SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1989-21

CONCERNED CITIZENS OF TENAFLY, INC., a non-profit corporation of the State of New Jersey,

Plaintiff-Respondent/
Cross-Appellant,

v.

BOROUGH OF TENAFLY PLANNING BOARD,

Defendant-Respondent/
Cross-Respondent,

and

95 TENAFLY, LLC,

Defendant-Appellant/
Cross-Respondent.

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Argued June 6, 2023 – Decided June 28, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3640-21.

Sheppard A. Guryan argued the cause for appellant/cross-respondent 95 Tenafly, LLC (Lasser Hochman, LLC, attorneys; Sheppard A. Guryan and Bruce H. Snyder, of counsel and on the briefs).

John J. Lamb argued the cause for respondent/cross-appellant Concerned Citizens of Tenafly, Inc. (Beattie Padovano, LLC, attorneys; John J. Lamb, of counsel; Ira E. Weiner, of counsel and on the brief; Jason Cherchia, on the brief).

Jeffrey A. Zenn argued the cause for respondent/cross-respondent Borough of Tenafly Planning Board (Cullen and Dykman LLP, attorneys; Jeffrey A. Zenn, on the brief).

PER CURIAM

Defendant 95 Tenafly, LLC (95 Tenafly or applicant) applied to defendant Borough of Tenafly Planning Board (Board) for preliminary and final site plan approval, a major soil moving permit, several variances, exceptions, and waivers to construct a large retail liquor store, located in a B-2 business zone, which permits retail use. The site is known as 95 County Road and designated on the Borough's tax assessment map as Block 1005, Lot 8. The proposed liquor store would be 16,745 square feet, with 13,784 square feet of retail space on the first floor, 2,821 square feet of storage space on a mezzanine, and 140 square feet of office space on the second floor. The site measures 58,568 square feet and is a

through lot with frontage on both County Road and Piermont Road. The site was formally used for a now vacant car dealership, which would be demolished as part of the project. The Board granted preliminary and final site plan approval, a major soil moving permit, several variances, exceptions, and waivers, and denied two bulk variances. Based on our careful review of the record, the contentions raised by the parties on appeal, and the applicable legal principles, we affirm in part and reverse in part.

95 Tenafly's engineer originally calculated that fifty-five parking spaces would be required under Tenafly's land development regulations (LDR). The Board determined that the LDR's definition of floor area encompassed the mezzanine and office space, requiring a total of sixty-seven parking spaces. 95 Tenafly revised its application to include a parking variance and provided new notices reflecting this additional variance.

95 Tenafly also sought a design waiver as to the width of the parking spaces, proposing that the spaces be nine feet wide as opposed to the ten-foot width required by the LDR for retail uses involving shopping carts. At the recommendation of the Board and its professionals, 95 Tenafly agreed to increase the width of the parking spaces to 9.5 feet and add hairpin striping.

Because the site borders on two roads, it has two front yards, with a setback of 186 feet from County Road and 44.8 feet from Piermont Road. The B-2 Business Zone requires a 15-foot setback according to LDR Attachment 11, Schedule B.

95 Tenafly sought a variance to permit two freestanding signs; a 150 square foot mounted building sign as opposed to the 32 square feet permitted by the LDR; a 4-foot height for the building mounted sign as opposed to the 3 feet permitted; and 48-inch proposed building letter height for the building sign as opposed to the 15 inches permitted.

95 Tenafly also sought a variance to allow a 50-foot-high flagpole with a 216 square foot flag, as opposed to the 25 feet flagpole height and 30 square feet flag limits imposed by the LDR.

95 Tenafly's original plans called for access to the loading area from both County Road and Piermont Road with a second, separate driveway for deliveries from Piermont Road. During the course of the hearings, at the request of the Board and the Board's professionals, the second driveway from Piermont Road was eliminated, and the loading area was reconfigured to permit all unloading to take place on premises. Pursuant to the vehicle circulation exhibit designed by 95 Tenafly's engineer at the suggestion of the Board professionals, trucks

entering from County Road would travel over a driveway entirely on the premises, thereby eliminating the need to travel through the Tenafly downtown area, and then back into the loading area, crossing the sidewalk and Piermont Road right-of-way, without entering Piermont Road itself. Trucks entering from Piermont Road, a one-way street, would enter the premises and back up and unload entirely onsite.

The proposed parking area is accessed from both County Road and Piermont Road by a 30-foot-wide traffic aisle, which is wider than required by ordinance. During the Board hearings, the proposed building was moved southward by 2.5 feet and the sidewalk width along the northerly side of the building was reduced by 2.5 feet. This resulted in an increase in the buffer area from 3 feet to 8 feet along the northern property line by the residential complex.

The proposed five perpendicular parking spaces in the front yard along County Road require a variance for parking within the site's front yard.

In sum, 95 Tenafly's application sought (1) two parking variances, for number of spaces and for parking in the front yard, and one design waiver for 9.5-feet wide parking spaces rather than 10-feet wide spaces, (2) signage waivers to allow two free-standing signs and a building mounted sign higher and

larger than allowed by the LDR; and (3) a flagpole height and flag size variances.

The existing stormwater design consisted of seepage pits and a 6-inch-diameter outflow pipe connected to the drainage system along Piermont Road. The proposal included new storm inlets piped to additional, greater capacity seepage pits, that would be connected to the Piermont Road drainage system. Additionally, the Board's engineer indicated that onsite impervious coverage would be reduced by 4,953 square feet compared to existing conditions.

Plaintiff Concerned Citizens of Tenafly, Inc. (Concerned Citizens), a nonprofit corporation composed of eleven Tenafly residents, opposed the application, expressing concern that the project as designed will negatively impact the area and require numerous variances. Concerned Citizens retained several experts, who submitted expert reports and testified before the Board.

Concerned Citizens' planning expert, Peter Steck, opined that a side yard setback variance was required because the proposed building is only setback a few feet from The Learning Experience property. The B-2 Zone does not require a side yard setback but if one is provided, it must be at least 13 feet. The site's property line runs along the rear of the adjacent Learning Experience property. This is technically a side yard of 95 Tenafly's building proposal. The proposed

building is setback 14 feet along most of the side yard but due to a jog in the property line it does not maintain that 14-foot setback along the entire property line.

Steck also opined that since 95 Tenafly was proposing to raze the existing structure, it could have designed a fully conforming building. Steck further opined that 95 Tenafly had not satisfied its burden for a c(1) variance because there is no hardship associated with complying with the ordinance and the need for variances were self-created. He testified there was a significant shortage of parking proposed. Steck also testified that the ordinance does not permit freestanding signs and the building should be closer to the property line with no parking between the building and the curb.

Concerned Citizens' traffic engineering expert, Michael Maris, provided traffic counts that were fifteen percent higher than 95 Tenafly's expert. He claimed that 95 Tenafly's expert did not analyze two intersections further from the site that should have been analyzed to determine the impact of the project. Maris opined that turning movements into the site from County Road presented safety issues.

Concerned Citizens also challenged the adequacy of the notices of the Board hearings provided by 95 Tenafly. No members of the public other than

Concerned Citizens made any public comment concerning the application. 95 Tenafly argues the notices provided were sufficient.

The initial notice given by 95 Tenafly stated: (1) the name and address of the applicant; the street address and block and lot number of the site; (3) the date, time, and place of the hearing; (4) the place and times when the plans and documents relating to the application were available for inspection; (5) and the nature of the application. The notice stated 95 Tenafly had applied for site plan approval and variances. Regarding the nature of the proposal, it stated:

> The applicant is proposing to demolish the existing KIA car dealership at the property and to construct a Bottle King retail liquor store and related site improvements. In connection therewith, the applicant seeks variances pertaining to loading space dimensions, and sign area and height, and letter height and projection. The applicant also seeks any other variances and/or waivers as may be required by the Planning Board.

The notice was served by publication in The Record on September 16, 2019, and simultaneously by certified mail to the persons and entities listed in an attachment to an affidavit of service.

Subsequent notices indicated the size of the proposed store, stated that cheese and related products would be sold, and provided greater detail concerning the scope of the variance requests. For example, the notice served

on October 16, 2019, provided the following information about the variances and waivers sought:

> The applicant is proposing to demolish the existing KIA car dealership at the property and to construct a 13,784 square foot Bottle King retail liquor store and related site improvements. In connection therewith, the applicant seeks the following variances and/or waivers:
>
> Variances:
>
> - [§35-804.4.a.2] Required off-street parking facilities shall not be located in the front yard. Applicant is proposing off-street parking facilities in the front yard.
>
> - Signage as follows:
>   - [§14-1.11.b.1(c)] Building-mounted max. sign area: 32 SF permitted; 150 SF proposed
>   - [§14-1.11.b.1(c)] Building-mounted max. sign height: 3.0' permitted; 4.0' proposed
>   - [§14-1.11.b.1(f)] Building-mounted max. letter height: 15" permitted; 48" proposed
>   - [§14-1.8.a] Building-mounted max. projection: 6" permitted; 8" proposed
>   - [§14-1.9.a] Flagpole max. flag area: 30 SF permitted; 240 SF proposed
>   - [§35-802.20] Flagpole max. height: 25' permitted; 50' proposed
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> Waivers:
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> - [§35-723.2.g] Min. retail parking space size (where shopping carts provided): 10'x18' required; 9'x18' proposed

- [§35-723.2.i]9 Min. loading space size: 12'(W)x45'(L)x14'(H) required; 30.0'(W)x35.0'(L) proposed
- [§35-723.3.A] Enclosures may adjoin the rear wall of a building and any adjoining side wall of a building which does not face on either a street or a residential district. Proposed trash enclosure is located on side of building facing street.

The applicant may also be required to seek a side yard setback variance and a variance pertaining to the two free standing signs being proposed by the applicant.

The applicant also seeks any other variances and/or waivers as may be required by the Planning Board.

[(Brackets and bracketed material in original).]

The subsequent notices also indicated that a variance for the number of parking spaces was also sought. The subsequent notices were served in the same manner as the initial notice.

The Board conducted a hearing on eight dates over the course of fifteen months. During the course of the hearing, 95 Tenafly made numerous modifications to the plans in response to comments from Board members and the Board's professionals. The modifications included:

(1) Shifting the proposed building 2.5 feet southward and reducing sidewalk width by 2.5 to 5 feet to increase the buffer along the northerly property line from 3 feet to 8 feet.

(2) Eliminating the extra driveway by reorienting the loading area and providing access from the onsite driveway and adding additional landscaping along Piermont Road to screen the loading area and rear of the building.

(3) Increasing width of the parking stalls from 9 feet to 9.5 feet and adding hairpin striping.

(4) Reconfiguring the parking area to extend the driveway from County Road to increase the separation between driveway entrance and drive aisle.

(5) Prohibiting left turns when exiting the site onto County Road.

(6) Agreeing to a condition that if left turns into the site from County Road became problematic as determined by the Tenafly Police Department, 95 Tenafly would return to the Board to address the issue.

(7) Relocating the proposed sign, light pole, and landscaping along Piermont Road and agreeing that no sign, lighting, or landscaping would be placed within the Piermont Road right-of-way except for street trees.

(8) Reducing the number of building-mounted signs.

(9) Relocating the rooftop HVAC units so they would not be in the line of sight of the northerly condominium units.

(10) Reducing the height of the free-standing monument signs along County Road from 12 feet to 7 feet.

Following the multiday hearing, the Board adopted an unanimously approved, thirty-two-page resolution that included a comprehensive recounting of the application, modification to the application, the expert and lay testimony, the numerous exhibits presented, the meeting notices provided, and the Board's findings and unanimous decision to approve the site plan as modified and most of the variances despite strenuous opposition from plaintiff Concerned Citizens.

The Board found that appropriate notice of the Board hearings was given in accordance with statutory requirements through "a legal advertisement in an appropriate newspaper and mailing notice to all neighboring property owners within 200 feet and/or delivering by personal [service]."

The Board rejected Concerned Citizens' claim that the notice was defective because it did not properly advise the public of the scope of the project and specific variances sought. The resolution adopted by the Board stated: "The Board reviewed the form of notice and each time determined that the Applicant's notice was sufficient since (a) it complied with the requirements of the Municipal Land Use Law (MLUL), [N.J.S.A. 40:55D-1 to -163,] and (b) fairly apprised the public of the proposed use and scope of the application."

The Board found the proposed plan involved a permitted retail use and eliminated a prior non-conforming use. Regarding wine tastings, the Board

noted 95 Tenafly stipulated that wine tastings would not be by invitation or advertised and would not create additional traffic. 95 Tenafly also stipulated it would not engage in distribution of products from the site, other than "deliveries of its goods as other retail establishments in Tenafly do." The Board noted that distribution was not permitted in a B-2 business zone in any event.

The Board found that "[o]verall, this application represents a significant improvement in zoning and upgrade in aesthetics from the current development on the property which results in a benefit to the community." According to the Board, the improvements included: (a) removal of a non-conforming use replaced by a permitted use; (b) reducing curb-cuts on Piermont Road from two to one; (c) changing the full movement driveway on County Road to a right turn only movement; (d) changing the existing freestanding sign located in the right-of-way along County Road to a smaller onsite sign; (e) replacing current non-conforming drive aisles with new, wider drive aisles that conform with the LDR; (f) reducing impervious ground coverage by 7 percent; (g) improving stormwater drainage; and (h) providing "a generous landscape plan with over 300 plants along County Road alone."

The resolution listed the following variances sought by 95 Tenafly:

> (a) Number of parking space: 67 spaces required; 55 spaces provided.

(b) Parking in the front yard: not permitted; 5 parking spaces proposed.

(c) Flagpole height: 25 feet maximum; 50 feet proposed.

(d) Flag size: 30 square feet maximum; 216 square feet proposed.

(e) Freestanding sign: not permitted; 2 freestanding signs proposed.

(f) Building mounted sign size: 32 square feet maximum; 150 square feet proposed.

(g) Building mounted sign height: 3 foot maximum; 4 feet proposed.

(h) Building mounted sign letter height: 15 inches; 48 inches proposed.

As to the proposed signage and flagpole, the Board noted:

> The variances are largely driven by the fact that the building is set back so far from County Road and in order to see the signs and read them, particularly as motorists are passing by, they need to be larger than what is permitted under the ordinance. Safety requires that a passing driver be able to look quickly and not have to turn one's neck or crane in order to see the signs.

Regarding parking requirements, the Board explained:

> 27. Having sufficient parking and not creating more parking spaces than are needed avoids over-paving the site and creating more impervious coverage than is necessary, it allows more planting areas and a

reduction in impervious coverage. The design promotes efficient land use, advancing one of the purposes of the [MLUL]. The variance therefore finds support under c(2) as the benefits outweigh any detriments. This is particularly so where there the Board finds that there are no detriments.

28. Applicant proposes five parking spaces within the front yard. Preliminarily, the Board finds that the variance needed here is only for five spaces between the street line and the minimum required front yard setback. Objector argued that all the spaces between the building and the street line are within the front yard and therefore require variance relief. The Board has had a long and consistent interpretation of 'front yard' being consistent with the sketches referred to in the definition of "Yard, front" and attached to the LDR setting forth both graphically and verbally the front yard is to be measured to the required setback line. The Board's engineer testified that has been how the Board has construed that provision for at least the past 25 years and gave examples of how that was applied elsewhere in the Borough.

29. The Board finds that the five parking spaces within the front yard is not an unusual condition and the variance can be granted for the following reasons. Early on in the application, the Board's engineer recommended that the County Road driveway should be moved further into the site to provide larger separation between the driveway entrance and the drive aisle. Then he recommended that perpendicular parking spaces should be provided along the easterly curbline and accessed from the relocated drive aisle knowing that such spaces require variance relief. He also noted that the spaces will be located at about the same setback as the existing parking.

30. Under c(2) analysis, the accommodation of the public with safe, convenient and efficient parking is a clear benefit over strict compliance which would cause the number of parking spaces to be reduced without a commensurate benefit. The revised parking and circulation plan increases the safety of the site and optimizes the efficiency of the site. Thus, this presents a better zoning alternative and this is also a long standing condition at this site.

31. The Board also notes that there are no negative consequences associated with this variance. The layout is compatible with the Chase Bank next door and similar to the existing configuration. The zone intent for a vibrant business area is met with viability[,] efficiency and the aesthetics. There is no member of the Objector group who lives within 200 feet and there were no members of the public who commented on this application. So, the Board finds that there is no substantial detrimental effect on the zone plan or the community.

Regarding the flagpole height and flag size, the Board explained:

32. Under the LDR, the area of a flag is limited to 30 [square] feet where 216 feet are proposed and the flagpole height is limited to 25 feet where 50 feet are proposed. The Board finds that the flagpole is an accessory structure and is clearly not a principal structure. However, the Board finds that the requested flagpole height at two times what is permitted and the flag area at approximately seven times what is permitted are too large. Neither is necessary to the Applicant's business use and lack the import of clear and visible signage while driving. The Board finds that the flag and flagpole would be nice and enhance patriotism, but this proposal is of a magnitude that the Board finds does not meet the requirements of c(2) as

the height of the flagpole and the size of the flag do not result in an overall benefit for the community. Accordingly, the variance requests related to the height of the flagpole and the size of the flag itself are denied.

As to the proposed signage, the Board explained:

> 33. The Applicant originally proposed a freestanding sign on County Road only. It then added a freestanding [sign] on Piermont Road at the recommendation of the Board engineer to identify the site from Piermont Road. The freestanding signs on County Road and Piermont Road were each proposed with an area of approximately 80 square feet. There are existing freestanding signs on the property one which is 50 square feet on County Road and the other is 40 square feet on Piermont Road. The height of the freestanding signs originally proposed was 12 feet which complies with sign ordinance. After comments from the Board, the Applicant reduced the height of the freestanding signs to 7 feet with a total area of approximately 47 square feet. Applicant also added low landscaping on the bottom 2 feet of the signs effectively making them 5 feet with an effective area of about 31 square feet where the ordinance has no maximum area for a freestanding sign. The existing sign on County Road has a height of 15 feet and the proposed is only 7 feet. Further the proposed freestanding signs would be setback 5.7 [feet] on County Road and 5 feet on Piermont Road where the current freestanding signs have no setback on either road.
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> 34. The Board finds that freestanding signs are permitted and no variance is required. This has been the Board's longtime interpretation regarding freestanding signs. When an application has come before the Board with a freestanding sign the Board has

not considered it to trigger a variance and thus has not required it in the past. Section 14-1.7 of the Sign Regulations of Tenafly which deals with prohibited signs does not prohibit freestanding signs. Moreover, section 14-1.11 of the Sign Regulations only provides what signage a use shall provide. It does not limit what other signage may otherwise be utilized. The neighboring properties of the subject each of which has a freestanding sign demonstrate that.

35. Even if the Board's interpretation is flawed, the Board would grant a variance for a freestanding sign since the need to identify the address of the property and business use is important for safety and convenience purposes. A variance for freestanding signs clearly finds support under c(2) as that presents a better planning alternative especially with a building set back so far from either road. It is smaller than similar free-standing signs as Exhibit PB-6 demonstrates. The signage is comparable to the Chase Bank sign adjacent to the north of the property. As a retail property, there could be multiple users at the site and the need for multiple signs. This avoids that situation. The proposed signs are nicer than what currently exists there. The signs do not point or face toward a residential neighbor. The free-standing signs seek to continue signage use used by the Kia dealership but in response to the Board's concerns, Applicant has reduced the area of the sign to [7' x 7'] which represents an improvement to an existing condition and complies with the sign ordinance.

36. The sign regulations only regulate the height of freestanding signs. It permits heights of up [to] 12 feet and Applicant proposes compliant heights of 7 feet for both freestanding signs.

37. The existing building has 3 building mounted signs. While Applicant originally proposed two building mounted signs it removed one and only proposes one with a proposed area of 150 square feet in the front facing County Road. The ordinance only permits one building mounted sign so that complies.

38. The ordinance permits building mounted signs up to 32 square feet. The existing building mounted signs aggregate about 50 square feet. The building sign height limit is 3 feet where 4 feet is proposed and the existing is 3.5 feet. The maximum letter height for building mounted sign is 15 inches where a letter height of 48 inches is proposed and the existing signs all exceed the 15[-]inch maximum. The projection of the sign was proposed at 8 inches where the existing signs and the ordinance permits 6 inches. During the course the hearings, Applicant revised the plan so that the sign projection is 6 inches and complies.

39. The Board finds that the variance relief for the building mounted sign is warranted due to the very large distance the building is setback from County Road and the need primarily for motorists to see the signs, read them quickly and easily without straining. The signs promote clear and safe visibility and identification of the building. Good signage helps avoid sudden stops and turning movements. Since the minimum building setback is only 15 feet the sign ordinance is written with that in mind. Here the building is set back approximately 200 feet from County Road. Much larger signs than otherwise permitted are needed to see and read the signs while driving along County Road which has a posted speed limit of 35 mph. This is needed to identify the site to the traveling public and let people know where the site is. This promotes public safety and the sign size is not

> overwhelming given its distance from County Road. The benefits of the larger building mounted sign area, sign height and letter height as a whole substantially outweigh any detriments. The benefits are that the overall sign package provide identification and safety for motorists and the Board finds the signs are tasteful and provide harmony to the area by virtue of the large site.
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> 40. The Board finds that the building mounted sign variances do not cause a substantial adverse impact on the zone plan and community. The sign faces a county road and does not impact any residential properties. Further the building signage is not obtrusive or unattractive. The sign is proportional and creates a desirable visual impact. It blends with the building's mass and distance from the view points in the public right-of-way.

The Board also found that "there is no substantial detriment to the zone plan or community [by] granting of any of the variances."

The Board next addressed the following design exceptions sought by 95 Tenafly: (a) "Minimum parking space size: 10' x 18' required; 9.5' x 18' provided"; and (b) "Dumpster location: not permitted on side of building facing a street; dumpster proposed on side of the building facing street (Piermont Road which effectively acts as the rear of the property)." The Board found:

> 43. Exceptions require a lesser standard of proof than a variance and the Board finds that the stall width proposed at 9.5 feet x 18 feet is reasonable. That size parking space is consistent or larger than most retail parking throughout New Jersey and in Tenafly

except for those retail places with shopping carts. Applicant's engineer testified that widths of 8.5 - 9 feet are adequate based upon the Urban Land Institute guidance. The Board's engineer felt comfortable that the proposed width was adequate especially with the hairpin striping that is provided which enables vehicles to center within each space appropriately. The increase in stall widths would create a practical difficulty in providing the maximum number of parking spaces and [the] Board finds that it is better to keep the number of parking spaces rather than reduce any since the parking space width is safe and adequate.

44. The Board also finds that an exception for the trash enclosure location is appropriate. The hardship arises because the property has frontage on two streets. In this case, the trash enclosure is sited at the actual rear of the building but is still facing Piermont Road. This location is not only reasonable but preferred in light of the through lot condition and is necessary to maintain adequate on-site circulation. Further the dumpster is enclosed within a masonry enclosure and that is screened from the road with a tree and vegetation. This minimizes any aesthetic impact.

The Board expressed the following overall conclusions:

45. All of the foregoing variances and exceptions do not substantially impair the intent and purpose of the Master Plan or the LDR. None of them, either individually or in the aggregate, cause substantial harm or detriment to the surrounding neighborhood or the public good in general. The requested variances and exceptions are largely related to conditions on the site that being a through lot with two frontages and the building being set back so far from the road. With one exception, the adjoining properties are not residential. The Planning Board finds that the Applicant has

> submitted sufficient and substantial proof for the granting of the site plan, soil moving permit, variances and exceptions set forth above.
>
> 46. This approval is consistent with the purposes of the LDR and Master Plan. This project is substantially in conformity with the Borough's zoning objectives.

Considering its findings and analysis, and subject to certain conditions it imposed, the Board granted preliminary and final site plan approval, a major soil moving permit, and the following variances and exceptions: (a) a variance approving 55 parking spaces; (b) a variance approving 5 front yard parking spaces; (c) a variance approving the two proposed freestanding signs; (d) a variance for building signage of 150 square feet; (e) a variance allowing a building mounted sign height of 4 feet; (f) a variance allowing a building mounted sign letter height of 48 inches; (g) an exception for the location of a dumpster facing the street; and (h) an exception allowing parking spaces 9.5 feet wide. The Board denied variances for a flagpole height of 50 feet and a flag area of 216 square feet.

Among the conditions imposed, the Board directed:

> 1. If in the future the Tenafly Police Department finds traffic and safety problems arising from left-hand turns into the site from northbound County Road then the Applicant shall be required to come back before the Planning Board and either amend its plan or otherwise

seek to resolve such turning movements with the Board's approval.

2. Applicant shall not invite large gatherings for wine tastings however there shall be no prohibition on sampling wine within the store without invitation.

3. Applicant shall not engage in distribution of wine and spirits from the store as same is not permitted in the zone district. This however does not impede or prevent Applicant from making deliveries to customers.

On June 4, 2021, Concerned Citizens filed a complaint in lieu of prerogative writs in the Law Division seeking to declare the Board's approval "void and invalid," or in the alternative, to remand the application to the Board "for a smaller building more compliant with the zoning ordinance." The nineteen-count complaint alleged the Board's approval should be revoked for the following reasons:

- Insufficient proof of c(1) and c(2) variance standards.
- Use of public road for truck deliveries and unloading rendered the application invalid, use of adjacent property not referenced in application, notice deficiencies to adjacent property owners.
- Failure to prohibit left turns into the site from County Road and unclear condition to return to Board to resolve problems.
- Inadequate parking space width.
- Parking in front yard and front-yard setback.
- Violation of side-yard setback requirement.

- Lack of testimony regarding distribution activities despite warehousing and distribution of alcohol not being permitted in the zone.

- Refusal to allow subpoena of relevant data from other Bottle King stores, including delivery schedules, types of trucks used, and sales.

- Inadequate parking for wine tastings and social events.

- Wine tastings not a permitted use and require a use variance.

- The Board's unreasonable and arbitrary acceptance of traffic and planning testimony from the applicant's experts and ignoring the testimony of Concerned Citizen's experts.

- Failure to study traffic impacts on nearby intersections.

- The proposed signage, flagpole, and flag area violated the ordinance.

- The proposed flagpole required a use variance.

- Conflicts of the chairwoman and other Board members and the improper influence of the former mayor on the proceedings.

- Insufficient notice and non-compliance with Department of Community Affairs (DCA) and virtual hearing regulations.

- Other procedural errors.

- Due process violations.

- Cumulative error.

Relying on the extensive record created before the Board, the parties submitted briefs and documents in support of their respective positions. No

witnesses testified and no exhibits were marked at the prerogative writ hearing convened on March 4, 2022. Counsel presented extensive oral arguments. Later that same day, the judge issued an order and accompanying thirty-one-page opinion vacating the approvals granted by the Board, finding the Board's actions by "granting the application of 95 Tenafly, LLC were arbitrary, unreasonable and capricious."

The judge found "at the outset that the Board lacked jurisdiction to hear this application on account of the proposed 50-foot flagpole." The judge concluded that because the variance sought more than a ten percent increase in the maximum permitted flagpole height, a (d)(6) variance was required pursuant to N.J.S.A. 40:55D-70(d)(6). The judge further found the flagpole was a principal use, not an accessory use. The judge noted that section 35-201 of the LDR "defines an accessory use or building as a 'use or structure subordinate to the principal use on the same lot serving a purpose customarily incidental to the principal use of the principal structure.'" The judge then engaged in the following analysis:

> Structure is defined as "a combination of materials forming a construction for occupancy, use or ornamentation whether installed on, above or below the surface of a parcel of land, but not including surface pavement such as sidewalks or driveways, parking areas and similar installations." The court finds the

> flagpole to be a "structure." Applying the logic of Nuckel v. Borough of Little Ferry Planning Board, [208] N.J. 95 (2011), if a use is not subordinate or incidental, it must be a principal use. If it is primary, a use variance is required, and the jurisdiction of the use variance lies with the Zoning Board of Adjustment.

The judge noted that "N.J.S.A. 40:55D-70 reserves the power to grant (d) variances to the Zoning Board." Because the proposed flagpole would not designate the store to be a public building, the judge concluded the flagpole was not subordinate to the principal use of the store, stating "[t]he American flag has nothing to do with the operation of the proposed liquor store." The judge commented that "[t]he outcome might have been different had the applicant withdrawn the application for the flagpole. It did not. The Planning Board cannot deny an application it had no power to grant in the first place."

Regarding the conflict of former Mayor Peter Rustin, who recused himself from participating in the Board's decision, the judge recounted his deposition testimony and noted his predisposition in favor of the application but found he had no pecuniary or personal interest in the proposed liquor store. The judge found "his participation as a member of the public did not rise to the level of a conflict which would void the actions of the Board."

The judge found 95 Tenafly's "public notice was substantially defective because it did not indicate . . . the need to utilize a portion of the public right-

of-way for its loading operation." The judge noted that "[t]o be legally sufficient, the notice must identify the 'property proposed for development,'" and that the board acts "without jurisdiction" if the notice is "legally insufficient." The judge found:

> the Planning Board's approval of 95 Tenafly['s] application was without jurisdiction because 95 Tenafly failed to disclose its proposed development involved use of the public-right-of way as evidenced in the testimony of Mr. Chase, its traffic engineer, on cross[-]examination in which he concedes that delivery trucks will utilize the sidewalk and Piermont Road to access the loading dock.

The judge determined the Board's approval of the application "also fails because the applicant failed to meet the positive and negative criteria" of the MLUL, finding the variances only "serves the applicant's business model." The judge found "the granting of the 'c(1)' variances was arbitrary, unreasonable and improper." She reasoned that "[a] 'c(1)' variance is not available to provide relief from self-created hardship." Based upon the testimony, the judge found "there is no hardship," noting the requested variances "benefit only the owner and the owner's business plan."

As to conducting wine tastings at the liquor store, the judge found this anticipated use of the property "required a use variance which deprived the . . . planning board of jurisdiction."

Regarding the front yard setback requirement, the judge found the Board misinterpreted the ordinance by "consider[ing] the front yard to be the distance between the front yard property line and the setback line." She found the ordinance defines "front yard . . . as the area between the building and any lot line fronting on a street." The judge agreed with Concerned Citizens "that the better alternative here would have been a smaller building and therefore less required parking." She concluded that "the decision of the [B]oard did not meet the criteria for a c(2) variance, i.e. that the applicant's proposal was a better zoning alternative."

The judge further found the Board's interpretation of side yard was arbitrary, unreasonable, and capricious. The judge rejected the Board's conclusion that a canopy extending to the side yard eliminated the required 13-foot minimum side yard, noting the building was to be setback only five feet from the property line. Because the proposed building is not an attached building, which would justify a zero-side yard, the judge found the 13-foot side yard requirement applied.

The judge also found the Board failed to comply with N.J.A.C. 5:39-10.1 governing notice for remote public meetings during the COVID-19 pandemic.

She found notice of the November 18, 2020 meeting[1] was not published in a second newspaper and "the application documents were not available online ten days before the meeting."

The judge noted that although not determinative to her decision, the Board failed to make 95 Tenafly's principal, Kenneth Friedman, available for additional questioning regarding the stipulation pertaining to prohibited warehousing.

The judge did not specifically address the purported failure of the Board to state reasons for rejecting the testimony of Concerned Citizens' traffic engineer or the recusal of Board members other than former mayor Rustin.

Finally, the judge found that considered cumulatively, the Board's errors denied Concerned Citizens' a fair hearing. She entered an order vacating the approvals, waivers, and exceptions granted by the Board. This appeal followed.

On appeal, 95 Tenafly, LLC argues:

> I. THE TRAL COURT'S ENTIRE OPINION IS INFECTED BY ITS FAILURE TO CONFINE ITS CONSIDERATION TO SOLELY DETERMINING WHETHER THE PLANNING BOARD'S ACTIONS WERE SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD, RATHER

[1] At various points, the record indicates the meeting occurred on either November 18 or November 19, 2020. The Board's resolution states the meeting took place on November 18, 2020.

THAN SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE BOARD.

II. THE PLANNING BOARD HAD JURISDICTION TO HEAR THE SUBJECT APPLICATION.

A. The Fact that the Application Included a Flag Pole did not Deprive the Board of Jurisdiction.

B. The "Wine Tastings" Did Not Require a Use Variance, and Did Not Divest the Board of Jurisdiction.

C. Notice was Sufficient.

III. THE BOARD DID NOT MISINTERPRET THE LDR.

IV. THE OBJECTOR GROUP WAS NOT DENIED A FAIR HEARING.

In its cross-appeal, Concerned Citizens argues:

THE TRIAL COURT IMPROPERLY ANALYZED WHETHER THE MAYOR HAD A CONFLICT WHEN IT SHOULD HAVE ADDRESSED WHETHER HIS ACTIONS IMPROPERLY INFLUENCED THE PROCEEDINGS.

A.

"Our standard of review for the grant or denial of a variance is the same as that applied by the Law Division." Advance at Branchburg II, LLC v. Twp. of Branchburg Bd. of Adj., 433 N.J. Super. 247, 252 (App. Div. 2013). "Like

the trial court, our review of a planning board's decision is limited." Bd. of Educ. of Clifton v. Zoning Bd. of Adj. of Clifton, 409 N.J. Super. 389, 434 (App. Div. 2009). "[T]he Board's factual conclusions are entitled to great weight and, like those of an administrative body, ought not be disturbed unless there is insufficient evidence to support them." Pullen v. Twp. of S. Plainfield Plan. Bd., 297 N.J. Super. 1, 7 (App. Div. 1996) (alteration in original) (quoting Rowatti v. Gonchar, 101 N.J. 46, 52 (1985)). "[B]ecause of their familiarity and particular knowledge of the community's characteristics and interests," planning boards "must be allowed wide latitude in the exercise of their delegated discretion." Ibid.; see also Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (quoting Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296 (1965)).

"A board's decision 'is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable.'" Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adj., 152 N.J. 309, 327 (1998) (quoting Sica v. Bd. of Adj. of Wall, 127 N.J. 152, 166-67 (1992)); see also Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 229 (2013) (stating that a board's "factual determinations are presumed to be valid"). "We do not review the wisdom of [a planning board's] decision, rather . . . we merely 'determine whether the board

could reasonably have reached its decision.'" Pullen, 291 N.J. Super. at 6-7 (quoting Davis Enters, v. Karpf, 105 N.J. 476, 485 (1987)).

"Because a board of adjustment's actions are presumed valid, the party 'attacking such action [has] the burden of proving otherwise.'" Cell S. of N.J., Inc. v. Zoning Bd. of Adj. of W. Windsor Twp., 172 N.J. 75, 81 (2002) (alteration in original) (quoting N.Y. SMSA Ltd. P'ship v. Bd. of Adj. of Bernards, 324 N.J. Super 149, 163 (App. Div. 1999)). However, a planning board's conclusions of law are subject to de novo review. Nuckel, 208 N.J. at 102. "Accordingly, we will not disturb a board's decision unless we find a clear abuse of discretion." Cell S. of N.J., 172 N.J. at 82.

B.

N.J.S.A. 40:55D-70(d)(6) provides that a variance may be granted which exceeds the maximum height permitted in the district by 10 feet or 10 percent, for a principal structure. The maximum permitted height for flagpoles was 25 feet. The proposed 50-foot flagpole exceeds that limit by 25 feet or 100 percent.

The judge found that the proposed flagpole is a principal use, not an accessory use, of the property. She therefore concluded that a use variance pursuant to N.J.S.A. 40:55D-70(d)(6), not a bulk variance pursuant to N.J.S.A. 40:55D-70(c), was required. The zoning board of adjustment, not the planning

board, has exclusive jurisdiction over such use variance applications. Najduch v. Twp. of Indep. Plan. Bd., 411 N.J. Super. 268, 276 (App. Div. 2009) (citing N.J.S.A. 40:55D-60). Accordingly, the judge determined that the Planning Board had no authority to grant or deny the flagpole variance. We disagree.

The record does not support the finding that the flagpole is a principal use of the property, rather than an accessory use. Nor does common sense. The proposal involved the construction of a large retail liquor store. The flagpole and oversized flag were designed to call attention to the store. The flagpole was not a principal or primary use of the property. The flagpole was subordinate and incidental to the principal use of the proposed building as a retail liquor store.

A height variance for an accessory structure can be considered by a planning board under N.J.S.A. 40:55D-70(c). N.J.S.A. 40:55D-70(d)(6) only applies to principal structures. Here, the proposed structure was a permitted use that did not constitute a principal structure. The statute, as amended by L. 1991, c. 256, "leaves an area of jurisdiction in the planning board." Cox & Koenig, N.J. Zoning & Land Use Administration, § 29-3.4 (2023).

> [I]f the proposed height variance does not apply to a principal structure, that is, to a building or structure in which is conducted or which constitutes the principal use of the lot on which it is located, then it is not within the sole jurisdiction of the zoning board of adjustment. In other words, the height of an accessory structure will

> be a c variance matter and will thus fall within the ancillary power of the planning board pursuant to N.J.S.A. 40:55D-60 . . . .
>
> [Ibid.]

"The established rules of statutory construction govern the interpretation of a municipal ordinance." Twp of Pennsauken v. Schad, 160 N.J. 156, 170 (1999). An ordinance should not be construed to lead to absurd results. See ibid. Rather, "an ordinance[] must be interpreted sensibly in a manner that avoids reaching absurd results." In re N.J.A.C. 12:17-2.1., 450 N.J. Super. 152, 166-67 (App. Div. 2017). We reject the judge's strained reading of the ordinance that leads to the absurd result that the proposed flagpole would be a principal use of the property, thereby requiring a use variance.

More fundamentally, "[a] use variance, as the term implies, permits a use of land that is otherwise prohibited by the zoning ordinance." Nuckel, 208 N.J. at 101. N.J.S.A. 40:55D-70(d)(1) gives the board of adjustment jurisdiction if the variance seeks "a use or principal structure in a district restricted against such use or principal structure." Here, pursuant to LDR § 35-802.20, flagpoles were permitted in a B-2 business zone (and every other zone) up to a maximum height of 25 feet. The flagpole was not a prohibited use or a principal structure. It is clearly subordinate and incidental to the proposed 16,745 square foot retail

liquor store. Therefore, a d(6) use variance was not required. Rather, a bulk variance was required because the ordinance imposed a 25-foot height maximum for flagpoles. The Board had jurisdiction to decide whether to issue a bulk variance for the flagpole and flag.

In any event, the Board denied variances for the proposed 50-foot-high flagpole and oversized flag. We discern no basis to disturb those decisions.

C.

We reach a similar result with respect to the use of the proposed building to conduct wine tastings. The wine tastings were not separate, special events. The Board imposed a condition that the wine tastings could not be announced or advertised, and the store could not send out invitations. Instead, customers already in the store during regular store hours could participate. Given the limited nature of the proposed wine tastings, a use variance pursuant to N.J.S.A. 40:55D-70(d)(1) was not required. Therefore, the Board was not deprived of jurisdiction.

D.

We next address adequacy of the notice of the hearings provided by 95 Tenafly. The MLUL requires applicants to give notice to the public, N.J.S.A. 40:55D-12(a), and to owners of properties within two-hundred feet of the

property that is the subject of the hearing, N.J.S.A. 40:55D-12(b). Along with identifying "the property proposed for development by street address, if any, or by reference to lot and block numbers," the notice "shall state the date, time and place of the hearing," "and the location and times at which any maps and documents for which approval is sought are available" for review, the notice must state "the nature of the matters to be considered." N.J.S.A. 40:55D-11. Notice of the hearing "shall be given to the owners of all real property as shown on the current tax duplicates, located . . . within 200 feet in all directions of the property which is the subject of such hearing." N.J.S.A. 40:55D-12(b). "Public notice shall be given by publication in the official newspaper of the municipality, if there be one, or in a newspaper of general circulation in the municipality." N.J.S.A. 40:55D-12(a).

Compliance with the MLUL's notice requirements is a jurisdictional prerequiste. Pond Run Watershed Ass'n v. Twp. of Hamilton Zoning Bd. of Adj., 397 N.J. Super. 335, 350 (App. Div. 2008) (citing Perlmart of Lacey, Inc. v. Lacey Twp. Plan. Bd., 295 N.J. Super. 234, 237 (App. Div. 1996)). The notice must "fairly apprise" the public and neighboring property owners of the "nature and character of the proposed development . . . 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, 295 N.J. Super. at 237-38. The notice should be viewed from the perspective "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." Id. at 238 (internal quotations and citations omitted). "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." Ibid.

The notice need not specify each variance or waiver sought by the applicant. See Scerbo v. Bd. of Adj. City of Orange, 121 N.J. Super. 378, 388 (Law Div. 1972) (notice of application to construct a residential treatment center was sufficient without stating that a special exception or variance was sought). Other jurisdictions have adopted a similar approach. See e.g., Chitwood v. Cnty. of Adams, 495 P.2d 562, 564 (Colo. App.1972) (notice of an application for approval of a dog kennel was sufficient even though the precise type of zoning relief (a special exemption) was not identified); Shrobar v. Jensen, 257 A.2d 806, 809 (Conn. 1969) (notice of an application to reconstruct and improve a filling station was adequate); Moore v. Cataldo, 249 N.E.2d 578, 580 (Mass. 1969) (notice of an application for the construction of a nursing home was

sufficient); In re Booz, 533 A.2d 1096, 1098-99 (Pa. Commw. Ct. 1987) (holding notice of application to expand tractor repair business to include sales and leasing of new tractors and trailers adequately informed potential objectors of the general nature of the application despite mischaracterizing the technical zoning term for the relief requested). Our decisions in Perlmart and Pond Run are not contrary.

Indeed, in Perlmart, we endorsed the view that "few laymen" understand "the difference between a variance and a special exception." 295 N.J. Super. at 239 (quoting Booz, 533 A.2d at 1098-99). Thus, we emphasized that

> placing emphasis on the importance of accurately identifying the type of use or activity proposed by the applicant in laymen's terms, rather than the technical zoning term for that use, serves the dual purpose of adequately apprising the public of the general subject of the zoning hearing while at the same time avoiding unnecessary delays which could result from the need to readvertise the hearing in those cases where the applicant mischaracterizes the technical zoning relief which is sought.
>
> [Ibid. (emphasis omitted) (quoting Booz, 533 A.2d at 1098).]

In Perlmart, the developer's notice merely alluded to three commercial lots being created. We concluded that the notice did not reasonably alert neighboring owners and the public that a conditional use shopping center with a K-Mart

department store was proposed for the site. Id. at 241. Similarly, in Pond Run, we held the notice was deficient because it failed to indicate "that the proposed development included plans for a large sit-down restaurant, one that was expected to seek a liquor license to serve alcohol to its patrons. The notice merely refer[red]to 'retail/office' uses." 397 N.J. Super. at 352. We reasoned that this "generic reference would not reasonably put a neighbor, or an interested resident, on notice that a substantial restaurant was contemplated for the site." Id. at 353.

Here, the Board found the notice provided was sufficient. We reach the same conclusion. Here, in contrast to Perlmart and Pond Run, each notice "advise[d] the public that the nature of the proposed use" was a retail liquor store, thereby "inform[ing] the public of the nature of the application in a common sense manner such that the ordinary layperson could intelligently determine whether to object or seek further information." Perlmart, 295 N.J. Super. at 239. With "that basic information," we are confident "the general public understood the nature of the application" being considered. Id. at 239-40; see also Scerbo, 121 N.J. Super. at 388-89 (holding notice that informed the public of an application for "a residential treatment center" satisfied the notice requirements as it "was sufficient to alert the neighboring landowners to the

relief sought," even though it did not advise that such application was for a special exception or variance).

"Neither the MLUL nor Perlmart requires the notice to be exhaustive." Pond Run, 397 N.J. Super. at 355. Here, the notice adequately informed the public and neighboring landowners of the nature of the application by providing "a description of what the property would actually be used for." Ibid. Moreover, each of the subsequent notices specified the variances sought.

We also reject the judge's finding that the "public notice was substantially defective because it did not indicate . . . the need to utilize a portion of the public right-of-way for its loading operation." Although trucks unloading cargo at the liquor store that enter the property from County Road must cross the sidewalk and nose into the right-of-way of Piermont Road before backing into the loading area, the trucks will not "utilize" or obstruct the public right-of-way or sidewalk while unloading. Nor will they enter the travel lanes. Trucks entering the property from Piermont Road can access the loading area without crossing back over the sidewalk. Accordingly, the notice was not defective, much less substantially defective, with respect to unloading operations.

For these reasons, we reject the judge's determination that the Board lacked jurisdiction because the notice provided by 95 Tenafly was deficient.

E.

The judge found the Board failed to follow the LDR by: (1) determining a variance was required for only the five parking spaces between the street line and the minimum required front yard setback (i.e., the building envelope), as opposed to all of the spaces between the actual building and the street line; and (2) reading the LDR to mean the canopy constituted a zero-foot setback in the side yard of the building.

"As in the case of statutes, the purpose of construction of ordinances and municipal by-laws is the discovery and effectuation of the local legislative intent." DePetro v. Twp. of Wayne Plan. Bd., 367 N.J. Super. 161, 174 (App. Div. 2004) (quoting Wright v. Vogt, 7 N.J. 1, 5 (1951)). "[A]lthough we construe the governing ordinance de novo, we recognize the board's knowledge of local circumstances and accord deference to its interpretation." Fallone Props,, LLC v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004); accord DePetro, 367 N.J. Super. at 174.

As to the front yard, LDR § 35-201 defines "building" as "a structure enclosed by exterior walls and roof, built, erected and framed of component structural parts, designed for housing, enclosure and shelter of individuals, animals or property of any kind." That same provision states that "buildings"

and "structures" are "interchangeable except where the context clearly indicates otherwise." LDR § 35-201 defines "front yard" as "the area between the building and any lot line fronting on a street." However, the key to Sketch 13-16 of the LDR states that a front yard is "measured to the required setback line per schedule 'B.'"

The Board's engineer testified the front yard is the area between the building envelope and the property line according to the Board's interpretation of the LDR, so that a variance was required for only five spaces. We grant weight to the Board's longstanding interpretation of the ordinance, which reflects the express language of LDR § 35-201 and is perfectly reasonable. See DePetro, 367 N.J. Super. at 174 ("[W]e give deference to a municipality's informed interpretation of its ordinances."); cf. Last Chance Dev. P'ship v. Kean, 119 N.J. 425, 433 (1990) ("Substantial deference should be attributed to the contemporaneous construction, long usage, and practical interpretation given to [a statute] by . . . the administrative agencies charged with enforcement of the statutory scheme."). We discern no basis to disturb the Board's determination that the area between the building and the lot line fronting the street is the front yard, not the area between the lot line and the setback line.

As to the side yard setback, LDR § 35-801.4 incorporates Schedule B, which states: "No side yard required, but minimum 13 feet if provided." The plan includes a canopy that extends to the boundary of the property. The Board's engineer opined that the canopy was part of the building and there was, therefore, no need for a variance. We concur. The judge improperly engrafted a requirement on LDR § 35-801.4 that the proposed building be an attached building for a zero-foot side yard to be permissible. Schedule B makes clear that no side yard is required under these circumstances.

F.

In its cross-appeal, Concerned Citizens argues the judge improperly analyzed whether the former mayor had a conflict of interest rather than whether his actions improperly influenced the proceedings. We are unpersuaded.

Concerned Citizens' reliance on Szoke v. Zoning Bd. of Adj. of Monmouth Beach, 260 N.J. Super. 341 (App. Div. 1992), is misplaced. In Szoke, we determined that the improper participation of a disqualified board member "amounted to a substantive involvement in the deliberative process" and rendered the decision of the board void. Id. at 342-43, 345. We found the disqualified member interfered with the board's deliberations and engaged in conduct that "was capable of affecting the deliberations." Id. at 345.

Here, Rustin removed himself from the decision-making process. Concerned Citizens did not demonstrate that his comments and questions amounted to substantive involvement that interfered with or affected the Board's deliberations. Accordingly, Concerned Citizens' argument that Rustin's participation improperly influenced the proceedings was properly rejected by the Law Division judge.

G.

95 Tenafly argues the trial court erred in determining Friedman should have been subject to recross on what was meant when it agreed that it would not "engage in the 'distribution' of alcoholic beverages." We concur.

Interested parties have the right to cross-examine witnesses "subject to the discretion of the presiding officer and to reasonable limitations as to time and number of witnesses." N.J.S.A. 40:55D-10(d); accord Shakoor Supermarkets, Inc. v. Old Bridge Twp. Plan. Bd., 420 N.J. Super. 193, 205 (App. Div. 2011). Neither the MLUL nor our rules of evidence expressly recognize a right to recall a witness for recross-examination.

The Board limited Friedman's testimony to direct and cross-examination, without recross, after Friedman and the Board agreed to a condition incorporated into the resolution that "Applicant shall not engage in distribution of wine and

spirits from the store as same is not permitted in the zone district. This however does not impede or prevent Applicant from making deliveries to customers." The Board's decision to preclude recall of Friedman for recross-examination was within the discretion of the Board and reasonable. We discern no abuse of discretion.

H.

We briefly address the alleged deficiency in the notice required by the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21. OPMA imposes notice requirements on public bodies and affords remedies for violation of those notice requirements.

"Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public . . . ." N.J.S.A. 10:4-15(a). Similarly, "[u]nder R[ule] 4:69-6(b), an action in lieu of prerogative writs 'to review . . . a resolution by the governing body . . . approving . . . a recommendation made by the planning board [shall be commenced within] 45 days from the publication of a notice' which states the

effect of the resolution." Dolente v. Borough of Pine Hill, 313 N.J. Super. 410, 417 (App. Div. 1998).

Concerned Citizens filed this action in lieu of prerogative writs on June 4, 2021, exactly 45 days after the Board adopted its resolution. The forty-five-day period did not commence until notice of the adoption of the resolution was published. Davis v. Plan. Bd. of Somers Point, 327 N.J. Super. 535, 539 (App. Div. 2000). Therefore, Concerned Citizens' OPMA claims are not time-barred.

Substantively, we find no merit in Concerned Citizens' challenge to the notice of the November 18, 2020 Board meeting. Concerned Citizens claims that the Board failed to publish notice of the meeting of the meeting in a second newspaper. Notice of the meeting was sent for publication to four newspapers—The Record, The Star-Ledger, The Suburbanite, and The Northern Valley Press—on November 3, 2020. While The Star Ledger may not have published the notice, a public body is only required to provide 48 hours' advance notice to at least two newspapers designated by the Board by mail, telephone, telegram, or hand delivery. N.J.S.A. 10:4-8(d). Actual publication is not required by N.J.S.A. 10:4-8(d). See Worts v. Mayor & Council of Upper Twp., 176 N.J. Super. 78, 81 (Ch. Div. 1980) (stating "actual publication is not required"); Houman v. Mayor and Council of Pompton Lakes. 155 N.J. Super. 129, 167

(Law Div. 1977) (interpreting N.J.S.A. 10:4-8(d) as requiring a public body to post and merely transmit the notice to the appropriate newspapers at least 48 hours prior to the meeting); Dep't of State, Guidelines on the Open Public Meetings Act (advising that OPMA does not require notice to be published). The failure of an appropriate newspaper to actually publish notice does not render the Board's notice deficient. Accordingly, we discern no OPMA notice violation.

I.

The judge also found the Board failed to comply with regulations regarding public notice of remote public meetings during the COVID-19 pandemic emergency. She found the Board failed to publish the notice of the November 18, 2020 meeting in a second newspaper and that the documents were not available online for ten days before the meeting. The record does not support the judge's findings.

Regarding notice via newspaper, N.J.A.C. 5:39-1.2 provided:

> "Adequate notice" shall have the same definition as at N.J.S.A. 10:4- 8; however, for purposes of this subchapter, and to the extent not otherwise set forth at N.J.S.A. 10:4-8, the notice transmitted to at least two newspapers for publication may occur through electronic mail or other electronic means that is accepted or requested by the newspaper.

As to availability on documents online, N.J.A.C. 5:39-1.4(e) provided:

> If a document would be made available to individual members of the public in hard copy while physically attending the meeting, the document shall be made available in advance of the meeting for download through an internet link appearing either on the meeting notice, or near the posting of the meeting notice both on the website and at the building where the meeting would otherwise be held.

In turn, N.J.A.C. 5:39-1.7(b) provided: "The applicant shall submit all exhibits to the land use board secretary no less than two days in advance of the remote public meeting, and the applicant shall be responsible for converting all exhibits into an electronic format accessible to the public."

Notice of the meeting was sent more than two weeks in advance to four newspapers. "Adequate notice" under N.J.A.C. 5:39-1.2 is identical to adequate notice under N.J.S.A. 10:4-8. For the same reasons that the notice satisfied N.J.S.A. 10:4-8, it also satisfied N.J.A.C. 5:39-1.2. The failure of an appropriate newspaper to publish notice does not render the notice deficient under the regulation.

Regarding availability online of the application documents for ten days prior to the November 18, 2020 meeting, the record demonstrates that the original plans and documents were available for inspection at the Board's office from the original filing date in October 2019, long before COVID-19 remote

meeting requirements took effect. Once the application began to proceed on a remote basis, the materials were posted and available online via the "Important Links" section of the Borough's website for more than ten days in advance of the hearings.

As part of the emergency regulations adopted by the DCA, an applicant is required to submit all exhibits to the land use board secretary no less than two days in advance of the remote public meeting. N.J.A.C. 5:39-1.7(b). Here, the documents were delivered and posted online more than two days in advance of the hearing. Notice of the remote hearings, including the zoom links to access the hearings, were posted online "in the Important Links" section of the Borough's website.

In any event, effective September 24, 2021, the Legislature enacted legislation precluding appeals challenging proper notice of remote electronic meetings held during the COVID19 pandemic. The law provides:

> Notwithstanding any provision of law, rule, or regulation to the contrary, a decision of a municipal agency made at, or based, in whole or in part, on a meeting or proceeding held by means of communication or other electronic equipment such that some or all participants are not in the same physical location shall not be appealable on grounds attributable to convening the meeting or proceeding by means of communication or other electronic equipment, including but not limited to, lack of a physical quorum,

> lack of proper notice, conduct of the meeting or proceeding or lack of a reasonable opportunity to be heard or otherwise participate in the meeting or proceeding, provided that notice of the meeting or proceeding, and the conduct of the meeting or proceeding, is consistent with this section, and with guidance documents issued by, or rules or regulation promulgated by, the [DCA] and published on the [DCA's] Internet website on the date such notice was given. All notices required by the [MLUL] shall include directions for remote access by the public if provided to the applicant by the municipal agency. The applicant shall be entitled to rely upon such directions for remote access provided by the municipal agency and the applicant's reliance on such directions shall not invalidate any meeting or proceeding or any decision of a municipal agency made at, or based, in whole or in part, on such meeting or proceeding.
>
> [L. 2021, c. 230, § 1.]

Thus, 95 Tenafly was entitled to rely on the directions for remote access provided by the Board and the alleged lack of notice is not appealable. Ibid.

J.

Concerned Citizen contends the Board ignored the testimony of its experts. The parties presented opposing expert testimony of their traffic engineers and planners. The Board "may choose which witnesses, including expert witnesses, to believe." Bd. of Educ. of Clifton, 409 N.J. Super. at 434. "Although the Board is not bound to accept the testimony of the expert, its determination must be made on a rational and reasonable basis." Reich v.

Borough of Fort Lee Zoning Bd. of Adj., 414 N.J. Super. 483, 504-05 (App. Div. 2010) (citing Ocean Cnty. Cellular Tel. Co. v. Twp. of Lakewood Bd. of Adj., 352 N.J. Super. 514, 537 (App. Div. 2002)).

The Board considered the expert testimony and made detailed findings in its resolution explaining why 95 Tenafly satisfied the positive and negative criteria for variance relief. We discern no abuse of discretion in giving greater weight to the testimony of 95 Tenafly's traffic engineer and planner. We defer to the Board's findings as they are supported by the record and were rational and reasonable.

The judge also found the c(2) variances were not warranted because they "benefit only the owner and the owner's business plan" and that the applicant "advanced no argument other than business preference for the c variances." We disagree. As reflected by the detailed findings in the resolution, the Board carefully reviewed the evidence in deciding whether 95 Tenafly satisfied the requirements for the c(2) variances. As part of its c(2) analysis, the Board found the application "represents a significant improvement in zoning and upgrade in aesthetics from the current development on the property which results in a benefit to the community." The improvements were described in the resolution.

A proposed "variance cannot be considered in isolation," but rather "in context of its effect on the development proposal, the neighborhood, and the zoning plan." Pullen, 291 N.J. Super. at 9. The Board did just that as shown by its comprehensive resolution, which "contains sufficient findings to support its determination." Id. at 8. Notably, no property owners within 200 feet of the property objected to the application. Appropriate deference was not afforded to the Board's findings.

K.

Lastly, the judge also found the Board's cumulative errors denied Concerned Citizens a fair hearing. For the reasons we have stated, we disagree and find no such cumulative error. The record demonstrates that Concerned Citizens was not denied a fair hearing.

L.

We have considered the remaining arguments raised by the parties, and conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In summary, the Board's findings were supported by substantial evidence in the record. Giving appropriate deference to those findings, we conclude the Board's determinations were consonant with applicable legal principles and

were not arbitrary, capricious, or unreasonable. Accordingly, we discern no basis to disturb the Board's decision. We reverse the Law Division's order vacating the Board's actions in granting the preliminary and final site plan approval, variances, waivers, and exceptions. We affirm the Board's denial of the variances related to the flagpole and oversized flag. We also affirm the Law Division's rejection of Concerned Citizens' claim regarding the former mayor's alleged improper influence on the proceedings.

Affirmed in part and reversed in part.