JUSTIN D. SANTAGATA, ESQ. (NJ ID 000822009)
COOPER LEVENSON
1125 Atlantic Avenue
Atlantic City, NJ 08401
P: 609-247-3121
E: jsantagata@cooperlevenson.com

GARDEN STATE OUTDOOR LLC, Plaintiff- Appellant, v. CITY OF SOMERS POINT AND CITY OF SOMERS POINT ZONING BOARD, Defendant - Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-0346-24T2 ON APPEAL FROM: NEW JERSEY SUPERIOR COURT LAW DIVISION ATLANTIC VICINAGE DOCKET NO.: ATL-L-143-23 SAT BELOW: Hon. Dean R. Marcolongo, J.S.C.

APPELLANT GARDEN STATE OUTDOOR LLC'S MERITS BRIEF

Dated: June 16, 2025; revised June 18, 2025

On the brief: Justin D. Santagata, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Authority

Other Authority

INTRODUCTION

This is Plaintiff Garden State Outdoor LLC's ("**Garden State**") merits brief challenging Defendant Somers Point's absolute ban on off-premises speech ("**Ban**") and Defendant Somers Point Zoning Board's ("**Board**") denial of related variance relief. The Ban pre-dates the New Jersey Supreme Court's decision in E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 584–585 (2016), which held that a "safety" interest could not support a similar ban without competent modern evidence and that general invocations of "aesthetics" would not suffice. The problem with the Ban, as suggested recently in Garden State Outdoor, LLC v. Egg Harbor Twp., 2025 N.J.Super.Unpub. LEXIS 982 at *16 (App. Div. June 10, 2025), is that Somers Point permits on-premises speech that invades the same supposed substantial interests as off-premises speech and the Ban does not distinguish between types of off-premises speech, such as a billboard versus a freestanding sign versus a wall sign. As such, there is no reasonably equivalent alternative means of communication.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Garden State has a lease to erect a digital billboard at 8 Macarthur Boulevard in Somers Point, New Jersey, site of the "Somers Point Diner" ("**Property**"). (Pa117.) The Property is in the "HC-2 Zone," which permits all uses in the "HC-1

[1] Combined for brevity.

Zone," along with motels and methadone clinics. The "HC-1 Zone" in turn permits "retail stores," "general businesses," and similar operations. (Pa93.)

Somers Point bans "billboards," which is broadly defined to mean any sign that directs the reader to off-premises activity, including "non-commercial activity," such as "charity." (Pa50, 85.) The Ban is described as "content neutral[]." (Pa59.) The Ban thus prohibits any off-premises speech unconnected to the use on a property.

The "HC-2 Zone" permits certain on-premises signs associated with use on a property, such as "one free standing sign." (Pa91.) The "HC-2 Zone" is heavily commercial and contains many large signs, such as for the "Somers Point Diner," "Circle Liquor," and "Diorio's Circle Café"; several of these on-premises signs have electronic and changing displays. (Pa110.) The permitted size of on-premises signs is generally 25-feet in height. (Pa91.)

Somers Point Code § 114-4.8 (Pa58, 84) permits a "noncommercial message" on a "sign that is not a prohibited sign" under "this article," but a "billboard" is a prohibited sign. It is not entirely clear what this provision means or how it is supposed to work, but in the most Somers Point-friendly interpretation it allows an owner/user of a property to display an extremely small non-commercial message.

See Pa58-59.[2] But this interpretation conflicts with the Ban's express language that it is "content neutral" and should be construed as such, which it could not be under the preceding interpretation. (Pa59.)

I. Garden State's application

On October 25, 2022, Garden State applied to the Board for a use variance, a height variance, and a setback variance to construct a billboard on the Property to display commercial and non-commercial speech ("**Application**"). (Pa112-117.) The billboard would change signage approximately every eight seconds. (1T:6.)[3] The billboard would be 45 feet high, with a sign surface of 36 feet by 10.5 feet and an area of 378 square feet. (Pa112-117.) A use variance was required because of the Ban. A "D-6 height variance" was required because principal structures in the "HC-2 Zone" are limited to 35 feet in height. And a bulk variance was required for principal front setback, where 50 feet is required and the Application proposed "4 feet to the sign itself" and "37 feet to the column" (holding the sign). (1T:16; Pa88.)

The Board heard the Application on December 12, 2022. (1T:1.)

Garden State's planner testified that the billboard was suitable for the Property and "this location was chosen because of the [m]arket really demanding it on Route

[2] This provision potentially differentiates this appeal from Garden State Outdoor LLC v. Middle Township, et. al., A-3622-23 [pending], where the municipality clearly prohibits all commercial/non-commercial speech off-premises.

[3] 1T = transcript dated December 12, 2022; 2T = transcript dated March 15, 2024.

52." (1T:21.) He explained that the surrounding commercial development protected views for residential areas and nearby zones from being impacted by the billboard: "you can't see this board from any residential." (Id.)

Garden State's planner explained that the nearby historic "Somers Point Mansion," which is in a different zone, would not be impacted by the billboard because the billboard has auto-dimming and technology where it is not viewable after a certain angle from the sides: "from the Mansion can't see the board." (Id. at 22.) The billboard has no more effect on the "Somers Point Mansion" than existing on-premises signage. (Id.)

The size of the billboard is just large enough to work as a billboard, but not more so. (Id. at 11.) A rendering of the billboard shows it is consistent with the "HC-2 Zone" and surrounding area. (Pa112-117.) Garden State's planner further explained the same: most businesses signs are larger than permitted because the Board has in the past granted a lot of variances for on-premises signage, most businesses signs are "not much smaller" than the billboard, and "this is the smallest commercially available board." (1T:20.)

Garden State's planner testified that numerous and recent federal studies established that billboards were not a safety risk to drivers and that the New Jersey Department of Transportation had approved this billboard. (Id. at 20.)

Garden State's planner testified that the billboard would provide a unique source of advertising for local businesses, would provide for dynamic emergency response signage, and that this particular Property allowed the billboard to reduce any visual impact when compared with other potential sites. (Id. at 25-26, 38.)

The Board voted seven to zero to deny the Application, focusing on impact on the "Somers Point Mansion," which is in a different zone and separated by a major thoroughfare, and the Ban overall. One board member specifically said the billboard did not "contribute to our historic district" (Id. at 50-52), but it is not in a "historic district." Another Board member echoed the same point. (Id.)

On January 9, 2023, the Board adopted a resolution memorializing the denial. (Pa97.) Other than reciting testimony, without analysis, the resolution does not provide any explanation for the denial and is couched in conclusory language. (Id.)

Based on Garden State's extensive experience with billboards, Somers Point does not permit any reasonably equivalent alternative to a billboard for off-premises speech. (Pa42.)

II. The litigation and the trial court's order/opinion

On January 25, 2023, Garden State sued Somers Point and the Board in a complaint in lieu of prerogative writs and a related First Amendment claim. (Pa25.) The trial court subsequently set a briefing schedule. (Pa411.)

In defense of the Ban, Somers Point submitted the record of creation of the Ban from 2011. (Pa218-322.) This record was substantially based on "safety." (Pa220, 226, 244, 320.) Of the 23 documents cited by Somers Point in 2011 as the record of the Ban, two-thirds cite to "safety." (Pa220.) The "aesthetic" citations are mostly generic and can be summed up as the difference between "small town charm by the bay" and "the city with big signs by the bay" (Pa226.) But the record before the Board and the trial court, set forth above, showed comparable on-premises signage, none of which could be described as turning Somers Point into the "city with big signs by the bay." Somers Point did not submit any evidence whatsoever of reasonable alternative means of communication. Garden State submitted evidence to the contrary. (Pa42.)

On September 30, 2024, the trial court upheld the ban and the Board's denial and dismissed the litigation. (Pa15.) The trial court held that the Ban was the only means of accomplishing Somers Point's objectives and that there were reasonable alternative means of communication. (Id.) Among the trial court's list of "alternatives" was "non-billboard on-site signage." (Id.) It is not clear what this means, but there is no permitted off-premises signage whatsoever and literal on-premises signage would mean requiring an advertiser to buy a property to be able to advertise *only for that property*. As to the Board's denial, the trial court relied upon Board member statements about "safety" and the "Somers Point Mansion"; the trial

court did not even cite the resolution in the analysis itself, only in passing reference to what was reviewed. (Pa17-19.)

Garden State timely appealed. (Pa414.)

STANDARD OF REVIEW

The trial court's holding on the constitutionality of the Ban is subject to a de novo review. E&J Equities, 226 N.J. at 565. The trial court's affirmation of the Board's denial is reviewed by the same standard applied by the trial court: whether the Board's denial is based in substantial evidence and is not arbitrary, capricious, and unreasonable. Effectively, this Court reviews the denial anew as if it were the trial court. Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 89 (2002).

LEGAL ARGUMENT

The trial court's order upholding the Ban is plainly in conflict with Bell v. Stafford, 110 N.J. 384, 395-96 (1988) and E&J Equities and fails the test set forth in the latter. Neither this Court nor the New Jersey Supreme Court has ever upheld a ban of this nature or anything similar. Recently, in Egg Harbor Township, this Court suggested that, at a minimum, a conflict between permitted on-premises signage and prohibited off-premises speech creates a dispute of fact for trial. This harkens to the multiple precedents of the New Jersey Supreme Court that a "billboard ban" is not analyzed in a vacuum, but against what is *permitted*.

I. The Ban is unconstitutional on its face and was clearly struck down in Bell and the trial court erred in upholding it (Pa15)

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

While municipal ordinances generally enjoy a presumption of validity, that presumption disappears when "an enactment directly impinges on a constitutionally protected right." Bell, 110 N.J. at 384. "Courts are far more demanding of clarity, specificity and restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights." Id. "Because the exercise of first amendment rights and freedom of speech are at stake, the municipality cannot seek refuge in a presumption of validity. It clearly ha[s] the burden to present and confirm those compelling legitimate governmental interests and a reasonable factual basis for its regulatory scheme in order to validate its legislative action. Its failure to do so is fatal." Id. at 396.

Free speech litigation over billboards has a long history, but there is a clear, guiding principle in New Jersey. A municipality may not simply ban all off-premises

speech or all billboards in the absence of a precise, specific, and current factual record— a record that this Court and the New Jersey Supreme Court *has never seen*. Both the United States and New Jersey Supreme Court have confirmed this clear, guiding principle. Bell, 110 N.J. at 397; E&J Equities, 226 N.J. at 584-85; see also Metromedia, Inc., 453 U.S. at 513 ("[t]he city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages").

The Ban violates this clear, guiding principle. By banning all messaging of any kind that is unconnected with the property on which a sign is located, Somers Point has concluded "that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages," in direct contradiction of Metromedia. And Somers Point's ban leaves open no "reasonably equivalent forms of communication available"; it bans an entire form of media in violation of Bell and its progeny.

Bell struck down this *exact* Ban. This appeal already happened. The municipality lost at the New Jersey Supreme Court: "The controversy arose from the Township of Stafford's enactment and enforcement of an ordinance declaring that [b]illboards, signboards, and off-premises advertising signs and devices are

prohibited within any zoning district of the Township." Bell, 110 N.J. at 387. "Township of Stafford has not presented adequate evidence that demonstrates its ordinance furthers a particular, substantial government interest, and that its ordinance is sufficiently narrow to further only that interest without unnecessarily restricting freedom of expression. Consequently, it has failed to demonstrate a basis for upholding the constitutionality of the ordinance." Id. at 397-398.

Bell is binding here and the Court need go no further than that.

II. The Ban is not a not valid time/place/manner regulation and the trial court erred in upholding it (Pa15)

If Somers Point overcomes facial unconstitutionality, against all precedent to the contrary, the Ban is still unconstitutional time, place, and manner regulation. In determining the constitutionality of an ordinance regulating speech, courts afford different types of speech different levels of protection. E & J Equities, 226 N.J. at 568. The Ban is content neutral,[4] so it is reviewed under the time, place, and manner test. Id.; see City of Austin v. Reagan Nat'l Adver. of Austin, LLC, 142 S.Ct. 1464, 1475 (2022).

The time, place, and manner test is known as the "Clark/Ward test," named after Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289 (1984), and Ward

[4] As set forth in footnote 2 above, if certain very small non-commercial speech is permitted, then the Ban is not content neutral, but the Ban itself proclaims that it is content neutral, so Garden State interprets it accordingly.

v. Rock Against Racism, 491 U.S. 781, 784 (1989). E & J Equities, 226 N.J. at 580-81. The test applies to content-neutral regulations of signs of any form, including billboards, affecting commercial and noncommercial speech equally. E&J Equities, 226 N.J. at 580; see also City of Austin, 142 S.Ct. at 1476.

Under the Clark/Ward test, Somers Point "must demonstrate that the prohibition...is content neutral, that it is narrowly tailored to serve a recognized and identified government interest, and that reasonable alternative channels of communication exist to disseminate the information sought to be distributed. In assessing whether an ordinance is narrowly tailored, the inquiry is whether it promotes a substantial government interest that would be achieved less effectively absent the regulation."[5] E&J Equities, LLC, 226 N.J. at 582 [cites omitted]; see also State v. DeAngelo, 197 N.J. 478, 486 (2009). As Bell put it: the enactment must be "sufficiently narrow to further only that interest without unnecessarily restricting freedom of expression." Bell, supra at 397-398.

Somers Point fails the Clark/Ward test because (1) the Ban is not narrowly tailored; and (2) Somers Point simply does not permit any reasonably equivalent

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

alternative means of communication[6] for permanent off-premises speech, let alone a reasonable equivalent to a billboard.

A. "Safety" cannot justify the Ban and warrants reversal by itself

It is clear that "supposition" on "safety" has been rejected by the New Jersey Supreme Court as justification for a billboard ban. E&J Equities, 226 N.J. at 557. Such "safety" concerns are outdated after E&J Equities, in the absence of concrete evidence. Id. Nothing in Somers Point's 2011 record for the Ban overcomes the more recent and competent evidence presented by Garden State on the "safety" of billboards. There was no evidence or testimony to the contrary before the Board. In E&J Equities the New Jersey Supreme Court instructed municipalities to actually consider the safety studies on billboards because there was no competent evidence they were unsafe:

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

E&J Equities, supra at 584.

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[6] In this brief, "reasonably equivalent alternative" is synonymous with "ample alternative channels."

On this record, the Court cannot possibly unpack potentially valid substantial interests, such as aesthetics, with an invalid one— "safety." While "safety" can be a substantial interest, the New Jersey Supreme Court has already held competent evidence is required and that saying "safety" is not enough. This is why a plenary hearing was necessary below: there were conflicting and potentially invalid substantial interests perhaps intertwined with valid ones and the trial court should have separated them and then analyzed narrow-tailoring. See e.g. Exxon Co., U.S.A. v. Livingston, 199 N.J.Super. 470, 478 (App. Div. 1985) (remanding for review absent improper considerations); Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J.Super. 515, 537 (Law Div. 2006) (same); Twp. of Cinnaminson v. Bertino, 405 N.J.Super. 521, 536 (App. Div. 2009) (remanding for consideration of "interplay of restrictions" as they relate to narrow tailoring and reasonably equivalent alternatives).

C. While aesthetics are a substantial interest, the Ban fails narrow tailoring and, at a minimum, the trial court should have held a plenary hearing on the issue

For a municipality to constitutionally rely upon a purported government interest to restrict speech, it must do more than invoke an allegedly substantial interest. See E&J Equities, 226 N.J. at 557 ("[s]imply invoking aesthetics and public safety to ban a type of sign, without more, does not carry the day"). The substantial interest must be established with competent evidence. Id. There are various methods

of proving this, such as "reference to studies pertaining to other jurisdictions, legislative history, consensus, and even common sense," Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 271 (1998), but none avoided a dispute of fact here.[7] As this Court recently said in Egg Harbor Township, supra, the preamble to an ordinance or generic invocations are insufficient.

Bell is again informative. There, the municipality enacted a municipal-wide ban on permanent off-premises speech. Id. at 387. Like the billboard here, the plaintiff had "occasionally used his billboards for noncommercial purposes" and asserted the billboards were "a means of reaching the public for groups who could not afford other methods of getting their message across." Id. at 397. In striking the ban down as unconstitutional, the New Jersey Supreme Court held:

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

Id. at 396.

[7] Twp. of Cinnaminson, 405 N.J.Super. at 536, rejects "common sense" or hypothesis as a replacement for competent evidence.

Here, the trial court's overarching error on aesthetics was construing the phrase "achieved less effectively" in time/place/manner precedent (Pa13) to mean there was no limitation to what a municipality could do if that phrase were satisfied, but that is clearly wrong. Under the trial court's use of that well-trod phrase in time/place/manner precedent, "aesthetics" justify *any billboard ordinance*. But Somers Point has the burden of establishing substantial interest with evidence *and narrow tailoring* and reasonably equivalent alternatives. See e.g. Twp. of Cinnaminson, 405 N.J.Super. at 537 ("township shall bear the burden") [cites omitted]. For example, in State v. Miller, 83 N.J. 402, 409-410 (1980), the substantial interest of aesthetics was upheld, but Miller struck down a "town-wide ban" because it was not narrowly-tailored. Id. at 411.

Yes, Miller upheld the *substantial interest*, but not the *narrow tailoring*. This is a crucial constitutional point. Somers Point's 2011 record on the Ban is not any different than in Bell, Miller, or E&J Equities. E&J Equities is highly similar:

> To be sure, the record demonstrates that the Township has labored to preserve the bucolic character of sections of the municipality and to minimize the impact on a residential neighborhood across the highway. The Township Council also cited safety concerns. The Township, **however, permits industrial and corporate development and has directed that static billboards may be erected in the M-2 zone**. In fact, three static billboards can be erected along I-287 in the M-2 zone. **The record provides no basis to discern how three static billboards are more aesthetically palatable than a single digital billboard**.

E&J Equities, supra at 643 [emphasis added]. Note the comparison to existing signage and zoning. The trial court ignored this key part of E&J Equities.

As exemplified *factually* in E&J Equities, narrow tailoring is not "rational basis" and it is not the higher standard of "least restrictive alternative" (which is applied to content-specific speech regulation). See Johnson v. City & Cnty. of Phila., 665 F.3d 486, 492 (3d Cir. 2011). "While the requirement of narrow tailoring does not mean that the ordinance must be the least restrictive means of serving the Borough's substantial interests, **government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals**. Accordingly, the issue of narrow tailoring cannot be determined without **knowing the undesirable secondary effects**." Phillips v. Borough of Keyport, 107 F.3d 164, 174 (3d Cir. 1997) [emphasis added].

"The validity of the [speech] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." Ward, 491 U.S. at 801. The Court in Bell explained:

> It is not the scope of a ban, or even the fact that it may be municipal-wide, that is determinative of its validity, but rather the existence of a demonstrable legitimate governmental objective genuinely served by such a ban. Thus, even if we were to assume that a legitimate interest justified some regulation of signs and billboards within Stafford, there has been no demonstration of the factual basis for this particular regulatory scheme, namely, a total municipal-wide ban. This clearly implicates an important prong in the test of constitutional validity: that

> this ordinance constituted the least restrictive means possible by which to serve such an interest.

110 N.J. at 396-397. A complete ban on speech can be narrowly tailored *only* "if each activity within the proscription's scope is an appropriately targeted evil." Frisby v. Schultz, 487 U.S. 481, 485 (1983).

At a minimum, Garden State created a dispute of fact on narrow tailoring by explaining all the types of on-premises signage that was permitted in Somers Point and how it was not appreciably different than *some form of off-premises signage*. For example, the corridor where the Property is located, and nearby areas, already contain similar signage for "Surfside Casual," "Wawa," "Advanced Auto Parts," and "Circle Liquor," to name just a few, many of which have some form of electronic and changing signage. (1T:20-22.) There is no doubt that the billboard is larger than most on-premises signage, but that is not a distinction on *use*, i.e. on-premises versus off-premises signage.

At the same time, a "substantial portion" of the Ban has nothing to do with the type of commercial speech targeted by Somers Point in the 2011 record on the Ban. In the worst interpretation of the Ban,[8] a business cannot make a political statement in its on-premises signage, such as "Make America Great Again" or "Pray for Ukraine." Businesses cannot cross-promote other businesses. Businesses cannot

[8] Again, see supra at p.2-3 for the differing interpretations.

support national or local sports team, such as "Go Eagles." If a "Planned Parenthood" opens in Somers Point, a nearby business could not display a contrary message.[9] The examples could go on and on. In the best interpretation, some of these non-commercial messages are permitted if very small and controlled by the owner/occupant of the property. Of course, the size permitted by Somers Point (in the best interpretation) is so tiny as to essentially be prohibited. (Pa58-59.)[10] See e.g. Intl. Outdoor, Inc. v City of Troy, 974 F3d 690, 707 (6th Cir 2020) (construing exemptions for non-commercial messages to be content-based and subject to strict scrutiny).

As E&J Equities admonished, ordinances that "restrict too little speech because its exemptions discriminate on the basis of the signs message" and ordinances that "prohibit too much protected speech" are both unconstitutional. 226

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[9] The irony of what Somers Point has done here by banning all off-premises speech is that a ban on purely commercial speech is actually subject to a slightly more flexible test (if non-commercial speech is meaningfully permitted, which it is not here). While it may seem counterintuitive that the content-neutral test, "Clark/Ward," is more rigorous than the content-based test, "Central Hudson," this is because "Central Hudson" addresses *commercial speech*, which is given less protection under the First Amendment. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553 (2001). Unlike "Central Hudson," "Clark/Ward" requires narrow tailoring, not merely "reasonable fit," and it requires a showing of "reasonable alternative channels of communication…" DeAngelo, supra; E&J Equities, supra.

[10] In briefing below, Somers Point took the position the Ban is content neutral, which it could not be if non-commercial messages were treated differently. See supra at p.2-3; Intl. Outdoor, Inc., supra. In State v. Miller, this Court was presented with a similar ambiguity in a sign ordinance and held the ambiguity against the municipality. 16 N.J.Super. 337, 392 (App. Div. 1978).

N.J. 549, 573. That is true here. Yes, of course, the Ban—a total ban on all off-premises speech— accomplishes Somers Point's goals, but so does banning speaking entirely. See Bd. of Airport comm'rs v. Jews for Jesus, 482 U.S. 569, 570 (1987) ("The issue presented in this case is whether a resolution banning all First Amendment activities at Los Angeles International Airport (LAX) violates the First Amendment").

The Ban goes too far and the trial court avoided this constitutional problem by misconstruing time/place/manner precedent to require only a showing that the objective would be "achieved less effectively,"[11] a showing that is far less than what is actually required and avoids analysis of "secondary effects" and the kinds of non-commercial speech swept up in the Ban. A conditional use ordinance accomplishes the same goals without overburdening all the speech here. See e.g. Elray Outdoor Corp. v. Bd. of Adjustment of Englewood, 2009 N.J.Super.Unpub.LEXIS 2378 at *22 (App. Div. Sep. 8, 2009). Distance and height regulations naturally limit "sign proliferation." See Hucul Adver., Ltd. Liab. Co. v. Charter Twp. of Gaines, 748 F.3d 273, 278 (6th Cir. 2014) (upholding spacing requirements as narrowly tailored). Distinctions between kinds and dimensions of off-premises signage (not necessarily billboards) in particular zones would pass constitutional muster. Or, as suggested in

[11] Literally anything would be "achieved less effectively" if more limited, which is why that is not the complete standard.

Bell, an ordinance prohibiting signs that "obstruct driving vision, traffic…" Bell, supra n.7. Or, specific to Somers Point, prohibiting signs that impede the view of the "Somers Point Mansion." The possibilities are nearly innumerable as to how to accomplish Somers Point's goals in a constitutional manner while limiting billboards (or some other form of off-premises signage) to very few in number.

D. The Ban leaves no reasonably equivalent alternative means of communication and the trial court erred in holding otherwise (Pa15)

Based on the above, it is almost self-evident that the Ban leaves no reasonably equivalent alternative means of communication to a billboard. In Linmark Associates, Inc. v. Willingboro, the United States Supreme Court explained:

> Although in theory sellers remain free to employ a number of different alternatives, in practice [certain products are] not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated...involve more cost and less autonomy then...signs[,]...are less likely to reach persons not deliberately seeking sales information[,]...and may be less effective media for communicating the message that is conveyed by a...sign....The alternatives, then, are far from satisfactory.

431 U.S. 85, 93 (1977).

Following Linmark, the New Jersey Supreme Court invalidated an ordinance in DeAngelo that prohibited all but a few exempted signs, and expressly prohibited "portable signs[,] balloon signs or other inflated signs (excepting grand opening signs)." 197 N.J. at 481. Because the ordinance "almost completely foreclosed a venerable means of communication that is both unique and important," it was

unconstitutional. Id. at 490. DeAngelo relied upon City of Ladue v. Gilleo, where the Supreme Court declared overbroad an ordinance essentially banning residential signs with limited exceptions, while permitting commercial, religious, and non-profit establishments to erect signs not allowed at residences. 512 U.S. 43, 45 (1994). There, the Supreme Court held:

> [a]lthough prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent--by eliminating a common means of speaking, such measures can suppress too much speech.

Id. at 54-55, 58-59.

In sum: "[t]here is a special solicitude for forms of expression that are much less expensive than feasible alternatives, and so an alternative must be more than merely theoretically available…[] an adequate alternative cannot totally foreclose a speaker's ability to reach one audience even if it allows the speaker to reach other groups." Gresham v. Peterson, 225 F.3d 899, 906–907 (7th Cir. 2000) [cites/quotes omitted]. Somers Point has the burden of establishing a reasonably equivalent alternative to a billboard, Bell, supra at 397-398, which is impossible here *because no sign can have permanent off-premises speech.*

Metromedia and Bell are dispositive here on the question of reasonably equivalent alternatives to a billboard. In both, the "alternatives" were "insufficient, inappropriate and prohibitively expensive." Metromedia, supra at 525; Bell, supra at 397.

Here, Somers Point did not proffer any competent evidence of reasonably equivalent alternatives. Garden State proffered competent evidence there were none. Perhaps there is a reasonable dispute of fact on that issue, but it could not be resolved by the trial court's hypotheticals. The problem with this part of the trial court's analysis is that it assumes, wrongly, that the "intended audience" is just anyone who can receive advertising or has eyes. That is wrong. Billboards are proximal and temporal: they advertise usually nearby and oftentimes they advertise events that are happening in the near future. "Go here on Wednesday." "This is around the corner."

Reasonably equivalent alternatives, or "ample alternative channels," has a legal meaning and it is not hypotheticals, lacking any *evidence*, and having no relation to the means of communication and intended audience. See e.g. 2T:10-11 (oral argument discussion of why Somers Point failed to create any issue of fact on reasonably equivalent alternatives). If the intended audience is a certain subset of recipients, such as attendees at a hockey game, then barring communication within 1,000 feet of a game does not leave open reasonably equivalent alternatives just because, hypothetically, the sender could, through "tremendous effort," maybe reach some of them some other way. Harrington v. City of Brentwood, 726 F.3d 861, 865-866 (6th Cir. 2013). Cost does matter. Id. Cost is an *issue of fact*.

Time/place/manner review is "meaningfully different" than rational basis scrutiny. The former does not permit "rational speculation"; it requires *evidence*.

Silvester v. Becerra, 583 U.S. 1139, 1146 (2018). There is no evidence *at all*, even attempted, that the trial court's "list" of "alternatives" satisfies time/place/manner review. See Elray, supra (requiring evidence on reasonably equivalent alternatives).

III. Because the Ban is unconstitutional, the Application should be reviewed as a permitted "sign" (Pa15)

Because the Ban is invalid, the Application is subject only to the remaining, valid portions of Somers Point's regulation of signs. Intervine Outdoor Advert. v. City of Gloucester City Zoning Bd. of Adjustment, 290 N.J. Super. 78, 87 (App. Div. 1996).[12]

IV. The Application was wrongly denied (Pa17)

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

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[12] Garden State acknowledges that some precedent permits the municipality to re-write the invalidated ordinance. See S. Burlington County NAACP v Mount Laurel, 67 NJ 151, 192 (1975). But that precedent is inapposite here. The Application is pending under the "time of application rule," N.J.S.A. 40:55D-10.5. If the Ban is removed from the Application equation, existing signage regulation *still applies*, but *not the distinction between on-premises and off-premises speech*.

A. Garden State was entitled to a use variance

If the Board's conclusory resolution is ignored, Garden State is still entitled to a use variance (and other relief variance relief).

An applicant for a variance must establish the so-called "positive" and "negative criteria" under N.J.S.A. 40:55D-70. Price v. Himeji, LLC, 214 N.J. 263, 285 (2013). The positive criteria is the specific standard for the particular variance sought— here use, height, bulk— and the negative criteria addresses the impact on the zoning and surrounding area. Id.

The positive criteria for a use variance under N.J.S.A. 40:55D-70(d)(1) requires an applicant to establish that the application advances the purposes of the New Jersey Municipal Land Use Law, known as "special reasons." Price, supra at 287. There are three types of special reasons, but only one is implicated here: the use promotes the general welfare because the proposed site is particularly suitable for the proposed use." Id.

Particular suitability is a "site-specific analysis." Id. "A [d]etailed factual [record] that distinguish[s] the property from surrounding sites and demonstrate a need for the proposed use may help to establish that the property is particularly suitable…" Id. However, an applicant need not establish a property as the *only possible* property for the use. Price, supra at 293. "It is long settled law in this state that" the "special reasons" does "not require that the particular premises cannot

feasibly be used for a permitted use or that other hardship exists. Special reasons is a flexible concept; broadly speaking, it may be defined by the purposes of zoning set forth in *N.J.S.A.* 40:55-32." De Simone v. Greater Englewood Hous. Corp., 56 N.J. 428, 440 (1970).

The negative criteria for a use variance requires the applicant to establish, with an "enhanced quality of proof," that the use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance." Medici v. BPR Co., 107 N.J. 1, 4 (1987). The New Jersey Supreme Court has explained the myriad ways to establish this "enhanced quality of proof":

> It may be that the proposed use was one, like a health club, that was uncommon when the ordinance was last revised, but has since gained currency. Competent proofs to this effect could dispel the concern that exclusion of the use was deliberate rather than inadvertent. Likewise, a variance application to permit a commercial use to be established on residentially-zoned property might also be supported by proofs demonstrating substantial changes in the character of the neighborhood surrounding the subject property since the adoption of the ordinance, in order to reconcile the apparent conflict between the ordinance and the proposed variance. Similarly, the needs and character of an entire community may be altered by extrinsic factors, such as the proximity of major highway construction or commercial development in adjoining municipalities. Such circumstances may create a demand for uses, such as hotels, that were not anticipated when the ordinance was last revised. These examples are offered merely to illustrate, and not to exhaust, the nature of the proofs that could be offered to reconcile a proposed use variance with the provisions of the zoning ordinance.

Id. at 22 n.11.

Here, Garden State established that the Property is best suited for the billboard and that its location will mitigate the purported negative effects normally associated with a billboard. This is especially true as to the "Somers Point Mansion," which was the sole cited reason for denial of the Application. Garden State's unrebutted testimony is that the billboard on this Property would be at the most advantageous angle to ameliorate any supposed effect on the "Somers Point Mansion." The Board's resolution, however, does not even attempt to explain what that effect supposedly is. Nor does the Board's resolution (or its members comments at the hearing) explain how *all the other signs in the "HC-2 Zone" do not have the same purported effect on the "Somers Point Mansion,"* some of which are closer than the billboard.

The Board's reliance on the "Somers Point Mansion" highlights a fatal deficiency in the Board's denial of the use variance: it relied on historic preservation *in another zone*. The "Somers Point Mansion" is in a separate zone to protect historic propert(ies). There is nothing "historic," however, about the "HC-2 Zone," which is separated from the "Somers Point Mansion" by a four-lane thoroughfare. It is well-settled that a local land use board may not apply neighboring zoning purposes to the zone for which a use variance is sought. Funeral Home Mgmt., Inc. v. Basralian, 319 N.J.Super. 200, 213 (App. Div. 1999).

Garden State satisfied the negative criteria by "enhanced quality of proof" because the surrounding uses and signs establish reconciliation with the zoning. See Price, 214 N.J. at 275, 293 (affirming use variance for same reasons). As testified to by Garden State's planner, digital billboards were not in use when the Ban was enacted. Digital billboards now allow dimming and other technological features to address the purported "problems" of static billboards. Similarly, the "safety" concerns that existed in decades prior were rejected in E&J Equities and rejected in unrebutted testimony by Garden State's planner. Garden State thus satisfied the "enhanced quality of proof" set forth in Medici through various methods showing that the zoning can accommodate the billboard, is consistent with the signs/uses, and that the Ban is outdated. See Medici, supra at 22 n.11 (explaining that outdated assumptions may justify use variance).

B. Garden State was entitled to a height variance

There are two forms of height variances, a "(d)(6)" heigh variance where the height "exceeds 10 feet or 10% the maximum height permitted," or a bulk variance for height where the deviation is less than that. See N.J.S.A. 40:55D-70(d)(6); Grasso v. Borough of Spring Lake Heights, 375 N.J.Super. 41, 53-54 (App. Div. 2004). A "(d)(6)" height variance is not a use variance and does not require that level of proof. Id. Garden State "could prove special reasons for a height variance if…a taller structure than permitted by ordinance would nonetheless be consistent with the

surrounding neighborhood. To establish special reasons, [Garden State] would need to demonstrate that [height] would not offend any of the purposes of the...height limitation." Id. at 53.

Here, Garden State established that: (i) the billboard was no higher than it needed to be to serve its purpose; (ii) that it was consistent with, or only slightly higher than, permitted signage in the "HC-2 Zone"; and (iii) that the technology of a digital billboard was able to ameliorate purported negative effects of a billboard, such as automatic dimming and angling to make the billboard barely discernible when viewed from the side (i.e. the neighboring "historic district").

C. Garden State was entitled to a bulk variance

Where a use variance is sought, as here, a bulk variance is subsumed in the analysis of the use variance. Puleio v. N. Brunswick Tp. Bd. of Adjustment, 375 N.J Super. 613, 621 (App. Div. 2005). Accordingly, for the reasons already set forth, Garden State was entitled to a bulk variance for principal front set back, which was only necessitated because the sign itself exceeds the principal front set back requirement; the portion on the ground, i.e. the column holding the sign, does not.

D. To the extent properly before the Court, Garden State did not need a use variance for "two principal uses"

The Board's resolution contains contradictory and passing reference to a "use variance" for two principal uses. Compare Pa100 ("three variances") and Pa102 (adding another use variance). The Court did not address this in its dismissal.

For the record, the interpretation of the Somers Point Code as to whether property owners are permitted more than one principal use is a legal issue. See generally Supermarkets Oil Co. v. Zollinger, 126 N.J.Super. 505, 508 (App. Div. 1974). As the Appellate Division held in TR Liquor, LLC v. Twp. of Toms River Planning Bd., 2012 N.J.Super.Unpub.LEXIS 1844 at *17-18 (App. Div. Aug. 3, 2012), it is wrong to assume that such a one-principle-use limitation exists. Each code is different and must be interpreted using common canons of statutory construction. Nothing in the Somers Point Code clearly states, or even implies, such a limitation. Indeed, the Somers Point Code sections at issue all speak in the *plural*. This is even stronger evidence than in TR Liquor, LLC, where the evidence was the use of "a" instead of "the." Id. Here, the word is "purposes." Somers Point Code § 114-35, 47, 62, 65: "a building or land shall be used only for the following purposes…" (Pa148, 157, 159, 161.)

Separately, the one-principal-use issue does not matter because a billboard is not a principal use under the Somers Point Code. "Signs" are merely denominated as "permitted uses." The Somers Point Code defines "principal use as "the use that constitutes the primary activity or use to which the property is put." (Pa35.) The "primary activity" on Property is a diner, not a billboard. Other language in the Somers Point Code similarly supports this interpretation. It says that the purpose of the off-premises speech ban is to "preclude signs from conflicting the principle

permitted use of the site…" (Pa48.) This obviously implies a legislative determination that a billboard is not a principal use. Thus, again, by the Somers Point Code, the billboard is not subject to any one-principal-use limitation.[13]

If, against all reasonable interpretation, a use variance was required for two principal uses, the proofs were satisfied by what is set forth above.

CONCLUSION

The Ban should be struck down, as similar bans have been and the Court should remand with instruction for the Board to grant the Application.

Respectfully submitted,

/S/

JUSTIN D. SANTAGATA

[13] TR Liquor, LLC rejected the argument that a contrary interpretation had to be disputed before a local land use board. TR Liquor, LLC, supra at 18.

GARDEN STATE OUTDOOR, LLC, Plaintiff/Appellant, v. CITY OF SOMERS POINT AND CITY OF SOMERS POINT ZONING BOARD, Defendants/Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL APPEAL DOCKET NO.: A-0346-24T2 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO.: ATL-L-143-23 SAT BELOW: HON. DEAN R. MARCOLONGO, J.S.C.

BRIEF OF RESPONDENTS, CITY OF SOMERS POINT AND CITY OF SOMERS POINT ZONING BOARD

THOMAS G. SMITH, ESQUIRE (ID No. 009471988)
Law Offices of Thomas G. Smith, PC
2312 New Road, Suite 201
Northfield, New Jersey 08225
thomas@thomasgsmithlaw.com
(609) 241-1296
Facsimile (609) 377-5852
Attorney for Respondents, City of Somers Point and City of Somers Point Zoning Board

Dated: July 31, 2025

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

CASES:

STATUTES:

CONSTITUTIONAL PROVISIONS:

ORDINANCES:

PRELIMINARY STATEMENT

It is axiomatic that billboards of any kind are subject to considerable regulation. Such regulation is justified for a myriad of reasons, including, but not limited to, the fact that they obstruct views, distract motorists, and are visual pollution. There may well be appropriate places for them, but Somers Point justifiably determined that there is no such appropriate site within its 4 square-miles, largely surrounded by water, based on both the aesthetic detriment they pose to this small town by the bay with its several historic districts, and the detrimental impact they would have on traffic safety in the predominantly residential town.

The mere fact that the proposed location for Garden State's digital billboard might be a financial coup for Garden State's wallet does not make the application to construct it any more eligible for the use variances it needed; nor does that financial windfall justify upending the interests of Somers Point and its residents in maintaining or improving the aesthetics of the city and protecting the safety of motorists, pedestrians, and bicyclists at a very busy intersection on a very short stretch of road. The trial court correctly found the ordinance banning billboards in Somers Point to be constitutional.

The Zoning Board's denial of the variances sought by Garden State to erect a digital billboard at this location was reasonable and amply supported by the record.

The trial court correctly found that it was not at all arbitrary, capricious, or unreasonable. Both holdings of the trial court should be affirmed.

PROCEDURAL HISTORY

Garden State Outdoor, LLC ("Garden State") filed an application with the Somers Point Zoning Board (the "Board") on October 25, 2022, for several use variances and bulk variances pursuant to the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 *et seq.*, in order to erect a double-sided digital billboard where billboards are not permitted in Somers Point. (Pa117) The proposed digital billboard, 378 square feet in area per side and 45 feet tall, would be constructed on the property of the Somers Point Diner (the "Property" or the "Diner"). (Pa117) The Property is located at 8 MacArthur Boulevard in Somers Point, at the intersection of MacArthur Boulevard, Mays Landing Road, and Shore Road, just west of the bridges going into Ocean City, New Jersey. (Pa111; Pa124)

The Board heard the application on December 12, 2022, at the conclusion of which it voted unanimously against the application, seven to zero. (1T51:16-54:13)[1] The Board adopted the Decision and Resolution denying the application on January 9, 2023. (Pa98)

[1] 1T references the transcript of the December 12, 2022 Zoning Board hearing; and 2T references the March 15, 2024 trial court hearing on the Complaint in Lieu of Prerogative Writ

On January 25, 2023, Garden State filed a Complaint in Lieu of Prerogative Writ against the City of Somers Point and the Zoning Board, claiming the ordinance banning billboards ("Ordinance 1-2011" or "the Ordinance") is unconstitutional, and the Board's denial of the variances was arbitrary and capricious. (Pa25) The trial court issued a briefing schedule on August 3, 2023. (Pa411) Briefs were submitted and oral argument was heard on March 15, 2024. (2T) Near the conclusion of oral argument, the trial court announced that the parties would have an opportunity to file additional, but short, submissions with the court by March 27, 2023 "on any additional topic that we talked about." (2T55:12-15) The Honorable Dean R. Marcolongo, J.S.C. issued a Memorandum of Decision on September 30, 2024, upholding the Ordinance and the Board's denial of the application. (Pa2-20) Garden State appealed the Order on October 3, 2024. (Pa21)

STATEMENT OF FACTS

A. Ordinances relevant to the Property

1. The history and process of the Billboard Ordinance's adoption

In August 2010, Somers Point was sued by Jersey Outdoor Media, LLC after its applications for use and height variances to erect a digital billboard at 5 MacArthur Boulevard and a static billboard across the street were denied in June and July of 2010. (Pa181) During the course of that litigation, Somers Point undertook a review of its sign ordinance. (Pa178; Pa209; Pa213-321) The governing body ("City

Council") formed a subcommittee of three members of Council, the City Engineer, the Planning Board Engineer, the Planning Board Solicitor, and the City Solicitor to undertake a full and thorough review of the then-existing ordinances pertaining to signs. (Pa209) Included in that review, and considered by City Council, were almost 40 reports, studies, and articles about billboards and traffic safety, as well as the aesthetic and environmental impacts of billboards. (Pa219) Those reports and articles spanned several decades and included items from the early aughts up through 2011. (Id.)

The Planning Board Engineer (who is also a licensed professional planner) submitted a report to the Planning Board in mid-March 2011 which addressed both the aesthetics and traffic safety aspects of the proposed Ordinance[2] that would continue to ban billboards in the city ("the Watkins report"). (Pa224) Mr. Watkins referenced an article drafted by Edward McMahon, an expert in the field of land conservation, urban design and historic preservation,[3] wherein Mr. McMahon clearly states that billboards are a form of pollution – visual pollution. (Pa226) Mr. Watkins' report also discussed the traffic safety concerns associated with billboards and the studies and manuals that support and validate those concerns. (Id.)

[2] Ordinance 1-2011 (Pa323)
[3] Somers Point has several historic districts. (Pa147)

The report to the Planning Board concludes with the salient point that the proposed ordinance's continuing prohibition of billboards within the city protects the open space and natural resources of the community, retains the community's historic features, and provides for the safe and efficient movement of vehicles and pedestrians, all of which is consistent with the city's Master Plan and its reexamination reports. (Pa227) The Planning Board deemed the proposed ordinance to be consistent with the Master Plan after a public meeting on March 16, 2011. (Pa229)

The Ordinance passed later in March, with documentation and testimony indicating that all members of the governing body had reviewed the dozens of articles, reports and studies addressing aesthetics and traffic safety issues engendered by billboards. (Pa234; Pa237-306)

2. Regulations pertaining to the HC-2 District

The Diner, where Garden State proposed to erect its digital billboard, is located within the HC-2 Highway Commercial Zoning District. Although Somers Point is predominantly a residential community of just around 4 square miles, there are 8 commercial districts within its borders. (Pa224) The permitted uses in the HC-2 District are set forth in § 114-54 of the Somers Point Code. (Pa79) The permitted uses are (1) Principal uses and buildings which are enumerated as the permitted uses in the HC-1 District (Pa93) as well as (2) Motels (which are not a permitted use in

the HC-1 District); and (3) Methadone clinic. The City's Code addresses "Signs" as a separate category of regulations within each commercially zoned district, as well as the R-1 Single-Family Residential District.[4]

Signs in the HC-2 District are governed overall by §114-60 (Pa91) which permits one freestanding sign for any single property, identifying only the principal establishment located on the property. (Id.) Such a sign cannot exceed the permitted height of 25 feet; the sign area cannot exceed a total area of 48 square feet per face; it shall be mounted at least 10 feet from the ground; and it shall not have a moving or flashing effect. (Id.)

A "billboard" is defined in §114A-3 "Definitions" in the Somers Point Code:

> A sign structure and/or sign utilized for: advertising an establishment, an activity, a product of service or entertainment that is sold, produced[,] manufactured, available or furnished; or promoting any activity, including noncommercial activity and solicitation, such as[,] but not limited to[,] charitable solicitation and noncommercial speech, at a place other than on the property on which said sign structure and/or sign is located. (Pa50)

Section 114A-8 of the Code also provides for the substitution of noncommercial speech for commercial speech on signs as follows:

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[4] For example, §114-17 governs 'Signs' in the R-1 Single-Family Residential District; §114-42 governs 'Signs' in the GB General Business District; §114-52 governs 'Signs' in the HC-1 District; and §114-60 governs 'Signs' in the HC-2 District.

> Notwithstanding anything contained in this article or the Somers Point Code to the contrary, any sign erected pursuant to the provisions of this article or the Somers Point Code with a commercial message may, at the option of the owner, contain a noncommercial message unrelated to the business located on the premises where the sign is erected. The noncommercial message may occupy the entire sign face or any portion thereof. The sign face may be changed from commercial to noncommercial messages or to one noncommercial message to another as frequently as desired by the owner of the sign, provided that the sign is not a prohibited sign or sign-type . . . (Pa58)

Finally, as to the content of a sign's message, §114A-9 provides:

> Notwithstanding anything in this article or the Code to the contrary, no sign or sign structure shall be subject to any limitation based upon the content (viewpoint) of the message contained on such sign or displayed on such sign structure. (Pa58)

B. Garden State's Application to the Zoning Board

1. The Application and Narrative filed with the Board

Garden State filed its application with the Zoning Board on October 25, 2022 for several use variances and bulk variances pursuant to the MLUL to erect a double-sided digital billboard on the Somers Point Diner property on MacArthur Boulevard. (Pa117) Billboards are prohibited throughout Somers Point. Signs associated with a property are limited to 25 feet in height, 48 square feet in area per face, and cannot have a moving or flashing effect. (Pa91) The proposed billboard is 45 feet tall, and 378 square feet in area per face. (Pa124)

2. The Board Engineer's Report on the Application

Several weeks before the application was heard, the Board Engineer issued a report on the application. (Pa105) That report noted that five (5) variances would be required. It listed the variance relief that Garden State would need: d(1) variances for a use or principal structure in a district restricted against such principal structure, and for the proposal of two (2) principal uses on one site; and a d(6) variance for height, because the permitted height is 35 feet, and the proposed sign is 45 feet; and "C" variance relief for setbacks where 50 feet front setback is required and 4 feet is proposed, and a side setback where 30 feet is required and 19 feet is proposed. (Pa106-107)

C. The Zoning Board hearing of December 12, 2022

The applicant's professionals did not address the need for the d(1) variance for two principal uses on one site as raised by the Board engineer in his report to the Board when the application was presented in December, several weeks after the report was rendered. Near the end of the application, the engineer's report was mentioned by the Board Chairman. (1T47:16) The applicant's attorney, Mr. Talvacchia (misidentified in the transcript as Mr. Burkett, Garden State's principal), stated, "[W]e had no comment on it. It's accurate." (1T47:21) Mr. Doran, the Zoning Board's engineer, commented immediately after Mr. Talvacchia's closing comments (again, misidentified in the transcript as Mr. Burkett), that there were, in fact, two d(1) variances required: "[U]nder the D-1 there's two different clarifications. [sic]

One is the use not permitted in the zone. …And the second one is a secondary for use on the site. The same d, but for clarity." (1T48:24-49:3)

Mr. Talvacchia did not take that opportunity (nor did he when he received Mr. Doran's report) to clarify or challenge whether the applicant needed one or two d(1) use variances; and no testimony was proffered as to the second d(1) variance for two principal uses on one site. The applicant put on an application for one d(1) variance for a non-permitted use; a d(6) height variance; and the two setback c variances. After Mr. Doran's testimony that the applicant needed two d(1) variances, Mr. Talvacchia simply stated that Mr. Burkett would be willing to install a generator for the sign. (1T50:5-9)

Before the Board moved to vote on the application, the Board's Solicitor, Mr. Fleishman, then stated that "there would be [ ] two D-one use variance for the use and also for a second principal use, a D-6 for the height variance that's being requested . . . I would also say that Mr. Doran's report would certainly be incorporated in the resolution. And all testimony that has been given here tonight would also be incorporated into the resolution. (1T50:25-51:8) Mr. Talvacchia did not comment on this, nor did he raise any objection to the necessity of two d(1) variances.

1. Testimony of Garden State's planner, Mr. Sciullo

The only exhibit presented by the applicant was the site plan. (Pa111) The "renderings," as Mr. Sciullo described them, were prepared by an unidentified "professional hired by the applicant provided to us for use on this board." (1T13:17-18) They are alleged to simulate what the billboard will look like. (1T21:19-22) In stark contrast to the Board engineer's report indicating that five variances were required (the two d(1) use variances; one d(6) height variance; one (c) front setback variance; and one (c) side setback variance), Mr. Sciullo testified that the applicant was seeking only three variances, to wit, one d(1) use variance; one d(6) height variance; and one (c) bulk variance for front setback. (1T16:8-17:1)

Mr. Sciullo testified that the ordinance banning billboards was written prior to the "invention of these digital boards." (1T17:12-13) He then went on to discuss a single study from "2012 into 2013" that concluded "there was no conclusive evidence that billboards in any form contributed to driver distraction any more than any other normal roadway network distractions." (1T18:16-19:8) Later, Mr. Sciullo stated that "there was inconclusive evidence of distraction." (1T29:21) Mr. Sciullo did not present a copy of the study. He did not directly quote from the study. He did, however, refer it to after his brief description, as "studies." (1T19:12)

Mr. Sciullo testified that "this billboard will look very similar to many other signs in the city," although he then immediately admitted that it is "larger than most of the signs permitted." (1T19:21-23) He then referenced a sign in another part of

town claiming, without any data in support thereof, that it was "not much smaller than what we propose with this billboard." (1T20:1-4) Mr. Sciullo did not proffer the measurements of a single existing sign in Somers Point.

Mr. Sciullo went on to testify that the location chosen by the applicant was because of "the market really demanding it… Coming into town, you can imagine the visitors and the amount of traffic." (1T21:3-5) He acknowledged the historic Somers Mansion across the road. (1T21:18-19) He discussed what the billboard would look like from the site of the Somers Mansion, but nothing about the look of the billboard being in the immediate area of the historic Mansion. (1T21:1-10)

Mr. Sciullo testified that the site is particularly suitable for a digital billboard because there is enough traffic for the applicant to want to install one. (1T24:8-10) He testified that satisfying some of the negative criteria for a use variance constitutes particular suitability. (1T24:10-15) He went on to address the purposes of the MLUL, which do constitute whether a site is particularly suited for a proposed use. (1T25)

As to the "the market really demanding it," Mr. Sciullo clarified that "advertisers are calling [Mr. Burkett] and asking for space in this area." (1T25:12-14) He repeated his claim that this use "wasn't contemplated, I don't think, in this part of the city at [sic] this type of technology when the Prohibition was put in place." (1T26:8-10)

Mr. Sciullo did not address the height variance at all in his testimony, but he briefly mentioned one of the two bulk variances that were needed. (1T27:24-28:17)

The Board Chairman voiced his concerns about the proposed location, primarily because "it does create a distraction. A lot of the people have a hard time manipulating that intersection as it is. There's so many ins and outs. Ingress, egress, right turns, left turns. There's just a lot going on there." (1T31:3-7) Mr. Sciullo responded with some anecdotal comments about the Atlantic City Expressway, and then acknowledged that this billboard "could be a distraction." (1T31:16-32:6) He then stated, "[W]e don't feel that it's going to be an issue." (1T32:7-8)

2. Testimony of Garden State's principal, Mr. Burkett

Mr. Burkett testified that Garden State had been thinking about putting up a billboard in the area for a long time, and that they send letters to landowners in any potential area to see if they are interested in leasing space for the billboard's erection. (1T36:11-19) He did not present any data as to what percentage of advertisers would be local businesses when asked about this by a Board member.

3. Testimony of members of the public

Ms. Bowen asked whether the billboard would extend over the road. (1T44:18-19) Mr. Exadaktilos, who is the son of the owners of the Diner, testified that he did not object to local restaurants and bars advertising on the billboard. (1T45:21-46:23)

4. Board members' comments/testimony

The Board members' reasons for voting against the application are cogently and accurately summarized by the trial court in its Memorandum of Decision – negative commercialization; inconsistent with the Master Plan; deleterious impact on conservation of historic sites and districts; special reasons not proven by the applicant; inappropriate location; the billboard would be aesthetically unappealing; the billboard would be a distraction to drivers in a heavily congested intersection; and granting the application would substantially impair the intent and purpose of the zoning plan and zoning ordinance. (Pa7-8)

5. The Decision and Resolution ("D&R")

The Decision and Resolution, adopted by the Board on January 9, 2023, states in relevant part:

> * * *
> [T]he Board voted to deny the application by a vote of 0 in favor and 7 against, finding that the application was not consistent with the City's Zoning Ordinance or Master Plan, that the Applicant failed to prove special reasons to support the granting of the required "d" variances, and had not adequately presented a case and had not met its burden for the Board to grant site plan waiver and the "c" and "d" variance relief for the Project under the requirements of the MLUL. In addition, the Board made the following findings of fact and conclusions of law, and decision:
>
> A. The Board finds that pursuant to N.J.S.A. 40:55D-70d(1), d(6) and c(2), the purposes of the Municipal Land Use Act would not be advanced by deviations or departures from the requirements of the Zoning

> Ordinance and that the benefits of the requested variances will not substantially outweigh the detriments. Further, the Board finds that the requested variance relief will cause substantial detriment to the public good and will substantially impair the intent and purpose of the zone plan of the City of Somers Point and the Zoning Ordinance.
>
> B. In terms of the negative criteria, (that granting the variances will not cause substantial detriment to the public good or substantially impair the intent and purpose of the City of Somers Point zone plan or Zoning Ordinance), the Board finds that the Project will have substantial negative impacts and will cause substantial detriments to the public good, and that the overall benefits from granting the requested variances will be substantially outweighed by the detriments. (Pa102-103)

The Decision and Resolution ("D&R") specifically incorporated the Board engineer's report, discussed in this Statement of Facts, section B. 2, *supra.* (Pa102)

D. The Complaint in Lieu of Prerogative Writ

Garden State filed a Complaint in Lieu of Prerogative Writ on January 25, 2023. After briefs were filed and oral arguments were heard, the trial court ruled in favor of Somers Point on both Counts (constitutionality of the Ordinance banning billboards and decision of the Board) and dismissed the Complaint. (Pa1-20) This appeal followed. (Pa21)

STANDARD OF REVIEW

The trial court was correct in holding that Somers Point's ordinance banning billboards is a constitutionally valid time, place or manner regulation. This Court's

standard of review of the trial court's interpretation of the law and the legal consequences that flow from established facts is de novo. Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995).

The standard of review as to the trial court's Order affirming the Zoning Board's denial of the variances is also de novo. New York SMSA, Ltd. P'ship v. Bd. of Adj., Twp. of Weehawken, 370 N.J. Super. 319, 331 (App.Div. 2004). In evaluating a challenge to the denial of a variance, the burden is on the Plaintiff herein to show that the Zoning Board's denial was arbitrary, capricious, or unreasonable. Price v. Hemeji, LLC, 214 N.J. 263, 284 (2013)(citation omitted).

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY UPHELD THE BILLBOARD ORDINANCE AS CONSTITUTIONAL (Pa15)

Both the United States and New Jersey Constitutions provide protections from the government's interference with the freedom of speech. U.S. Const. amend. I; N.J. Const. art. I, ¶ 6; Twp. of Pennsauken v. Schad, 160 N.J. 156, 175 (1999). "When a law or ordinance directly impinges on the constitutionally protected right of free speech, the State is required to justify the restriction." Ibid. (citing Bell v. Stafford Township, 110 N.J. 384, 395 (1988)). Because our State Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide our courts' analysis. Schad at 176 (citing Hamilton Amusement Center v. Verniero, 156 N.J. 254, 264-65 (1998)).

However, speech can be subject to reasonable time, place, or manner restrictions. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). The Supreme Court has repeatedly emphasized that time, place, or manner restrictions are valid if they are "justified without reference to the content of the regulated speech, [ ] are narrowly tailored to serve a significant governmental interest, and [ ] leave open ample alternative channels for communication of the information." Ibid. (citations omitted).

Somers Point's Ordinance is, accordingly, a valid, constitutional regulation. It is content-neutral; it is narrowly tailored to serve the significant governmental interests of aesthetics and traffic safety; and there are ample alternative channels for communication. The trial court's holding should be affirmed.

Garden State's assertion that "[t]his appeal already happened," ostensibly because "Bell struck down this *exact* Ban," (Pb9)(emphasis in original) ignores the stark and salient distinctions between that case and the one herein. Although the ban of billboards in the Bell case was, like Somers Point's, city-wide, that single fact does not conclude the analysis. As the Bell Court underscored, "It is not the scope of a ban, or even the fact that it may be municipal-wide, that is determinative of its validity, but rather the existence of a demonstrable legitimate governmental objective genuinely served by such a ban." Bell, 110 N.J. at 396.

The Bell Court further stated that, although legislative enactments normally enjoy a presumption of validity, if an ordinance or regulation "directly impinges on a constitutionally protected right, the presumption of its validity disappears." Id. at 394-95 (citations omitted). Thus, the city has the burden to "present and confirm those compelling legitimate governmental interests and a reasonable factual basis" for the regulation. Id. at 396. Unlike the case in Bell, wherein the record was bereft of *any* factual basis for the billboard ban therein, Somers Point evidenced the almost 40 studies, articles and reports that were reviewed; the Planning Board's and City Council's reviews; the hearings; and the experts' reports – all considered by the Board and governing body and which combined to constitute the factual basis for its ban of billboards. The Somers Point ordinance has a solid foundation of decades of studies, reports and articles which overwhelmingly demonstrated the aesthetic and safety concerns generated by billboards. Bell at 395 (the ordinance itself does not have to articulate the specific objectives in order to be valid; the municipality may proffer evidence to the court). Ordinance 1-2011 is supported by a strong factual basis.

Somers Point did not ask the trial court to simply apply a presumption of validity to its ordinance; nor could it have, given the constitutional rights at stake. Here, the city provided the trial court with an extensive record demonstrating the impacts of billboards in a small town such as Somers Point, both to the aesthetics of a primarily

residential town on the bay (a characteristic that is not belied by the existence of commercial districts in town), and the significant traffic safety concerns that billboards would create therein. (Pa142-353) The trial court acknowledged the comprehensive review Somers Point undertook of its development ordinances focusing on its sign ordinance and regulations of signage within the City when a billboard company attempted to construct a digital billboard near this Property in 2010. (Pa11; Pa142-353) The court pointed out that the Planning Board retained experts to review the ordinance and recommend changes consistent with the City's vision, but also to insure constitutional validity. (Ibid.)

The Planning Board was presented a final report from one of its experts, Mott Associates, LLC; the Board held public hearings on the expert's report and the proposed ordinance; the Board found it to be consistent with the Master Plan and Reexaminations and recommended its adoption by City Council. (Pa12) City Council reviewed the studies and reports, and voted to adopt the Ordinance on March 31, 2011. (Pa12; Pa178-353) The trial court recognized the rationale for the Ordinance that included, but was not limited to, the adverse effects and impacts of billboards on both traffic safety and aesthetics. (Pa12)

In Bell, Stafford Township failed to provide any such record or justification to the courts. As that Court noted, "the record [was] almost completely devoid of any evidence concerning what interests of Stafford are served by the ordinance and the

extent to which the ordinance has advanced those interests." Bell at 396. The Bell Court acknowledged that aesthetics and traffic safety can constitute legitimate governmental interests, but Stafford, unlike Somers Point, had not demonstrated a factual basis for either interest. Ibid. Because the facts and the absence of any factual basis in the record to support the ban in Bell are so starkly different from those in the case *sub judice,* Bell is inapposite to this matter; it is not binding, contrary to Garden State's contention; nor does it conclude the analysis and review.

II. THE ORDINANCE BANNING BILLBOARDS IS A VALID TIME, PLACE OR MANNER REGULATION, CORRECTLY UPHELD BY THE TRIAL COURT (Pa15)

The New Jersey Supreme Court held that an ordinance regulating signs, including billboards of any form, affecting commercial as well as noncommercial speech, should be analyzed pursuant to the Clark/Ward time, place, and manner standard. E&J Equities, LLC v. Bd. of Adj. of the Twp. of Franklin, 226 N.J. 549, 580 (2016).

The trial court correctly held that the Somers Point billboard ordinance satisfied the three prongs of the Clark/Ward test for time, place, or manner restrictions on speech. Clark, *supra,* 460 U.S. at 293; Ward v. Rock Against Racism, 491 U.S. 781 (1989). (Pa15) As the Clark Court acknowledged, speech can be subject to reasonable time, place, or manner restrictions. 460 U.S. at 293. If the government is merely regulating the time, place, or manner of speech, the ordinance is valid if it is

(1) content neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leaves open ample alternative channels for communication. Ibid. (citations omitted); E&J Equities, 226 N.J. 549, 570, 580.

Somers Point's ordinance is content neutral; it is narrowly tailored to serve significant governmental interests; and it leaves open ample alternative channels of communication. The trial court correctly upheld the constitutionality of the Ordinance, and that decision should be affirmed.

A. The Ordinance is Content-Neutral (Pa12)

The Supreme Court emphasized in City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 72 (2022) that the Court's "First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." The Austin Court went on to recognize that the Court has understood distinctions between on-premises and off-premises signs, like the ordinance herein, to be content neutral. Id. at 73. Garden State acknowledges that Somers Point's billboard ordinance is content neutral and the trial court correctly determined that the ordinance is content neutral.

B. The Ordinance is Narrowly Tailored to Serve Somers Point's Interests in Aesthetics and Traffic Safety (Pa14)

1. Traffic safety has been recognized by the courts as a significant governmental interest that is served by regulating billboards.

Aesthetics and public safety have long been recognized as legitimate and substantial governmental interests, particularly in the context of regulations affecting billboards. E&J Equities, 226 N.J. at 583 (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981)). In E&J Equities, the Township of Franklin permitted billboards in one zoning district proximate to a heavily travelled interstate highway, I-287, but prohibited digital billboards in that same district. Id. at 557. Franklin Township, a 47 square-mile municipality, undertook a review of its sign ordinance that permitted billboards as a conditional use in one of its zoning districts. Id. at 558. Following the Planning Board's recommendation, the Township Council adopted an ordinance permitting static billboards along I-287, but prohibiting digital billboards. Id. at 559-60. It cannot be overemphasized that the record in E&J provided "no basis to discern how three static billboards are more aesthetically palatable than a single digital billboard." Id. at 642-43.

When E&J presented its application for a use variance to erect a digital billboard in the district along I-287 that permitted static billboards, it submitted only two of the "number of studies investigating the relationship between digital billboards and traffic safety" in support of its application. Id. at 560. Of note, the methodology used in those two studies was sharply criticized by an expert in the field. Ibid. The E&J Equities Court highlighted the fact that, contrary to Franklin Township's Planning Board and Director of Planning's contention that there was insufficient research to

make traffic safety determinations as to digital billboards, there was "ample information [ ] to make informed decisions about [them.]" Id. at 584.

In contrast, Somers Point did what Franklin Township failed to do. Somers Point reviewed the multiple studies and reports, considered the roadways in Somers Point (as well as the characteristics of the town with respect to the bays, the historic districts, residential character and overall aesthetics of the town), and made the informed decision, based on experts' reports, that there existed no safe or suitable area in the municipality for the erection of any billboards, static or digital.[5]

Because the record in E&J Equities was bereft of any consideration of the safety impact of the three permitted static billboards, the arguments proffered by the Township that traffic safety could support its regulations permitting static billboards but banning digital billboards did not pass muster. Ibid. It also bears mention that I-287[6] in Franklin Township is so distinguishable from the short stretch of MacArthur Boulevard in Somers Point that the only commonality between them is that they are both paved roadways with traffic lanes painted on them.

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[5] Comments and observations made by various City Council members during the hearing when the Ordinance was adopted evidence some of the traffic safety concerns given the particular features of the roads in Somers Point. (Pa285-86; Pa288; Pa290)

[6] I-287 is a highway that carries over 100,000 cars and trucks daily. 226 N.J. at 557.

Although Garden State's planner/engineer, Mr. Sciullo, testified to the Zoning Board that this type of billboard had not been invented when Somers Point adopted its Ordinance in 2011, digital billboards have been around for decades. The E&J Court acknowledged as much when it noted that "since 1996, the New Jersey Department of Transportation (NJDOT) has permitted off-premises digital billboards or multiple message signs on the interstate highway system." E&J Equities at 561.

Remarkably, Plaintiff argues that "Nothing in Somers Point's 2011 record for the Ban overcomes the more recent and competent evidence presented by Garden State on the 'safety' of billboards." (Pb12) First, the record supporting Somers Point's 2011 Ordinance banning billboards included *dozens* of studies and reports, with ten of them being conducted/issued between 2006 and 2011. (Pa208-353; Pa219-222) Second, Garden State's planner, Mr. Sciullo, made a few statements about **a single study** to the Zoning Board, without actually bothering to submit that ***one*** study to the Board, that he stated was from "2012 into 2013," and admitted was "inconclusive." (1T18:16-19:8) One study; conducted one year later than the two released in 2011 considered by Somers Point before adopting the Ordinance; and not provided to the Zoning Board when making its application. Such scant evidence cannot be said to be insurmountable by the considerable evidence relied upon by Somers Point in enacting the Ordinance. It bears mention that these bare-boned

contentions about billboard "safety" were made by the same planner who testified incorrectly to the Zoning Board that Somers Point's 2011 Ordinance was written prior to the "invention of these digital boards." (1T17:12-13) Such a proclamation could have been corrected by Mr. Burkett at the hearing, who testified he has 30 years in the billboard business, but the applicant failed to do so. (1T34:1-4) Our Supreme Court specifically referenced the fact that digital billboards on interstate highways have been regulated *since 1996.* E&J Equities at 561.

Plaintiff quotes at some length language from the E&J Court that undermines its own argument. (Pb12) The quoted excerpt highlights the salient fact that Franklin Township's Planning Board and Director of Planning declined to make an informed decision about regulating digital billboards after reviewing all of the available literature, in stark contrast to Somers Point's Planning Board and experts.

Garden State's unfounded assertion that safety is an invalid governmental interest in this case is confounding. (Pb13) True, simply "saying 'safety' is not enough." Somers Point did not, however, simply say "safety." The record amply supports Somers Point's traffic safety *and* aesthetic concerns underlying its Ordinance. (Pa178-353) That record was submitted to the trial court and the judge reviewed it. (2T4:4-7) Garden State's protestations that a plenary hearing was necessary ring hollow. Its own planner had ample opportunity to present as many studies as he wanted to the Zoning Board. Moreover, he had ample opportunity to actually submit

to the Board that one single study he referenced in his testimony. The record before the trial court was much more than Somers Point simply saying "safety," and that record was ample support for the Ordinance.

2. Aesthetics is also a significant governmental interest recognized by the courts that is served by Somers Point's regulation of billboards.

Again, Garden State proffers a lengthy quote from E&J Equities that undermines its own argument. (Pb15) Franklin Township's ordinance allowed for static billboards along I-287 but prohibited digital billboards, without providing any basis to discern how three static billboards are more aesthetically palatable than a single digital billboard. Somers Point does not permit static billboards or digital billboards. Somers Point does not have an interstate highway running through any section of the municipality that carries over 100,000 cars and trucks every day like I-287 in Franklin Township. The road where the Property for Garden State's proposed billboard is located is just about a half-mile in length. Mr. Sciullo testified to the Zoning Board that 3,000 feet from the proposed site would be a site on the other side of Route 9, on a 2-lane residential strip of road (Laurel Drive) that starts at the termination of MacArthur Boulevard. (1T33:2-11) Unlike I-287, MacArthur Boulevard is about a half-mile long stretch of road on which multiple businesses are located, as the Board Chairman described, with lots of ingress and egress points. (1T31:2-7)

There is simply no comparison between Franklin Township and Somers Point; there is no comparison between the ordinances therein and in this case; and there is no comparison between the record supporting Somers Point's Ordinance and Franklin Township's record, which was devoid of support for the distinction made therein between static and digital billboards.

Garden State's reliance on language from Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997) is similarly misplaced. (Pb16) In Phillips, the district court sustained the constitutionality of an ordinance without any Answer from the municipality to the Complaint that might have identified the effects it was seeking to prevent. The Court of Appeals noted that there was "no articulation by the [municipality] of what it perceive[d] its relevant interests to be and how it thinks they will be served." Ibid. The Court went on to point out that the district court "had no way of knowing what problem or problems the Borough thought it was facing and there is no study or other evidence in the record concerning the secondary effects of 'adult entertainment uses.'" Id. at 174. Without any identification of the problems the Borough of Keyport thought it was facing, the court was in "no position to determine whether [the ordinance] was 'narrowly tailored' to effectively ameliorate the interest or interests the Borough sought to serve." Ibid.

The Phillips case is inapposite to the case *sub judice*. The record herein is replete not only with the identification of the problems Somers Point was trying to address

with its sign ordinances, but also with the studies and reports and evidence concerning the secondary effects of billboards on both traffic safety and aesthetics. The trial court recognized those governmental interests, acknowledged the studies and reports that were considered by the Planning Board and the governing body, and properly found the ordinance to be narrowly tailored to serve those interests. (Pa14)

Garden State argues that it created a factual dispute on the issue of narrow tailoring by explaining all the types of on-premises signage that was permitted in Somers Point and how it was not appreciably different than some form of off-premises signage. Plaintiff then cites four signs near the Property, which are on-premises business identification signs, and then states that "many" of the signs have some form of electronic and changing signage. (Pb17) First, Garden State misidentifies the transcript in which some of these signs (but not all) were discussed. It was not Garden State's planner or principal who identified or discussed signs for Circle Liquor or Surfside Casual at the Zoning Board hearing. (1T) The only sign Garden State discussed at the Zoning Board was a sign for CVS/Wendys/Advance Auto Parts that is on the other side of town. (1T20:1-2) It was counsel for Somers Point at the trial court who mentioned four signs near the Diner Property as examples of ***smaller*** signs in Somers Point that were granted variances for neon or LED signage. (2T21:15-21) In fact, counsel further pointed out to the trial court that Garden State's planner failed to present the Zoning Board with ***any specific***

dimensions of any other signs in Somers Point to support his (rejected) contention that they are "not much smaller," and "look very similar" to the proposed billboard. (1T19:21-22; 1T20:3-4) The applicant, who bears the burden of presenting its case to the Zoning Board, simply did not bother to provide the Board with any data whatsoever as to the size or height of any other signs in Somers Point. Relying on its own familiarity with signs throughout town, the Board rejected these assertions of Mr. Sciullo. There was no "factual dispute" presented by Garden State.

The Supreme Court made the point in Metromedia that the prohibition of off-premises advertising *is* directly related to the governmental interests of traffic safety and aesthetics, which is not altered by the fact that the ordinance is underinclusive because it permits on-premises advertising. 453 U.S. 490, 511. It also bears mention that on-premises signs in Somers Point are restricted to 25 feet in height, and 48 square-feet in area. The proposed billboard would have been 45 feet high and 378 square-feet in area per side.[7]

Garden State continues by suggesting that under a hypothetical interpretation of the Ordinance, a business in Somers Point cannot make a political statement or a pro-sports team statement on its on-premises sign. This is readily disputed by

[7] Illustrative of the considerations of aesthetics in supporting the billboard ordinance are comments made by City Council members when adopting the ordinance. (Pa266; Pa271-72; Pa276)

looking to §§114A-8 and 9, *supra*, quoted in the Statement of Facts herein at section A.2. Garden State then characterizes the permitted non-commercial messages a business can put on its sign pursuant to those two Code sections as being "very small" and "so tiny as to essentially be prohibited." (Pb18) This characterization is in direct contradiction to the ordinances just cited. The non-commercial message can occupy the entire face of the on-premises sign. Thus, if the Point Diner wanted to cover its sign with a message "Go Eagles!!" it could do so. If the Crab Trap wanted to change its LED message sign from "Crab cakes are our specialty," to "We love democracy!" it can do so. The messages cheering on a sports team or a democracy would not be "very small," and certainly would not be "so tiny as to essentially be prohibited." Plaintiff's arguments are extremely overexaggerated.

Although there are less restrictive measures that have worked in other situations and in other municipalities, conditional use provisions for certain industrialized areas, spacing requirements, and height restrictions were not viable options to achieve Somers Point's goals. Garden State criticizes the trial court's citing to E&J Equities for the proposition that a ban is narrowly tailored if it promotes a substantial government interest that would be achieved less effectively absent the regulation. (Pb19)(Pa14; E&J Equities at 572 (quoting Ward, 491 U.S. at 799)). Contrary to Plaintiff's contention, the trial court did not ignore other iterations of the narrowly tailored analysis by E&J Equities as well as other courts. (Pa14) The trial court

continued, stating that a restriction may not burden more speech than necessary; that a regulation is not rendered invalid merely because a less restrictive alternative can be identified. (Pa14) In fact, as the Ward Court pointed out, a regulation "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."491 U.S. at 800. Conditional use provisions and spacing requirements and height restrictions are less restrictive alternatives, to be sure. But that fact and those options, which would not resolve or serve Somers Point's interests, do not render the Ordinance invalid. The E&J Equities Court reiterated that a municipality is not required to adopt the least restrictive means to further its interests. 226 N.J. at 584.

The trial court properly articulated this aspect of the Clark/Ward test, stating:

> As set forth in E&J, a ban is narrowly tailored if it promotes a substantial government interest that would be achieved less effectively absent the regulation. This means that a restriction cannot burden more speech than necessary. It is not rendered invalid merely because a less restrictive alternative can be identified. Here the rationale of the City is unequivocal in that the City determined that billboards have a deleterious effect on both aesthetics and traffic safety. This determination was supported by the comprehensive study completed prior to the adoption of the ordinance. If this rationale is accepted, and this Court does accept same, then a city-wide ban is the only available avenue to achieve this goal and, as such, the ordinance is as narrowly tailored as possible to achieve this goal. Therefore, the second prong of the Clark/Ward test is satisfied. (Pa14)

Somers Point is not a big city. It is not a sprawling municipality. It is a 4 square-mile, predominantly residential town surrounded on 3 sides by water, with several historic districts. There is no interstate highway running through town. The experts and the City determined that there are simply no appropriate locations for billboards that would not have a significant negative impact or effect on the town's aesthetics and/or the public's safety on the roads. (Pa12)

As stated by the Metromedia Court, "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the **only** effective approach to solving the problems they create is to prohibit them." 453 U.S. at 508 (emphasis added). Billboards *are* visual pollution, and there is no area, no place, no location in the 4 square-mile city of Somers Point where a billboard, and most especially a digital billboard, would not have a disastrous impact on the aesthetics of the town, nor where they would not be a substantial threat to the safety of the public, whether they be in motor vehicles, on bicycles, or on foot.

C. Reasonable Alternative Channels of Communication Exist (Pa14)

The final prong of the Clark/Ward test is whether reasonable alternative channels of communication exist to disseminate the information sought to be distributed. Clark, 460 U.S. at 293; Ward, 491 U.S. at 791. The trial court correctly found that

there are ample "reasonable alternative channels of communication to disseminate the information sought to be distributed." (Pa14) The trial court stated in relevant part:

> In our increasingly commercialized world, innovative and incentivized merchants, businesspersons, and other advertisers continue to use and develop a multitude of mechanisms to disseminate the information they desire to the public. A non-exclusive list of alternate channels of communication would include non-billboard on-site signage, internet advertising, direct mail, radio, newspapers, television, circulars and flyers, commercial vehicle signage, public transportation signage, and here at the Jersey Shore, airplane banners as available avenues to commercial enterprisers. (Pa14)

Garden State's exaggerated substitution of "equivalent" for "alternative" channels aside, its reliance on Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) is misplaced. (Pb20) Linmark dealt with a content-based ordinance that banned "For Sale" signs at residences, not to promote or protect aesthetics, but in order to address what local officials perceived as "white flight" from mixed neighborhoods. The ordinance was not a time, place, or manner regulation and the lack of alternative channels of communication was not the dispositive requirement on which the Court decided the matter. Somers Point's Ordinance does not ban such signs, thus the lack of alternatives to the "For Sale" signs in front of one's house is inapposite to the case herein. Somers Point's Ordinance is content-neutral and is a valid time, place, or manner regulation, unlike the ordinance in Linmark.

Plaintiff's reliance on State v. DeAngelo, 197 N.J. 478 (2009) is similarly misplaced for this prong of the Clark/Ward test. That ordinance, prohibiting a union from displaying a large rat balloon while permitting balloons for grand opening events and the like, was clearly not content neutral; it did not serve any significant governmental interest; and was not narrowly tailored. 197 N.J. at 489.

Garden State's emphatic claim that "Metromedia and Bell are dispositive" on this prong of the test is overstated and simply not so. In Metromedia, decided in 1981, the parties stipulated that alternative channels were **not** available. 453 U.S. at 516. It is axiomatic that there are exponentially more advertising alternatives today than there were in 1981 when Metromedia was decided. Moreover, the alternative channels prong was not central to the New Jersey Supreme Court's holding in Bell. The Bell Court struck down Stafford's ordinance because the township failed to provide *any* record in support of its billboard ban and failed to provide *any* evidence as to what interests of Stafford were served by the ordinance.

Garden State's argument that it proffered evidence that there are no alternative channels of communication overstates the facts. (Pb22) Although Mr. Burkett did submit a Certification to the trial court that touches on some of the alternative channels of communication, it lacks any evidentiary support for his oversimplified assertions. (Pa43) The Certification also couches his comparisons in terms of "equivalence" where the overwhelming majority of cases do not require equivalent

alternatives or equivalent forms of communication, but rather, they require adequate alternative channels of communication. Mr. Burkett's statement that a billboard ad costs less than radio, television, or newspaper is not supported by any data or any evidence whatsoever. Is a billboard ad $5.00 less than a radio ad, or $15,000 less? How much less is it than a newspaper ad, and how many editions of the newspaper?

Mr. Burkett's next claim is that a billboard ad is "more efficient, because usually, the customer is picking a billboard in the relative vicinity of the business or organization." (Pa43) But many radio stations are local; many newspapers are local. His assertion that "If 5,000 people per day see a billboard, a couple hundred, if that, might see a bus." (Pa43) This is absurd. He provides no data as to how many people might see a billboard **ad** in Somers Point on a changing message billboard at the Point Diner. He does not even provide how many people might see the billboard, much less one of the many ads he wants to run on it in 8 second intervals. Nor does he provide any data as to **which ad** those people would see. Nor does he provide any evidence as to that number as compared to the number of people who would hear a radio ad; see a television ad; see a newspaper ad. Most interestingly, Mr. Burkett provides **no data, even when asked by the Zoning Board**, as to what percentage of the advertisers on his billboard would be local businesses, notwithstanding his claim that "locality" is so relevant.

Remarkably, Mr. Burkett makes the statement that "[i]nternet advertising has absolutely no comparison to a billboard because it is not specific to a locality and its view is not triggered by being in or near that locality." Apparently, Mr. Burkett has never Googled a town where he plans to vacation; he has never Googled a query like, "restaurants in Somers Point," or "homes for sale in Somers Point," or "dry cleaners near Somers Point," or "grocery stores in Somers Point," or more simply, "restaurants near me," "theaters near me," "festivals in Somers Point." There is no comparison to the cost of internet visibility offered in Mr. Burkett's vague and self-serving Certification. If taken at face value, one might think the *only* way a message could be communicated these days is on a digital billboard, and that there should be a digital billboard on every street, every 3,000 feet, in every town in every state. Put down your smart phones, America, and look at all the flashy digital billboards.

Mr. Burkett's "Certification" can hardly be characterized as competent evidence that there are no alternative channels of communication sufficient for this ordinance to pass constitutional muster. Garden State's "argument" that "Billboards are proximal and temporal: they advertise usually nearby and oftentimes they advertise events that are happening in the near future. 'Go here on Wednesday.' 'This is around the corner.'" (Pb22) is not supported in the record. Exactly what does "Usually nearby" mean? Mr. Burkett was asked by a Zoning Board member what percentage of advertisers would be local, and he did not provide even a rough idea of the

percentage of advertisers that would be "usually nearby." (1T37:22-38:6) As for "Go here on Wednesday," the ads on the billboard are purchased for a month's time. (Pa43) So on which Wednesday should one go there? The first Wednesday that month or the third? A 15-second radio ad, or an ad in the weekly Somers Point/Ocean City newspaper can relay that information. There are adequate alternative channels of communication, as the trial court correctly found.

As for reach and cost, beyond the deficiencies in Mr. Burkett's Certification, Garden State's citation to Contributor v. City of Brentwood, 726 F.3d 861 (6th Cir. 2013)(misidentified as Harrington in Plaintiff's brief at Pb22) misses the mark. The case where the author of a book critical of a hockey team CEO was barred from selling his book near the arena where that hockey team played its games is Weinberg v. City of Chicago, 310 F3d. 1029 (7th Cir. 2002). That one particular fact pattern is so unique it has little to no relevance to the discussion of a billboard in Somers Point, where the billboard owner herein has no idea how many advertisers might even be from the area. A book that eviscerated a hockey team's CEO is a much tougher sell to anyone other than the people who like the hockey team enough to attend its games.

Plaintiff's challenge to the trial court's findings as to the numerous alternative channels of communication tellingly cites to no case that specifically required the town or court to submit hard data or evidence as to those alternatives, or struck down an ordinance based on this assertion. Garden State cites language from Justice

Thomas's dissent in Silvester v. Becerra, 583 U.S. 1139 (2018), which has no bearing on this part of the analysis under Clark/Ward. The evidence to which the dissent is referring therein relates to evidence of the governmental interests, not the alternative channels of communication. Specifically, Justice Thomas wrote, "[I]ntermediate scrutiny requires the government to 'demonstrate that the harms it recites are real' beyond 'mere speculation or conjecture.'" 138 S.Ct. 945, 948 (citation omitted). This dissent is inapposite to the argument Plaintiff is trying to present.

Moreover, Garden State's intended "audience" is an amorphous collection of motorists traveling around Somers Point, or to and from Ocean City, which is quite different than the uniquely specific audience for the author's book in Contributor v. City of Brentwood, *supra.* Garden State offers no evidence to support its position that advertisers cannot reach their intended audience by employing the multitude of options listed in the trial court's decision. As the Contributor Court noted:

> [Plaintiffs] argue that the city must offer proof that the alternatives will be adequate. But we have never placed an onerous burden on a municipality to prove the adequacy of alternative channels of communication. Instead, we have only required a municipality to proffer a list of potential alternative avenues of communication that are reasonable and made in good faith. (citations omitted). 726 F.3d at 866-67.

Somers Point did so. Furthermore, the Contributor Court emphasized that "[a]n alternative channel of communication can be adequate even when the speaker is denied its best or favored means of communication. Id. at 865 (citing Phelps-Roper

v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008). *See also,* Interstate Outdoor Advertising, L.P. v. Zoning Bd. of Tp. of Mount Laurel, 706 F.3d 527, 535 (3d Cir. 2013). As the trial court noted, maximizing profit through economical advertising without restriction is not the animating concern of the First Amendment. (Pa14) Restrictions where substantial governmental interests are at stake and alternative channels of communication exist will be found constitutional. (Pa14-15)(citing Interstate Outdoor Advertising, *supra*, and Naser Jewelers v. City of Concord, N.H., 513 F.3d 27 (1st Cir. 2008).

It also bears mention that costs, vaguely touched on in Mr. Burkett's Certification, are not dispositive to the analysis. Although the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives, "this solicitude has practical boundaries." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812-13, n. 30. (1984)(citations and internal quotation marks omitted). Quoting Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949), the Vincent Court emphasized, "That more people may be more easily and cheaply reached by sound trucks … is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." Ibid.

The trial court got this right. The Ordinance satisfies all three prongs of the Clark/Ward test for constitutionality.

III. THE TRIAL COURT CORRECTLY HELD THE ZONING BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE AND SHOULD BE AFFIRMED (Pa19)

A. Garden State Was Not Entitled to the D Variances

1. Garden State was not entitled to the d(1) variance for a use not permitted in the district

Land use decisions are entrusted to the sound discretion of the municipal boards, which are to be guided by the positive and negative criteria set forth in the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.* ("MLUL"). Kaufmann v. Planning Bd. for Warren Tp., 110 N.J. 551, 558 (1998). A local zoning determination will be set aside only when it is arbitrary, capricious, or unreasonable. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965). The essence of an arbitrary and capricious action is a determination predicated on unsupported findings. In re Boardwalk Regency Corp., 180 N.J. Super. 324, 334 (App.Div. 1981), *aff'd and modified*, 90 N.J. 361 (1982). A court's review of a municipal board's action on zoning and planning matters, such as variance applications, is limited to determining whether the board's decision was arbitrary, capricious, or unreasonable. Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 198 (App.Div. 2001)(citing Kramer, *supra*, at 296).

Because local boards have peculiar knowledge of local conditions, they must be allowed wide latitude in the exercise of their delegated discretion. Kramer at 296. The Legislature has recognized that local citizens familiar with a community's

characteristics and interests are best equipped to assess the merits of a variance application. Ward v. Scott, 16 N.J. 16, 23 (1954). The factual determinations of a land use board are presumed to be valid, and the proper scope of judicial review is not to substitute its own judgment for that of the board's, but to determine whether the board could reasonably have reached its decision on the record. Kramer, *supra,* at 296; Davis Enterprises v. Karpf, 105 N.J. 476, 485 (1987).

The proper scope of judicial review is to determine whether the Board could reasonably have reached the decision it did. Davis Enterprises at 485. It is within the province of the Board to accept or reject the opinions of the various experts who testified. Allen v. Hopewell Tp. Zoning Bd. of Adjustment, 227 N.J. Super. 574, 581 (App.Div. 1988)(citing Davis Enterprises at 485)).

The Board herein found the applicant's expert failed to present sufficient evidence to support a finding of any special reasons in support of the variance for a use not permitted in the district. The MLUL gives zoning boards the authority to grant use variances upon a showing (1) of special reasons, commonly referred to as the positive criteria, and (2) that the variance 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, referred to as the two prongs of negative criteria. N.J.S.A. 40:55D-70(d); Burbridge v. Governing Body of Tp. of Mine Hill, 117 N.J. 376, 384-85 (1990) (citations omitted).

When, as here, an application does not concern an inherently beneficial use, such as a hospital or school, a use variance requires (1) satisfying the positive criteria by showing special reasons as to why the use promotes the general welfare because the site is particularly suited for the proposed use; and (2) satisfying the negative criteria by proving the variance can be granted without substantial detriment to the public good, and demonstrating through an enhanced quality of proof that the variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. Smart SMR v. Borough of Fair Lawn Board of Adjustment, 152 N.J. 309, 323 (1998); Medici v. BPR Co., 107 N.J. 1, 21 (1987).

Here, the Board found the applicant's presentation lacking, i.e., that the applicant failed to demonstrate that the use is peculiarly suited to the particular location for which the variance was sought. The applicant's expert testified that the location is particularly suited because Garden State's principal gets a lot of inquiries from potential advertisers about billboards in this area. That market demand, as Mr. Sciullo called it, has no relevance as to the particular suitability of a property for purposes of a use variance pursuant to the MLUL. In fact, as the Chairman of the Board emphasized, this particular location is a *terrible* location for a use such as a digital billboard, because it would create a distraction. The Chairman emphasized the fact, as every local knows, that "a lot of people have a hard time manipulating

that intersection as it is. There's so many ins and outs. Ingress, egress, right turns, left turns. There's just a lot going on there." (1T31:3-7)

Mr. Sciullo argued that another purpose that the board could consider is N.J.S.A. 40:55D-2(b) – to secure safety from fire, flood, panic and other [ ] disasters, because the billboard could be made available for public information. Maybe that is true; maybe not. The applicant failed to present any data or testimony as to how public information would be broadcast. For example, if Somers Point wanted to divert traffic away from a massive neighborhood fire, would the billboard stop displaying all of the paying ads and show only the message "avoid Shore Road – fire," for example? Or would it be just one of the 8 second "ads" in the loop? And how is that any more effective than having a police vehicle or emergency management vehicle simply blocking the access to Shore Road at that intersection? The Board clearly was not convinced in any degree that this purpose of the MLUL would be a factor. (1T25) The other testimony Mr. Sciullo provided as to any special reasons was so vague and unsupported by any evidence that it does not warrant further discussion.

In this appeal, Plaintiff argues that "Garden State established that the Property is best suited for the billboard…" (Pb26) That statement, alone, is the sole statement made with respect to how the applicant satisfied the positive criteria. Garden State failed to put on a case to the Board, and it fails to make any substantive argument in

its brief as to the required showing of positive criteria. Plaintiff's argument that there was no expert testimony rebutting Mr. Sciullo at the hearing must fail. The Board can reject expert testimony as long as it is not unreasonable to do so. Kramer, *supra,* 45 N.J. at 288. Plaintiff's comments at Pb26 miss the mark. First, Plaintiff complains that the Board did not explain how other signs in the HC-2 Zone do not have the same effect on the Somers Mansion. It is the applicant's burden to present its case, to explain how other (permitted) signs in the HC-2 Zone have the same effect (if they contend they do) that the digital billboard would have on the 325 year old Somers Mansion across the street.

Plaintiff also misconstrues the Board members' concerns about the impact and effect a huge digital billboard would have on the Somers Mansion. (Pb26) The Board did not apply neighboring zoning purposes to the HC-2 zone; it considered the effect.

Not only did the applicant fail to provide sufficient testimony or evidence to show special reasons to satisfy the positive criteria necessary for the use variance, but Garden State also failed to satisfy either prong of the negative criteria. It is the applicant's burden to present its case to the Board, and the testimony of Mr. Sciullo fell far short of what is required for such a significant use variance in Somers Point. The Board members know that location; they are all familiar with the complexity of this intersection where three roads meet: where, on MacArthur Boulevard, two lanes approaching the intersection branch out to four lanes at the intersection; where one

lane of Shore Road branches into 4 lanes at the intersection; where two lanes from Ocean City branch out to four at the intersection; and where one lane of Mays Landing Road branches out to four at the intersection. The Board members are familiar with all of the businesses on the short stretch of MacArthur Boulevard that have entrances/exits – ingress and egress all near that intersection. The applicant argued that it is a particularly suitable location for a digital billboard regardless of the complexities of the intersection. The Board was not convinced, and its decision was not at all arbitrary, capricious, or unreasonable. The deference accorded to a zoning board's denial of a variance is greater than the deference given to a grant of a variance. CBS Outdoor, Inc. v. Borough of Lebanon Plan. Bd., 414 N.J. Super. 563, 578 (App.Div. 2010).

The use of a digital billboard is so antithetical to the master plan and zoning ordinance, Somers Point undertook its comprehensive review in 2010 and 2011, enacting Ordinance 1-2011 based on the significant concerns for the deleterious effects of billboards on traffic safety and aesthetics in Somers Point. Mr. Sciullo suggested that digital billboards had not been invented when the ordinance was enacted. Digital billboards have been around for decades. The Ordinance was enacted to beef up the prohibition of billboards *because of a digital billboard application* in 2010. Mr. Sciullo testified that the first prong of the negative criteria was satisfied because Garden State was asking to install a 378 square foot billboard

and not a 670 square foot billboard, in a district that limits signs to 48 square feet. (1T27:1-7) The Board did not agree that such a ridiculously characterized accommodation qualified as satisfaction of the first prong of the negative criteria.

As for the 2nd prong of the negative criteria, Mr. Sciullo testified that the massive, prohibited digital billboard would not be inconsistent with the intent of the master plan and zoning ordinance because aesthetics are not an issue with this application. (1T27:17-19) He then misstated the "spirit and intent of the zoning ordinance and master plan [ ] is [ ] to protect the impact of neighboring properties," and that "is met with this application." (Ibid. at 20-22) That was the extent of his inapposite testimony as to the negative impact on the master plan and zoning ordinance. It fell far short of convincing the Board, much less by an "enhanced quality of proof." Garden State argues herein that the negative criteria was satisfied by an enhanced quality of proof because "the surrounding uses and signs establish reconciliation with the zoning." (Pb27)[8] Garden State repeats the false statement that "digital billboards were not in use when the [Ordinance banning billboards] was enacted." As already noted, Somers Point enacted Ordinance 1-2011 in reaction to an application for a digital billboard in 2010, and our own Supreme Court stated that digital billboards have been regulated since 1996. E&J Equities at 561.

[8] At the risk of being repetitive, Garden State did not provide the dimensions or height of any single sign that exists in Somers Point, making this statement absolutely meaningless.

A court's scope of review is to determine whether the board could reasonably have reached its decision on the record. Jock v. Zoning Bd. of Adj., Twp. of Wall, 184 N.J. 562, 597 (2005). It was the application that lacked evidential support in the record. The Board's finding that Garden State failed to satisfy the positive criteria and both prongs of the negative criteria was clearly reasonable, given the scant evidence presented by the applicant. The denial was not arbitrary, capricious, or unreasonable, and it should be affirmed.

2. Garden State did not present a case for a d(1) variance for a second principal use on the Property, nor was Garden State entitled to that d(1) variance

Garden State was put on notice that Somers Point required a second d(1) variance for a second use on the Property several weeks prior to the hearing. (Pa105) At the hearing's outset, counsel for the applicant acknowledged the report, stated it was accurate, and that he had no comment on it. (1T47) It has always been Somers Point's position that there is one principal use permitted on a lot. The regulations use the term "Permitted Uses" because there are a number of uses that are permitted in the district, not because multiple principal uses are permitted on any and every property. To construe the ordinance (e.g., §114-54 which lists all of the permitted uses in that district) as permitting multiple uses on each property is absurd.

If Garden State's interpretation is correct, then a property in the HC-2 district could conceivably have multiple motels, some retail stores, a couple of restaurants

and some banks, so long as they are not taller than 35 feet. Such a reading of Somers Point's development regulations defies logic and common sense. The applicant was on notice that this second d(1) variance was required. If Garden State was so certain of its position that it was not, it had ample opportunity to make its case – both prior to the hearing, and during the hearing. Perhaps counsel for Garden State thought he was winning a game of "hide the ball" by just ignoring it. That is untenable.

A 378 square foot, 45 foot high digital billboard could hardly be considered an accessory use. The principal use of property refers to the predominant use of any lot or parcel. Section 114-4.3 of Somers Point's Code defines "Principal Use" as "The use that constitutes the primary activity, function or purpose to which a parcel of land or a building is put."

Plaintiff's argument that "each code is different and must be interpreted using common canons of statutory construction" (Pb29) misses the point. Somers Point's code, as understood and applied by the Board and its professionals, limits each property to one principal use. Otherwise, each property could have, as just discussed, multiple motels and businesses sited thereon. The plural "purposes" under the "Permitted Uses" in the Code is simply because there are multiple purposes/permitted uses ***allowed in the district, not on each parcel.***

Garden State's argument that "'Signs' are merely denominated as 'permitted uses.'" is a misstatement. (Pb29) Signs are not listed in the "Permitted Uses" section

of the Code. The Code states that certain enumerated signs "shall be permitted." It does not state that signs are a permitted use.

When interpreting statutes or zoning ordinances, courts seek a reading that will not turn on literalisms, but on the breadth of the objectives of the legislation and the common sense of the situation. Sun Co., Inc. v. Zoning Bd. of Adjustment of the Borough of Avalon, 286 N.J. Super. 440, 445 (App.Div. 1996)(citations and internal quotation marks omitted). There are only two kinds of uses herein, to wit, principal uses and accessory uses. There are permitted uses, conditional uses, and prohibited uses. Billboards, 378 square feet in area, and 45 feet tall, cannot be considered an accessory use. Simply because it is not a listed permitted use does not change its status from a principal use (if permitted) to an accessory use, or not a "use" at all. If permitted, it would be a principal use; and to allow multiple principal uses on a single property would be allowing, as the Sun Court noted, mixed uses without the need for a variance, which the Court found untenable. Id. at 446. As the Court noted, such a configuration would hardly comport with usual zoning principles. Id. at 447.

B. Garden State Was Not Entitled to the Height Variance

Mr. Sciullo failed to present any evidence whatsoever in support of a height variance. In fact, the only mention he gave of a height variance was at the outset of his testimony where he acknowledged the need for one. (1T16:8) Mr. Sciullo failed to proffer a single number/height in feet/size in area for a single sign existing in

Somers Point. The *only* dimensions he proffered to the Board were the height and area of the billboard. Garden State's argument at Pb28 that it established it was entitled to a height variance because they established that it was no higher than it needed to be is irrelevant. Its argument that the billboard is "only slightly higher than permitted signage in the HC-2 Zone" is a blatant misstatement. Permitted sign height in Somers Point is 25 feet; the billboard would be 45 feet. Under no interpretation of the English language can it be said that a 45 foot tall billboard is "only slightly higher than 25 feet." The application was substantially deficient in offering any evidence in support of the height variance; Plaintiff's brief in this appeal is substantially deficient in making a plausible argument for the height variance, which the Board reasonably denied.

C. Garden State Was Not Entitled to the Bulk Variances

The applicant gave even less attention to the bulk variances than it did the height variance. Garden State did not even address the side yard setback variance it needed. Garden State did not acknowledge that the Board Engineer's report stated the need for a side setback variance. Plaintiff argues herein that they only needed a front setback variance, and only because the sign is 4 feet from the front property line, but the column holding it does not need the variance. (Pb28) This, too, is a blatant misstatement. The Board Engineer's report (Pa105) clearly notes that the building is set back 27 feet where 50 feet is required, and the column holding the

billboard would be right next to the front corner of the building. Thus, a front setback variance would also be required for the column.

Plaintiff's is correct that the bulk variances would be subsumed in the use variance (if granted), but the bulk variances are factors that the Board needs to consider in deciding the application. It is true that "c" variances are subsumed in the "d" variance, Puleio v. North Brunswick Tp. Bd. of Adjustment, 375 N.J. Super. 613, 621 (App.Div. 2005), and would have been if the Board had granted the use variances. What is troubling is the complete lack of regard the applicant gave to the regulations, the variance requirements, the Board engineer's report, and the concerns of the Board members in its presentation. That lack of regard is indicative of the shortcomings of the entire presentation and application.

CONCLUSION

For all the foregoing reasons, the trial court's well-reasoned holdings affirming the constitutionality of Somers Point's Ordinance banning billboards and the Zoning Board's denial of Garden State's application for use variances and bulk variances should be upheld. The Somers Point Defendants respectfully urge the Court to deny this appeal.

Respectfully submitted,

Thomas G. Smith, Esquire
Attorney for Somers Point Defendants

Dated: July 31, 2025

JUSTIN D. SANTAGATA, ESQ. (NJ ID 000822009)
COOPER LEVENSON
1125 Atlantic Avenue
Third Floor
Atlantic City, NJ 08401
P: 609-247-3121
E: jsantagata@cooperlevenson.com

GARDEN STATE OUTDOOR LLC, Plaintiff- Appellant, v. CITY OF SOMERS POINT AND CITY OF SOMERS POINT ZONING BOARD, Defendant - Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-0346-24T2 ON APPEAL FROM: NEW JERSEY SUPERIOR COURT LAW DIVISION ATLANTIC VICINAGE DOCKET NO.: ATL-L-143-23 SAT BELOW: Hon. Dean R. Marcolongo, J.S.C.

APPELLANT GARDEN STATE OUTDOOR LLC'S REPLY BRIEF

Dated: August 12, 2025

On the brief: Justin D. Santagata, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Authority

INTRODUCTION

This is Appellant Garden State Outdoor LLC's ("**Garden State**") reply brief challenging Defendant Somers Point's absolute ban on off-premises speech ("**Ban**") and Defendant Somers Point Zoning Board's ("**Board**") denial of related variance relief. The fundamental problem with Somers Point's opposition is that it does not know what it wants to be. Is the Ban content-neutral? Or is it content-based? Somers Point says it is *both*. But it cannot be both. The Ban should be struck down. Somers Point cannot choose what interpretation it wants depending on which it perceives to be most advantageous at any given moment.

I. Somers Point's record for the Ban does not justify "safety" as a substantial interest

In defending the Ban, Somers Point argues that the record from when the Ban was passed in 2011 is sufficient to defend it, even after E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 584–585 (2016). Hypothetically, this could be true, but it is not true here.

First, as a factual matter, there is no competent evidence justifying "safety" as a substantial interest. The record of passage of the Ban is replete with reliance on aesthetics, but its references to "safety" are just that— references. There is no competent evidence. While Somers Point made a game effort to make it look like a record existed on "safety," none of the "studies" referred to in the "log" of the record on the Ban are actually part of this record. (Pa219.) The only report in the record

references only a single study from *2006*: "The Impact of Driver Inattention on Near-Cras/Crash Risk…" (Pa226.) While the "report" says "billboards are distracting, not just for their visual landscape but they are a safety hazard," the study does not *say that*. Compare Pa226 with "Impact of Driver Inattention…," NTSB (April 2006), available at https://vtechworks.lib.vt.edu/bitstreams/209da0c9-e260-4748-8896-23f6bd14ed01/download. Instead, the study analyzes tens of variables contributing to potential "driver inattention," attributing "non-specific eyeglance" *for any reason* as two-percent or less contributing to crash/near-crash.

Of course, ten years later in E&J Equities, the New Jersey Supreme Court said there was a "considerable body of literature discussing the impact, or lack thereof, of digital billboards on traffic safety" and referenced more recent studies "over the last six years" as supporting that billboards are safe. E&J Equities, supra at 584. The point being: even if one study from 2006 was sufficient in 2011, it is not sufficient now, where the evidence is even more overwhelming that billboards are safe.

Adding to the staleness of the record of the Ban is that multiple studies listed in the "log" do not appear to support that billboards are unsafe and they appear, instead, to be cited to create the patina of "evidence" by *just having citations*. Their dates are often notably left out. (Pa219.) But pulling any of these studies at random yields almost no useful information on the safety of billboards at the time of the Ban. For example, the "Final Report on the Minnesota Roadside Study" is from 1947 and

does not address billboards. See https://onlinepubs.trb.org/Onlinepubs/hrbbulletin/55/55-002.pdf. "Highway Accidents in Relation to Roadside Business and Advertising" is from 1940. See https://onlinepubs.trb.org/Onlinepubs/hrbbulletin/30/30-004.pdf. The point should be obvious: none of this represents current evidence or even *reasonably current*. It is a façade.

Second, Garden State presented expert testimony to the Board that billboards were only potentially "unsafe" if they were so small so as to make drivers squint or exert extra effort to read them. (1T:11.) The same expert testified that "there's already a DOT permit…and their entire existence is based on public safety related to traffic…" (1T:18.)

Somers Point acknowledges Garden State's expert relied on later studies than those relied on for the Ban (Db23) and remarks that the expert did not actually submit any studies to the Board. The expert, however, was permitted to testify based on other studies without admitting them. See e.g. Macaluso v. Pleskin, 329 N.J.Super. 346, 355–356 (App. Div. 2000).

Somers Point then argues, in passing, that somehow Garden State had an obligation to create a record of "safety" before the Board *for use in any subsequent challenge on the constitutionality of the Ban*. (Db24, 27.) This is clearly wrong. Garden State's evidence was for the application and constitutionality should not be

argued to and cannot be determined by the Board. Ring v. Mayor & Council of Borough of Rutherford, 110 N.J.Super. 441, 446 (App. Div. 1970). The trial court must "receive [the] evidence." Id.

II. Somers Point has no idea whether the Ban is content-neutral or how to interpret its own Ban

Somers Point twists itself in knots arguing the Ban is content-neutral and then citing content-based exceptions to argue the Ban is not overly restrictive. Then Somers Point adds interpretations to the Ban that are defied by its plain language, such as the size of "non-commercial messages" that can appear on permitted signage.

First, if Somers Point's arguments are to be accepted, the Ban has no resemblance *at all* to the Supreme Court's acceptance of content-neutral in City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 71 (2022), where the municipality banned all off-premises speech *without exception*. Once exceptions are created, the Ban is clearly content-based. See id. ("unlike the sign code at issue in *Reed*, however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment").

Second, Somers Point's interpretation of the Ban is remarkable beyond its inability to distinguish between content-neutral and content-based. The Ban clearly contains specific size limitations for "non-commercial messages": "not exceeding four square feet in size…" (Pa59.) Thus, Somers Point's argument to the contrary is

an attempt to save the Ban because it recognizes that, on its face, it is too restrictive as to "non-commercial messages."

While it is true that certain provisions of the Ban appear to permit "non-commercial messages" to a larger extent, as Garden State acknowledged in its merits brief, the provisions are simply in total contradiction to one another, as already set forth, allowing Somers Point to pick and choose what it wants to "apply" at any given time. And statements at the 2011 hearing on the Ban certainly do not support the interpretation that Somers Point is taking now: "the existing ordinance has a prohibition against those and this ordinance doesn't change that [electronic changing messages/LCD/LED]" (Pa241); "maintain those signs and types of posted signs that had been prohibited" (Pa240).

Somers Point's inconsistent position on interpretation of the Ban is not a small matter here. It is actually central to the constitutional problem because "it is open to the kind of arbitrary application that the Supreme Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981). One day, the Ban is content-neutral and no off-premises speech is permitted; another day it is content-based but permissible when a local business owner wants to put up a

"non-commercial message." It would be different if Somers Point defended the Ban as content-based, but Somers Point is unwilling to do that and wants it both ways.

At a minimum, this issue warranted a plenary hearing to review Somers Point's history of interpreting and applying the Ban because "[u]ltimately, what will be constitutionally sufficient will depend upon an exquisite exercise of judicial authority, guided by the fundamental principles embodied in the First Amendment." Borough of Sayreville v. 35 Club L.L.C., 208 N.J. 491, 512 (2012).

For example, if Somers Point's content-based interpretation were accepted, the trial court would have to determine whether the content-based application was purely "commercial," which is a different First Amendment analysis than "non-commercial." See E&J Equities, 226 N.J. at 569. True to form, the Ban is not a model of clarity on this question. The definition of "commercial message" is not "solely" economic, as required to be deemed "commercial speech" under the First Amendment. Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 265 (1998). It includes any "indirect[] names, advertises, or calls attention" and includes any "service." (App50.)

III. For the same reason, a plenary hearing was necessary on narrow tailoring

For the reasons above, and already set forth, a plenary hearing was necessary on the related issue of narrow tailoring. This incorporates not just Somers Point's interpretative spasms, but a comparison between what is permitted for on-premises

speech and what is purportedly banned as to off-premises speech. See e.g. E&J Equities, 226 N.J. at 583. The trial court did not engage in this analysis. It is possible that what Somers Point permits and what it "bans" are in harmony; it is more likely, however, that there is disharmony and sufficient conflict to strike down the Ban. See e.g. id. ("the record provides no basis to discern how three static billboards are more aesthetically palatable than a single digital billboard"). This is the "secondary effects" problem highlighted in Garden State's merits brief: what are the undesirable secondary effects of off-premises speech that are not the same as on-premises speech?

IV. Somers Point misunderstands the requirement of alternative channels

In arguing that alternative channels hypothetically exist as alternatives to a billboard (or some off-premises speech), Somers Point inadvertently establishes why the trial court erred.

First, it was Somers Point's burden to prove, with evidence, such alternatives. See Twp. of Saddle Brook v. A.B. Fam. Ctr., Inc., 156 N.J. 587, 597, 722 A.2d 530, 536 (1999) ("Township should bear the burden of proving the adequacy of available alternative avenues of communication"). There was none submitted. This is undisputed.

Second, Somers Point bizarrely misunderstands "internet advertising" with "googling." (Pa35.) "Internet advertising" is pop-up adds that are essentially the

online equivalent of billboards. These, however, are not triggered by physical location, like a billboard, but by scrolling online. See generally 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F.Supp. 2d 273, 283 (D.N.J. 2006) (explaining generally how pop-up advertisements work). Taken literally, Somers Point is apparently arguing that drivers should be googling local businesses while driving, which is an illegal offense. N.J.S.A. 39:4-97.4. This type of random-thought argument is exactly why a plenary hearing was necessary. What reasonable alternative channels are available? How do they compare? What do they require? See id. ("relevant market area"). If randomly saying "the internet" were sufficient, reasonable alternative channels would not be an element at all of time/place/manner regulation, *but it is*. For example, in Elray Outdoor Corp. v. Bd. of Adjustment of Englewood, 2009 N.J.Super.Unpub.LEXIS 2378 at *22 (App. Div. Sep. 8, 2009), this Court held that the municipality failed to meet its burden to establish the reasonableness of the "relative costs and efficiency of the alternate means suggested."

V. It has long been well-settled that the Board cannot "fix" its deficient resolution through citing comments from a hearing

Somers Point's defense of the denial of the application does not warrant extensive review because remand is so obviously required. The defense relies entirely on the comments of Board members, not the resolution. This Court has long rejected this practice. N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J.Super. 319, 334 (App. Div. 2004).

CONCLUSION

At a minimum, this matter should be remanded for a plenary hearing. Somers Point was unfortunately permitted by the trial court to substitute supposition and wild hypotheticals for competent evidence on the Ban.

Respectfully submitted,

/S/

JUSTIN D. SANTAGATA