances of the Borough of Seaside Heights. (Pa23). The Board determined that the purpose of the Municipal Land Use Law would be advanced by a deviation from the Zoning Ordinance Requirement and the benefits from the deviation will substantially outweigh any detriment. (Pa23).

The Board determined that special reasons exist to grant the variance for height and density for the townhomes to be constructed for the following reasons:

1. **The Application for Development will promote the public health, safety, morals and general welfare.**
2. **The Application will secure from fire, flood, panic and other natural and man-made disasters.**
3. **The application for Development provides for adequate light, air and open space.**
4. **The Application promotes a desirable visual environment through creative development techniques and good civic design.**
5. **The Application promotes the construction of single-family residential dwellings consistent with current base flood elevation and FEMA requirements and is a substantial benefit to the general welfare of the community.**
6. **The site is particularly suited for the subject development as being consistent with the Borough of Seaside Heights Vision Plan.**

[Pa23-24]

The decision was memorialized by Memorializing Resolution No. 2023-17 of the Borough of Seaside Heights Planning Board Application No.2022-27, adopted by the Board on March 27, 2023. (Pa17-27).

PROCEDURAL HISTORY

Plaintiff filed a Complaint in Lieu of Prerogative Writ on May 9, 2023, pursuant to N.J. Ct. R. 4:69-1 seeking a reversal of the decisions of the Defendant Planning Board. (Pa1). On or about August 17, 2023, Plaintiff filed a Motion for Summary Judgment arguing that the Board lacked jurisdiction based on the wording of the published notice to property owners

pursuant to N.J.S.A. 40:55D-11. (Pa41). On September 22, 2023, the Court heard oral argument and found notice was sufficient under the Municipal Land Use Law and as such, the matter presented a genuine issue of material fact and the Court denied the motion. (Pa44). On October 2, 2023, the Court entered a Pretrial Order setting forth a briefing schedule and setting a trial date of March 7, 2024. (Pa46).

Trial occurred on April 5, 2024. Judge Hodgson affirmed the decision of the Planning Board in a decision dated April 11, 2024. (Pa49-71). As a preliminary matter, the Court confirmed that notice was proper under the Municipal Land Use Law, as any layman would be aware of the location of the municipal offices of the Planning Board, that the public could call or appear at the listed address and be directed to the new address. (Pa54-55). Indeed, even without the lettering posted on the Police Department's exterior door, the published notice itself sufficiently identified for the public the location as the municipal offices, which is identifiable by public record. The Court further found that as a matter of law the notice fairly appraised the public of the nature and character of the proposed application pursuant to the Perlmart decision. (Pa55-58)

As to the substance of the application, the trial court found that the area in question is unique in that it is near the boardwalk which is elevated

and where adjacent structures to the boardwalk are elevated. (Pa69). The trial court also found that the proposed height will not be a detriment to the surrounding properties. (Pa69-70). The trial court also found sufficient evidence before the board for it to conclude the area could accommodate the increased density. (Pa70).The trial court also found that the Board properly determined the variances could be granted without a substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance. The trial court noted the area is zoned for multifamily residential and business, and therefore the proposed development was consistent with the area's character, and there was sufficient evidence the proposed development would not negatively impact the master plan. (Pa70-71). The record reflects that the applicant met its burden in providing necessary proofs and criteria to the Board's satisfaction in granting the variance relief at issue, and that the Board's action in granting this application was consistent with the Municipal Land Use Law and the development ordinance of the Borough of Seaside Heights.

LEGAL ARGUMENT

I. THE RECORD SUPPORTS THE VARIANCES GRANTED; THEREFORE, THE TRIAL COURT DID NOT ABUSE ITS DISRETION IN FINDING THAT THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE

A. STANDARD OF REVIEW

The factual determinations and legal conclusions of the Board are presumed to be valid. The Board's exercise of discretion should not be overturned unless it is found to have been arbitrary, capricious, or unreasonable. "It is well established that when a reviewing court is considering an appeal from an action taken by a planning board, the standard employed is whether the grant or denial was arbitrary, capricious or unreasonable." Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 560 (App. Div. 2004)(citing Burbridge v. Mine Hill Tp., 117 N.J. 376, 385 (1990); Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965); Med. Ctr. v. Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 198 (App.Div.2001)). The burden of proof that the action of the Board was arbitrary, capricious, or unreasonable is upon the plaintiff. Kramer v. Bd. Of Adjust., Sea Girt, 45 N.J. 268 (1965); Jock v. Zoning Bd. of Adjustment, 184 N.J. 562 (2005). The purpose of judicial review of the Board's action is for a determination of the validity of the Board's action. The court shall not substitute its judgment in place of the Board. Fallone Prop. v. Bethlehem Plan. Bd., 369 N.J. Super 552 (App. Div. 2004). The court is to determine whether the Board applied the appropriate statutory criteria under the state and municipal land use law and then properly

exercised its discretion. Burbridge v. Mine Hill Tp., 117 N.J. 376 (1990). Also see Kaufmann v. Planning Bd., for Warren Tp., 110 N.J. 551 (1998).

The Applicant maintains the burden of proof based upon a preponderance of credible evidence that it has satisfied the statutory criteria entitling him to the relief sought; and if the Applicant does not meet his burden of proof, then the Board has no alternative but to deny the application. Chirichello v. Zoning Board of Adj. Monmouth Park, 78 N.J. 544 (1979). "A reviewing court is not to 'suggest a decision that may be better than the one made by the board of adjustment or planning board, but to determine whether the board could reasonably have reached its decision.'" Fallone, supra at 561 (quoting Davis Enters. v. Karpf, 105 N.J. 476, 485 (1987)). In other words, "[t]he challenger must show that the Board engaged in 'willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is [valid] when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.'" Northgate Condo. Ass'n v. Borough of Hillsdale Planning Bd., 214 N.J. 120, 145 (2013)(second alteration in original) (quoting Worthington v. Fauver, 88 N.J. 183, 204–05 (1982)).

While a court is not bound by an agency's determination on a question of law, the court is to give deference to a municipality's informal interpretation of its ordinances. While a court is not bound by an agency's determination on a question of law, nevertheless, the court is to "give deference to a municipality's informal interpretation of its ordinances." DePetro v. Township of Wayne Planning Bd., 367 N.J. Super. 161, 174 (2004); Wyzykowski v. Rizas, 254 N.J. Super. 28, 38, (App.Div.1992), aff'd in part, rev'd in part, 132 N.J. 509 (1993). "Thus, planning boards are granted 'wide latitude in the exercise of the delegated discretion' due to their 'peculiar knowledge of local conditions.'" Fallone at 561 (quoting Burbridge, 117 N.J. at 385)(quoting Kramer, supra, 45 N.J. at 296). "Indeed, local officials are 'thoroughly familiar with their communities' characteristics and interests' and are best suited to make judgments concerning local zoning regulations." Id. (quoting Pullen v. Township of South Plainfield, 291 N.J. Super. 1, 6 (App.Div.1996) (citing Ward v. Scott, 16 N.J. 16, 23 (1954); Bellington v. Township of East Windsor, 32 N.J. Super. 243, 249 (App.Div.1954), aff'd, 17 N.J. 558, 112 A.2d 268 (1955)).Likewise, when reviewing the decision of a trial court that has reviewed municipal action, the appellate court is "bound by the same standards as was the trial court." Fallone at 562.

B. THE BOARD PROPERLY DETERMINED THAT THE APPLICATION MET THE POSITIVE AND NEGATIVE CRITERIA UNDER (C)(2) FOR BULK VARIANCE RELIEF FOR FRONT YARD SETBACKS OF 5 FEET WHEREIN 10 FEET IS REQUIRED TO OCEAN TERRACE AND PORTER AVENUE

The record fully supports the variances that were granted, and therefore, the Board did not act arbitrarily, unreasonably, or capriciously in approving the application. N.J.S.A. 40:55D-70 sets forth the framework for the analysis that a planning board must utilize in granting variance relief. The statute provides that a planning board shall have the power to grant a variance from bulk zoning regulations where there is a "hardship" under subsection N.J.S.A. 40:55D-70(c)(1), and alternatively, under subsection (c)(2) where the grant of a variance would advance the purposes of zoning and where the benefits of the grant substantially outweigh the detriments. The statute details when relief under (c)(1) is appropriate and when relief under (c)(2) is appropriate. Relief under (c)(1) and (c)(2) are available together and/or alternatively.

Subsection (c)(2) allows the grant of a variance where the purposes of the MLUL would be advanced by a deviation from the zoning ordinance requirements and the benefits would outweigh any detriment to the public good. "No variance or other relief may be granted under the terms of [subsection c] … without a showing that such variance or other relief can be

granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70(c); Medici v. BPR Co., 107 N.J. 1, 4 (1987). Furthermore, in all variances cases, the applicant bears the burden of proving both the positive and the negative criteria. Ten Stary Dom Ptp. V. Mauro, 216 N.J. 16, 30 (2013); Nash v. Bd. Of Adj. of Morris Tp., 96 N.J. 97 (1984).

With regard to the negative criteria, the first prong requiring that the variance can be granted "without substantial detriment to the public good" is focused on the variance's effect on the surrounding properties, that being all reasonable vantage points. Medici, 107 N.J. at 22-23 n. 12; Jacoby v. Englewood Cliffs Zon. Bd. Of Adj., 442 N.J. Super. 450, 460 (App. Div. 2015). Regarding the second prong of the negative criteria requiring that the variance "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance," the New Jersey Supreme Court made clear that municipalities should make zoning decisions by ordinance and not by variance. Medici, 107 N.J. at 5. For boards to zone by variance is an arrogation of the governing body's power to zone. TWC Realty v. Zoning Bd. Of Adj., 315 N.J. Super. 205, 218- 219 (Law Div. 1998), aff'd o.b. 321 N.J. Super. 216 (App. Div. 1999); see also N.Y. SMSA P'ship v. Middletown Bd. of Adj., 324 N.J. Super. 166, 173 (App. Div.), certif. den. 162 N.J. 488

(1999). Also important, it is not the burden of a board to find affirmatively that the plan would be substantially impaired, but rather the burden of the applicant to prove the converse. Weiner v. Zoning Bd. of Adj. of Glassboro, 144 N.J. Super. 509, 516 (App. Div. 1976), certif. Den. 73 N.J. 55 (1977); see also Morris Cty. F. Housing v. Boonton Tp., 230 N.J. Super. 345 (App. Div. 1989) (holding that variance approval is not warranted where it is only needed to advance the purposes of the plaintiffs and there is no support for the proposition that it will benefit the community with improved zoning)

Speaking of the c(2) variance, the New Jersey Supreme Court held:

> **By definition, then, 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.**
>
> **[Kaufmann, 110 N.J. at 563 (Italics in original)].**

In the case at bar, under the (c)(2) criteria, the Board correctly found that the application advances the purposes of the Municipal Land Use Law, and the benefits substantially outweigh any detriment. The Board found that relief can be granted without substantial detriment to the public good and

will not substantially impair the intent and purpose of the zone plan and zoning ordinance. The Board reviewed the testimony of Applicant's experts and reviewed the plans submitted along with the Application, in approving the application. Notably, the Plaintiff did not provide any expert testimony to counter the Applicant's experts.

The Board reviewed the testimony of Mr. Wilder, who noted, in conjunction with the testimony of Mr. Hanrahan, how the application satisfied both the positive and negative criteria under (c)(2). Specifically, Mr. Wilder opined that the proposed development is consistent with other structures in the neighborhood and the design of the proposed buildings is set back 5 feet to provide for landscaping barriers from the street. He noted this is a benefit to the adjacent property owners and provides for a streetscape that will not be a detriment. The Court noted that Mr. Wilder's testimony addressed both the positive and negative criteria, as Mr. Wilder noted that the property being located at the very southern end of the Borough as the "gateway" to the town (Pa67) and that the design sought to address the Borough's "2009 Vision Plan" for revitalization which valued "branding" and "aesthetics improvements to promote Seaside Heights as a shore town" which were of particular note given the project's location. (Pa67). "Mr. Wilder also noted that the property currently is a private

parking lot having little aesthetic value (T31:9-10; T39:21-24) and that with the properties proximity to the boardwalk, pedestrians are seeing it every day (T32:7-8) and it is highly visible by motorists (T40:2-5).” (Pa67). Importantly, the Court noted that Mr. Wilder testified “he saw no detriment in the project and that and that the benefits of the deviations substantially outweigh any detriment. (T38-39:23-25; 1-11).” (Pa68).

Mr. Hanrahan also testified that the balconies are designed to be open-air so as not to infringe upon the light, air and space of adjoining properties. The setback to the building façade on Porter Avenue is 9 feet and is 5 feet to the open-air balconies. The setback on Ocean Terrace to the building façade is 5 feet.

Applicant clearly presented sufficient testimony addressing the benefits and/or detriments to the zone and therefore, meets its burden in establishing cause for the grant of variance relief. Once an applicant satisfies the affirmative proofs, or positive criteria, required under N.J.S.A. 40:55D-70(c)(2), the burden shifts, and the “negative criteria” will be met unless the detriments of granting the relief substantially outweigh the benefits. In light of the above-referenced testimony, the applicant not only provided sufficient proofs to support a c(2) variance, but also adequately addressed the benefits

and detriments of granting the relief sought and made a showing that the variances could be granted without substantial detriment to the public good.

As Judge Hodgson found here, "Applicant presented evidence that the variance could be granted without substantial detriment to the public good and it would not substantially impair the intent and purpose of the zone plan and zoning ordinance." (Pa69). The Court found "both Wilder and Hanrahan testified that neighboring properties would not be affected and, in actuality, would benefit from improved aesthetics with the removal of the parking lot, as well as space for air and light and added landscaping." (Pa69).

C. THE BOARD PROPERLY DETERMINED THAT THE APPLICATION NECESSITATED A (D)(5) SPECIAL REASONS VARIANCE FOR DENSITY WHEREIN EACH UNIT WILL HAVE APPROXIMATELY 1,092 SQUARE FEET WHEREIN 1,200 SQUARE FEET IS REQUIRED

The term "density" is defined in N.J.S.A. 40:55D-4 as "the permitted number of dwelling units per gross area of land to be developed." Pursuant to the Borough Zoning Ordinance, for multi-family dwellings, the minimum allowable size of property upon which development may occur within the Residential Zone, 1,200 square feet of lot area per unit in the Residential Zone. Section 246-36(B)(2)(b)[1]. The Applicant sought to construct a total of 17 residential units necessitating a use variance for density wherein each unit will have approximately 1,092 square feet, requiring a density variance.

Relief under an application for a density variance under N.J.S.A. 40:55D-70(d)(5) would be granted only upon the showing of "special reasons." See Commercial Realty v. First Atlantic, 235 N.J. Super. 577 (App. Div. 1989), aff'd 122 N.J. 546 (1991); Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994); Randolph Town Center v. Tp. of Randolph, 324 N.J. Super. 412, 416 (App. Div. 1999). Therefore, the applicant need not show that the site is particularly suited for more intense development. Randolph Town Center at 416. Rather, such an applicant must show that the site will accommodate the problems associated with the density larger than that permitted by the ordinance.

In Randolph Town Center v. Tp. of Randolph, the developer of a supermarket and bank sought a (d)(4) variance for floor area ratio. The court upheld the board's finding that special reasons were shown where both banks and supermarkets were allowed in the zone and the supermarket was explicitly contemplated in the master plan, there was a trend toward larger markets, the difference between the floor space applied for and that allowed was minimal and also well under the FAR permitted in adjacent zones. Id. at 417-418. The same standard for granting such relief that is applied to a floor area ratio case is the same for a density variance under (d)(5). Grubbs v. Slothower, 389 N.J. Super. 377, 386 (App. Div. 2007)("We now hold that

Coventry Square relaxed standard of review should be applied to variance applications seeking deviations from the density requirements in a particular zone. N.J.S.A. 40:55D–70d(5). Density variances for permitted uses in the zone should not trigger the application of Medici's more stringent standard for the same reasons expressed in Coventry Square. A density variance seeks a departure from certain regulations applicable to a use the municipality has chosen to permit, not prohibit, in the zone.).

Such requests need not demonstrate that the property is "particularly suitable to more intensive development" in order to prove "special reasons" under the MLUL. Randolph Town Ctr., supra, 324 N.J. Super. at 416. Rather, in considering such applications, zoning boards of adjustment should focus their attention on whether the applicant's proofs demonstrate "that the site will accommodate the problems associated with a proposed use with [a greater density] than permitted by the ordinance." Id. at 417. Grubbs v. Slothower, 389 N.J. Super. 377, 389 (App. Div. 2007)

Special reasons are those that promote the purposes of zoning as set forth in N.J.S.A. 40:55D–2. Burbridge, supra, 117 N.J. at 386–87; Medici, supra, 107 N.J. at 10, 18. Though not expressly stated in the MLUL, the preservation of the character of a neighborhood or property values in that neighborhood has also been recognized as legitimate purposes of zoning.

Home Builders League of S. Jersey, Inc. v. Twp. of Berlin, 81 N.J. 127, 145 (1979). A successful applicant for a density variance therefore must show that despite the proposed increase in density above the zone's restrictions, and, thus, the increased intensity in the use of the site, the project nonetheless served one or more of the purposes of zoning and was consistent with the overall goals of the MLUL. Grubbs v. Slothower, 389 N.J. Super. 377, 389 (App. Div. 2007)

The Trial Court's decision to affirm the Board's grant of the density variance is well reasoned and supported by the weight of the evidence. A reviewing court should grant deference to the "wide latitude" afforded the Board in the exercise of its delegated discretion. Booth v. Bd. of Adj. Rockaway Twp., 50 N.J. 302, 306 (1967). As stated earlier, Mr. Wilder testified to the proposed density variance and minimal impact on parking and traffic on the surrounding neighborhood. Specifically, he noted there would be "an additional space on Ocean Terrace. So, we are losing two on Ocean Terrace. We are adding one back on Ocean Terrace south of the proposed driveway and then we are adding one on Porter Avenue where we eliminate the existing driveway that serves the parking lot." (1T 41:2-8). "So, with this being said, I believe the property can support the density the variance being sought." (1T 41:16-18).

Importantly, the objector did not have another traffic study to submit into evidence that showed that the proposed development would negatively impact the surrounding neighborhood. The Board duly considered the evidence adduced at the hearing and based on the sworn testimony of the applicant's professionals. Even when doubt is entertained as to the wisdom of a board's action, there can be no judicial declaration of invalidity absent a clear abuse of discretion by a board. Pullen, supra, 291 N.J. Super. at 312, aff'd, 291 N.J. Super. 1 at 6. The Board acted reasonably in analyzing the proofs provided and relying on the counsel of the Board attorney and as such the Board's actions were not arbitrary, capricious or unreasonable and should be upheld by the Court. Furthermore, while Plaintiff's focus on the quantum of the density relief sought, i.e., the number of units in the proposed development, is perhaps understandable, the same "is not dispositive" of the issue. Jacoby v. Zoning Bd. of Adj. of Board of Englewood Cliffs, 442 N.J. Super. 450, 470 (App. Div. 2015).

Indeed, it is up to the Board to decide whether they find expert testimony to be sufficient or credible. "Zoning Boards may choose which witnesses, including expert witnesses, to believe." Board of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 434-435 (App. Div. 2009). Even in the face of diametrically opposed

testimony, a municipal board "has choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal." Kramer v. Bd of Adjustment, Sea Girt, 45 N.J. 268, 288 (1965). Therefore, the Board properly considered Mr. Wilder and Mr. Hanrahan's uncontroverted testimony in considering variance relief. As Judge Hodgson noted in his Opinion, Mr. Wilder testified that the "property could accommodate problems typically associated with greater density multifamily residential developments, namely parking. (T40:11-19). Mr. Wilder opined that the project mitigates any traffic concerns by providing two off-street parking spots for each unit and only results in the loss of one public parking spot." (Pa68). Further, "there is no evidence to the contrary, the objector did not provide evidence, such as a traffic study, that would challenge the evidence presented and that the proposed development would negatively impact the surrounding neighborhood." (Pa70).

D. THE BOARD PROPERLY DETERMINED THAT SPECIAL REASONS EXIST FOR THE GRANT OF A (D)(6) SPECIAL REASONS VARIANCE FOR HEIGHT OF 48.13 FEET BEING REQUESTED WHEREIN 41 IS THE MAXIMUM HEIGHT

In Grasso v. Borough of Spring Lake, 375 N.J. Super. 41 (App.Div.2004), the court extended Coventry Square's less stringent review standards to consideration of applications for height variances under

N.J.S.A. 40:55D–70d(6). "Once again, we reiterated that the standard of review of the applicant's "special reasons" for a variance depends on the type of variance at issue." Grubbs at 388 (citing Coventry Square at 49). "[S]pecial reasons necessary to establish a height variance must be tailored to the purpose for imposing height restrictions in the zoning ordinance." Grubbs v. Slothower, 389 N.J. Super. 377 (App. Div. 2007) (quoting Coventry Square at 52).

The decision was not in violation of the Seaside Heights Master Plan. The board heard testimony from Mr. Wilder that the proposed height variance of 48.13 feet requested wherein 41 is the maximum height will not be a detriment to the surrounding properties. Mr. Wilder noted that the lot is directly across the street from the Boardwalk which is elevated 5 feet above the subject property. Mr. Wilder testified as follows:

> **When looking at a height variance in context of the (D)(6) variance relief, we turn to the standards outlined in the Coventry Square versus Westwood. The issue is whether or not the lot can accommodate the noted deviation. Under Coventry we must demonstrate that the deviation can be reasonably accommodated and that the detrimental impacts can be mitigated. In essence, the Coventry standard shifts the focus of the negative criteria from the impact of the use to the impact of the deviation. The applicant must again demonstrate that the variance can be granted without substantial detriment to the public good and that the variance will not impair the**

> **intent or purpose of the zone plan or zoning ordinance.**
>
> **[1T 41:19-42:8]**

Mr. Wilder opined as to the height variance:

> **Again, I believe there are mitigating factors that make this property in the design before you unique. So, this property is a stone's throw from the boardwalk and the boardwalk is generally five to six feet in elevation above this subject property. And this part of the boardwalk is quite unique in that we actually have development on the east side of the boardwalk in this area at the elevation of the boardwalk. As you get further into Seaside Heights, you have a lot of development on the west side of the boardwalk that's at street level. In this area you actually have development on the east side of the boardwalk at boardwalk level.**
>
> **[1T 42:9-22].**

When questioned by Plaintiff's counsel if lowering the building level would improve access to light and air or be a lesser violation to the zoning plan or zoning ordinance, Mr. Wilder opined:

> **I do not believe light, air, and open space would be improved, because I don't believe that's impacted at that location. When you look down Ocean Terrace, we are matching the existing setback. When you look at the mass of the building with respect to light, air, and open space, by the design of the building being three separate buildings, I don't believe there's a detriment to light, air, and open space.**
>
> **[1T 72:12-73:5]**

Notably, Mr. Wilder testified that the proposed development meets the setback on Plaintiff's side of the property "so we would not be increasing the side yard of the west side of the property." (1T 74:25-75:3). As the Court noted in its Opinion "the design sought to construct several buildings with corridors rather than one large, massive building – these corridors provide access light and air for properties to the west. (T44:7-15; see also, Pa20 , ¶5.J.) Mr. Wilder noted the recently approved nearby project known as the Beach Club, which was built to the higher elevation of the Boardwalk. (T44:1-4)." (Pa67).

Further, a township's master plan has neither binding force nor regulatory power over the use of land. In fact, a master plan's designation of appropriate uses for various areas in a town is merely advisory. Although the Master Plan serves as the basis for the zoning ordinance it does not have the operative effect of a zoning ordinance. Manalapan Realty v. Township Committee, 140 N.J. 366, 381 (1995). As such, a planning board approval that is not strictly aligned with every tenet of the town's master plan is not uncommon, particularly in cases where variances are granted, and certainly is not grounds in and of itself for a finding that a board decision is arbitrary, capricious, or unreasonable.

For these reasons, the Court opined as follows:

> **The clear import of the evidence and testimony is that the project proposes a better zoning alternative than the existing parking lot. As to the special reasons, the main thrust of Plaintiff's argument can be found in its heavy reliance on density and related height variance approval by the Board and that the approval exceeds the zone's ordinary limitations. With regard to height, all things are relative. What the property owner seeks here is to build a to a heigh tin excess of what is permitted, but in an area unique in that it is near the boardwalk which is elevated and where adjacent structures to the boardwalk are elevated. Moreover, as the Board recognized here, the particular structure in question – a tall, thin, residential structure – was part of the design calculous ensuring corridors with enough open space to allow for views, light and air through the corridors crossing the property and benefiting the western properties. This is an alternative to one 'massive' structure, without the light and air corridors.**
>
> **(Pa69)**

The Court's reasoning is well-supported by the record and there is no abuse of discretion or any error by the Trial Court. Plaintiff brings no new argument on appeal that was not already considered by the Trial Court that would warrant a reversal. As stated by the Trial Court, "[c]onsequently, it is this Court's view that when viewed in the overall scheme, the proposed structure, despite its added height, will not necessarily give the appearance of disharmony or overcrowding that the concerned the court in Grasso, 375 N.J. Super. at 53." (Pa 70). The Court further noted "it is clear that a major

thrust of the evidence was accommodating the Mater Plan and Vision Plan which valued branding and aesthetics at this critical location, the gateway of the township." (Pa71). Judge Hodgson opined in conclusion:

> **. . . there was clearly sufficient evidence before the Board for it to have granted the application. The Board's determination that Applicant proposed a better zoning alternative and satisfied the "positive" and "negative criteria" requirements was not arbitrary and capricious but was based on facts present in the record. The proposed use will satisfy MLUL objectives while increasing aesthetics for an important area of the town and will not impact neighboring properties. Plaintiff's contention that increased density will result in unsustainable traffic is not born out by the evidence. Therefore, the Board did not err in granting defendant the various (c) and (d) variances.**
>
> **(Pa71).**

Plaintiff brings no new argument or evidence demonstrating an abuse in discretion of the Trial Court's reasoning.

II. NOTICE OF THE APPLICATION WAS SUFFICIENT UNDER THE PRINCIPLES ESTABLISHED IN THE PERLMART DECISION, THEREFORE THE DEFENDANT-BOARD HAD JURISDICTION OVER ONE OCEAN TERRACE, LLC'S APPLICATION

Appellant challenges the sufficiency of the public notice of the application as impermissibly vague under the Municipal Land Use Law. However, this challenge must fail as members of the public were fairly

apprised of the date, time and place of the hearing as well as the location of copies of the application and plans. Further, the notice sufficiently described the variance relief sought. Public notice of the hearing on the application is required pursuant to N.J.S.A. 40:55D-12(a). The contents of such notice are governed by N.J.S.A. 40:55D-11, which states:

> **Notices pursuant to [N.J.S.A. 40:55D–12 and –13] shall state the date, time and place of the hearing, the nature of the matters to be considered and, in the case of notices pursuant to [N.J.S.A. 40:55D–12], an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office, and the location and times at which any maps and documents for which approval is sought are available pursuant to [N.J.S.A. 40:55D–10].**
>
> **[N.J.S.A. 40:55D-11]**

"[T]he purpose for notifying the public of the 'nature of the matters to be considered' is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing or, at the least, look more closely at the plans and other documents on file." Perlmart of Lacey, Inc. v. Lacey Tp. Planning Bd., 295 N.J. Super. 234, 237-238 (1996)(citing Scerbo

v. Orange Bd. of Adj., 121 N.J. Super. 378, 389 (L. Div. 1972)). As discussed in the Perlmart decision:

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

Plaintiff alleges that the notice of the application for development did not comply with the requirements of N.J.S.A. 40:55D-11. Specifically, Plaintiff alleges that the Applicant's notice failed to identify the location and time at which any maps and documents for which approval is sought are available because at the time the notice was published and served on property owners within two hundred feet, the plans and other documents were not at 901 Boulevard & Sherman Avenue but were located at the new office of the Planning Board at 100 Grant Avenue, Seaside Heights, New Jersey, approximately one block from the advertised location provided in the notice.

Plaintiff's argument fails because the change in address was clearly posted on the door of the old location that the new municipal offices are

located at 100 Grant Avenue. (1T1 9:12-16). The Board considered the sufficiency of the Notice of Interested Persons and Property Owners within 200 feet. Pursuant to Perlmart of Lacey, Inc. v. Lacey Twp. Plan. Bd., 295 N.J. Super. 234 (App. Div. 1996) the Board voted unanimously to accept jurisdiction. Caselaw does not support Plaintiff's position that a clerical error in identifying the location where the maps and plans are physically stored in and of itself vitiate notice and therefore void the Board's jurisdiction. see Pond Run Watershed Ass'n v. Twp. of Hamilton Zoning Bd. of Adjustment, 397 N.J. Super. 335, 348–49 (App.Div.2008)(concluding that notice complied with MLUL in spite of minor typographical error in the transposition of two digits in a block designation and therefore did not deprive the Board of jurisdiction). Similarly, in Northgate Condo. Ass'n, Inc. v. Borough of Hillsdale Plan. Bd., 214 N.J. 120 (2013), the New Jersey Supreme Court declined to apply the language of N.J.S.A. 40:55D-11 strictly to an apparent clerical error and refused to void the Board's jurisdiction despite an error in the property description in the notice. "As the Appellate Division reasoned when it considered the significance of the typographical error in the notice in Pond Run, we agree that a minor, clerical deviation that had no potential to mislead any interested member of the public does not fall short of the statutory requirement for describing the property to be

developed." Northgate Condo. Ass'n, Inc. v. Borough of Hillsdale Plan. Bd., 214 N.J. 120, 142 (2013) (finding applicant's notice, although using a technically-inaccurate lot number, included both the property's commonly-known name of Golden Orchards as well as a reference to its location being "south of Ell Road" and concluding that the description of the site was "reasonably adequate to notify members of the public" about the identity of the property to be developed and that, therefore, the [applicant's] notice was adequate.)

Here the error in the notice was not such that a person reading it would have been unable to determine the location of the hearing on the application or the location to physically inspect the application and plans. see Perlmart at 238 (the "critical determination is whether the notice provides a reasonably adequate description of the land subject to the application, such that concerned neighbors or members of the general public who may be affected by the proposed development may properly protest the proposed use or structure.").

Judge Hodgson found that the Board's acceptance of jurisdiction was reasonable as the change of address was clearly posted and there was no evidence of any member of the public being unable to unable to inquire as to the correct address:

> **The record reflects that directions were available at the address noticed to the new location of the municipal buildings, which was close by. The record reflects, and it is uncontested, that the change in address was posted on the door of the old location (901 Blvd & Sherman) directing people to the new municipal offices located at 100 Grant Avenue. In addition, since the 901 Blvd & Sherman address is a police department, inquiries could also be made as to the location of the municipal buildings – as counsel for Plaintiff, Edward Liston, Esq., apparently did. Mr. Liston indicated to the Board that he went inside and "ask[ed] [at] the police headquarters where the other building was. (T11:2-4). It was also indicted by a Board Member, who advised: 'if I may, I just walked outside about ten minutes ago. On those doors outside that Mr. Liston was referring to, it directs people to go to 100 Grant Avenue for general municipal business" (T19:12-16). Finally, Plaintiff does not content that any member of the public was not notified of the location of the hearing or that there are any members of the public who were unable to inquire as to the correct physical address.**
>
> **Based on these facts, it is the Court's conclusion that common sense dictates that any member of the public concerned about the application could easily find the location of the plans either by asking at the police headquarters, as Mr. Liston did, or by reading the instructions on the door directing persons to the municipal buildings across the street. Accordingly, the notice comports with the requirements of the MLUL**.
>
> **[Pa54-55]**

Nor was the notice defective for the purpose of providing a description of the application or the relief sought. In the leading case Perlmart of Lacey,

Inc. v. Lacey Tp. Planning Bd., 295 N.J. Super. 234, 237-238 (1996), there was a notice with regard to an application being made to the board and the application specifically said minor subdivision approval with variance from lot area, front yard setback and rear yard setback, and minor subdivision approval with variance from lot area, front yard setback and rear yard setback, and minor subdivision resulting in creation of three commercial lots for a total of 42.53 acres. The notice did not specify whether the various applications were for a K–Mart shopping center or that the shopping center was a conditional use. Perlmart of Lacey, Inc. v. Lacey Twp. Plan. Bd., 295 N.J. Super. at 235. The Perlmart Court noted: "It is, to us, plain that the purpose for notifying the public of the "nature of the matters to be considered" is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing or, at the least, look more closely at the plans and other documents on file." Perlmart of Lacey, Inc. v. Lacey Twp. Plan. Bd., 295 N.J. Super. at 237–38 (citations omitted). The Perlmart Court concluded that the public notice was deficient because it did not identify the nature of the proposed use, i.e. that it was a conditional use shopping center. Id. at 241.

In the case at bar, the notice informs the public that there are going to be three structures, 17 townhouses, a front yard setback on Porter, a front yard setback on Ocean, and height and lot area per unit variances. Caselaw provides this would adequately notify the public of the variance relief requested. See Scerbo v. Orange Bd. of Adj., 121 N.J. Super. 378, 388 (Law Div.1972)(notice of an application to construct a residential treatment center was sufficient even though it did not state that a special exception or variance was sought).

In Pond Run, "[w]ithout directly addressing the fact that the developer's notice did not conform to the technical requirements of N.J.S.A. 40:55D–11, the appellate panel instead applied a more general approach to notice, finding it dispositive that a "reasonable person" would have been able to glean the necessary information despite the error." see Northgate Condo. Ass'n, Inc. v. Borough of Hillsdale Plan. Bd., 214 N.J. 120, 140–41 (2013)(citing Pond Run, supra, 397 N.J. Super. at 348–49).

Appellant charges that the notice was insufficient and vague, that the notice did not specify the size of deviations sought in the variances, along with the omission of the term "density". The Court concluded that the "subject notice sufficiently informs the public in accordance with the

MLUL." (Pa56). The Court reasoned that there was no such omission as that cited in the Perlmart decision. (Pa56).

Here the court found:

> **. . . the notice is sufficient to inform the layperson of the nature of what is being sought in the proposed development and whether it would affect them. It clearly informs the public that there are going to be three structures housing 17 townhouses and that the application will require variances relief from the front yard setback requirement on Ocean and Porter Avenues; height limitations; and the lot per unit limitation.**
>
> **[Pa56-57]**

The Court opined that "the required public notice need not be 'exhaustive." (Pa57). "It is the Court's view that the term 'density' was not needed to convey the nature of the approval sought." (Pa57). Specifically, the court found that the "forward slash represents a divisional sign and is commonly understood as shorthand to express 'per'. As used in this case, it is interpreted as 'lot area [per] unit . . . This expression is synonymous with the definition of density, which is defined in the MLUL as the 'permitted number of dwelling units per gross area of land that is subject to an application for development.'" (Pa57); See N.J.S.A. 40:55D-4. As such, the Court properly found that the Applicant provided notice of all "material aspects of the proposal." (Pa58).

For all of these reasons, the Defendant takes the position that it acted reasonably and in accordance with the evidence presented an in accordance with the municipal land use law and the case law that the notice sufficiently identified the location of the municipal offices despite a de minimis clerical error and the public was sufficiently notified of the variance relief requested.

CONCLUSION

For the foregoing reasons, the decision by the Board was not arbitrary, capricious, or unreasonable and the Trial Court's findings of fact and conclusions of law are supported by the record. It is respectfully requested that the Trial Court's decisions be affirmed.

Respectfully submitted,

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Dated: September 16, 2024

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September 30, 2024

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
25 W. Market Street
Trenton, NJ 08625-0006

Re: DOMINICK DIMINNI, Plaintiff-Appellant, V. SEASIDE HEIGHTS PLANNING BOARD and ONCE OCEAN TERRACE, LLC
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION (A-002859-23T01); ON APPEAL FROM ORDER BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION-CIVIL PART, OCEAN COUNTY (OCN-L-1062-23); CIVIL ACTION; SAT BELOW: HON. FRANCIS R. HODGSON, JR., A.J.S.C.; SUBMITTED SEPTEMBER 30, 2024

Dear Honorable Judges:

Please accept this Letter Brief in lieu of a more formal Reply Brief on behalf of Plaintiff/Appellant, Dominick DiMinni in response to the Briefs filed by Matthew J. Heagen, Esquire, Attorney for Defendant/Respondent One Ocean Terrace, LLC and Barry A. Stieber, Esquire, Attorney for Defendant/ Respondent Seaside Heights Planning Board.[1]

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

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REPLY TO PLANNING BOARD'S PRELIMINARY STATEMENT

The variances fail as a matter of law. That an expert 'sees no detriment' in a five-foot setback is not a special reason to deviate from the ten-foot-minimum setback. The same expert said that parking and traffic are the problems associated with the proposed density variance -- yet he fails to account for the loss of a parking lot serving the public to make room for seventeen residential units. If the property deserves a height variance because it is across the street from the boardwalk, then that justifies a height variance the entire length of Ocean Terrace (which is the entire length of the Borough).

As for public notice, even if 'lot area/unit' were not confusing, the fact remains that 901 Boulevard & Sherman Avenue was not the address where the application documents were made available for public inspection. That is a jurisdictional deficiency, the error was brought to the Board's attention at the hearing, and the Applicant proceeded at its own risk.

The order affirming the grant of the variances is untenable and should be reversed.

REPLY TO PROCEDURAL HISTORY STATEMENTS [2]

At DAb1, the Applicant accepts plaintiff's procedural history presentation.

The Board's procedural history (DBb18-DBb20) is out of sequence (see R. 2:6-2(a)(4) & (5)) and argumentative. Whether "any layman would be aware" (DBb19) and whether "[t]he record reflects that the applicant met its burden" (DBb20) will be addressed below.

REPLY TO COUNTERSTATEMENTS OF FACT

At DBb3 to DBb4, the Board acknowledges that the public notice directed interested persons to 901 Boulevard & Sherman Avenue. That is not where the application documents were located. The notice does not say that the documents are "one block away at 100 Grant Avenue" (DBb4). Regardless of what the

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[2] References: DAa_ (Applicant's appendix); DAb_ (Applicant's brief); DBb_ (Board's brief).

Board thinks "any member of the public would be able to discern" (DBb5), the defect was jurisdictional.

At DBb8 to DBb18, the Board violates the requirement that a statement of facts "shall not be a summary of all of the evidence adduced at trial, witness by witness" (R. 2:6-2(a)(5)).

At DAb3 and at DBb9, the defendants insinuate that a tavern was recently at the site. As is clear from the aerial photos (Pa104), all improvements have been gone since at least 2012. The Applicant points out that parking lot is not even paved -- it is 'vacant dirt' (DAb7; DAb13). There is no reason (other than the developer's greed) why this vacant dirt lot cannot be developed with compliant 10-foot-minimum setbacks. If the expert "explained that a c(2) variance can be granted when a plan advances the MLUL and the benefits of the deviation substantially outweigh the detriment" (DAb5), then the Applicant agrees that the testimony was incompetent: It is the variance, not the plan, which must advance MLUL purposes. See Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 198 (App. Div. 2009) ((c)(2) applicant must prove "that the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance"). The Board also bungles this at DBb12: whether "the proposed development would advance the Municipal Land Use Law" begs the question of whether the proposed 5-foot setbacks would advance

MLUL purposes whereas 10-foot setbacks would not. The Board never explains "the benefits of the deviation" (DBb12), and that is because there is no public benefit.

The Board argues that five-foot setbacks are "consistent with other structures in the neighborhood" (DBb11). The Governing Body does not want that so-called 'consistency.' The Governing Body wants minimum-ten-foot setbacks, hence the zoning requirement. Violating the setback because 'everyone else did it' is anything but a special reason for (c)(2) variance relief.

The Board repeats the expert's demonstrably false claim that the Applicant "actually increased our setback" (DBb12). This has been a vacant lot for at least twelve years.

The reference to a one-parking-space "net loss" (DBb10) is disingenuous because the expert and the Board fail to acknowledge that an entire parking lot serving the public is being sacrificed to make way for the seventeen residential units. The Applicant's expert admitted that the "[t]he most obvious problems" associated with excess density "would be traffic and parking" (1T40-13 to 1T40-14), yet he and the Board never explained the impact of the displaced cars that used the vacant dirt parking lot.

Nonsensically, the height variance is extolled because "the buildings on the Boardwalk are built at Boardwalk level" (DBb13). That is true of every

property up and down Ocean Terrace across the street from the Seaside Heights Boardwalk.

The Board's assertion that the plaintiff somehow needed a traffic expert (see DBb17), ignores the fact that it is the Applicant who has the burden of proof to produce evidence which supports the granting of the variance in question. The plaintiff/objector does not to prove anything. The Applicant's expert raised the issue of traffic and parking problems associated with the increased density, and he 'addressed' the issue by ignoring the loss of parking on the vacant lot. The Applicant's expert was not qualified as a traffic expert and therefore, the failure of the Applicant to call a qualified traffic expert to provide testimony in support of the Application which should have directly addressed the "traffic and parking problems" issue raised by the Defendant/Appellant's, Planning Expert leaves the Board with no testimony on that issue and therefore the approval granted by the Board and upheld on Appeal by the Court below should have been denied based on the obvious lack of sufficient proof on the issue.

REPLY TO LEGAL ARGUMENT

I. REPLY TO DEFENDANTS' ARGUMENTS REGARDING THE GRANT OF VARIANCE RELIEF.

The Board for the first time claims that the setbacks can be justified on (c)(1) hardship grounds. See DBb24. The Applicant mentions a (c)(1) variance at DAb10. Putting aside that the resolution contains no hardship findings and the records contains no hardship proofs, it is axiomatic that a hardship cannot be self-created by the Applicant in its own plans and then attempt to get the Board to grant a variance to excuse the Applicant's deliberate deviation in the ordinance requirement simply to increase density. Green Meadows at Montville, L.L.C. v. Plan. Bd. of Twp. of Montville, 329 N.J. Super. 12, 22 (App. Div. 2000). In the present case, the Applicant is starting off with a vacant lot. The five-foot setbacks are not based on a peculiar site condition, but rather based on the Applicant's deliberate plan to increase density and therefore, profitability for the subject project. There is no legal basis to grant a hardship variance where it is clear the hardship is self-created.

The Applicant questions whether "the use is peculiarly fitted to the particular location" (DAb12). There is no (d)(1) variance. The Applicant does not understand its application.

At DAb10 and at DBb24, the defendants acknowledge that the (c)(2) setback variance requires proof that the deviation (5-foot setbacks) advances

MLUL purposes whereas conformity (10-foot setbacks) would not do so. But the proverbial second shoe never drops: the defendants never explain how the public is benefitted by lesser setbacks. It is unnecessary to discuss the negative criteria (see DBb25 to DBb27) when special reasons for the (c)(2) variance do not exist.

The Board refers to 'Vision Plan' and 'Gateway' and 'Branding' (see DBb27). But the deviation (5-foot-setback-versus-10-foot-setback) does not advance any of this. The Borough's 'brand' would be just as effectively promoted (if not better promoted) with a building that conforms to the Governing Body's setback requirements.

The Applicant claims that "the C and D variances overlap" (DBb13), which is not the case. The setback variance has nothing to do with the height variance. The Applicant's attempt to bootstrap those two variances together whereas here the proofs presented the Board are each variance are deficient constitutes a transparent attempt to create a new dual variance where neither variance has a sufficient evidential basis to stand alone. There is no legal basis for this procedure either in the MLUL or existing caselaw.

Both defendants fail to justify the density variance. See DAb14 to DAb15; DBb29 to DBb34. According to the Applicant's expert, the problems associated with increased density are traffic and parking. The Applicant proposes to

remove the existing parking lot serving the public and replace it with seventeen residential units. Where are the cars that used the parking lot now going to park, and what impact will this have on the traffic/parking problem acknowledged by the expert? The expert had no answer, the Board did not even address the issue in its resolution, and thus the trial court lacked a sufficient basis to affirm the decision below.

The defendants fare no better in attempting to justify the height variance. See DAb11 to DAb13; DBb34 to DBb39. The expert's observation that "the lot is directly across the street from the Boardwalk which is elevated 5 feet above the subject property" (DBb35) overlooks the fact that the entire boardwalk is improved. See the 2012 aerial photo at Da104. Every property along Ocean Terrace is across the street from a boardwalk that is "elevated above the street level" (DAb13). And if the plaintiff and other Ocean Terrace property owners can be elevated to 48.13 to advance their purely private interests in having superior ocean views, then there is no principled reason why neighbors to the west (like the plaintiff herein) cannot elevate to 55-65 feet to reclaim their lost easterly views. The purpose of the ordinance is to avoid vertical overdevelopment -- the reasoning behind the variance would encourage such overdevelopment.

II. REPLY TO DEFENDANTS' ARGUMENTS REGARDING PUBLIC NOTICE.

The arguments at DAb15 to DAb22 and DBb39 to DBb47 do not adequately address the plain language of the MLUL notice statute, N.J.S.A.40:55D-12. The location where the application materials can be reviewed is one of the few requirements expressly set forth in the statute. The statute does not allow the Applicant to publish notice of where a sign is located directing people to the correct location. See discussion in Point II of the Plaintiff-Appellant's Merit's Brief at Pages Pb26 through Pb30.

It is submitted that the Court below erred in its analysis of the jurisdiction issue based on the failure of the notice to properly identify the place where the plans and relevant documents regarding the application could be inspected by members of the public.

Finally, "Da1" is improper as it is an unauthenticated photograph inserted into the Defendant's Appendix of One Ocean Terrace, LLC which is taken from a Brief in opposition to Plaintiff's Motion for Summary Judgment filed on August 17, 2023. Pa 41. This Motion was opposed by the Defendants/Respondents on September 12, 2023 which filing included the photograph referred to herein. (Da1).

Oral argument was held on this Motion on September 14, 2023 and denied by Order of Judge Hodgson on September 22, 2023. (Pa44).

A Pre-Trial Order was entered in this matter by the Trial Court on October 2, 2023 (Pa46). This Order allowed Plaintiff to renew its argument on jurisdiction at Trial. See Paragraphs three-four on the Pre-Trial Order.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the original Merits Brief, it is respectfully, but most strenuously urged that the Trial Court's Order affirming the site plan approval with variance relief approved by the Defendant Planning Board should be reversed and vacated by this Court.

Respectfully Submitted,

EDWARD F. LISTON, JR., L.L.C.
Counsel for Plaintiff

By: _____
Edward F. Liston, Jr.

EFL/dg