

JD JAMESTOWNE, LLC,

Plaintiff-Appellant,

vs.

**TOMS RIVER TOWNSHIP ZONING
BOARD OF ADJUSTMENT,**

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000937-23T4

CIVIL ACTION

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY: LAW DIVISION
DOCKET NO.: OCN-L-1309-22

SAT BELOW:
HON. FRANCIS R. HODGSON,
A.J.S.C.

**BRIEF ON BEHALF OF PLAINTIFF-APPELLANT
JD JAMESTOWNE, LLC**

**MONTENEGRO, THOMPSON,
MONTENEGRO & GENZ, P.C.**
531 Burnt Tavern Road
Brick, NJ 08724
(732) 295-4500
bmontenegro@mtmglaw.com
Attorneys for Plaintiff

Ben A. Montenegro, Esq.
Attorney ID# 028091996
Ryan M. Amberger, Esq.
Attorney ID# 113632015
On the Brief

TABLE OF CONTENTS

PROCEDURAL HISTORY1

STATEMENT OF FACTS 2

LEGAL ARGUMENT16

 POINT I

 THE TRIAL COURT ERRED IN CONCLUDING THAT THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS AND UNREASONABLE, AND WAS SUPPORTED BY THE SUBSTANTIAL CREDIBLE EVIDENCE OF RECORD. (2T41 to 71)16

 A. Density Variance17

 B. Bulk Variances32

 C. Improper Considerations35

CONCLUSION36

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Written Decision, dated April 5, 2023Pa72

Final Order, dated April 10, 2023Pa102

Order Dismissing Plaintiff's Complaint
with Prejudice, dated October 27, 2023Pa104

TABLE OF CITATIONS

Cases

Anastasio v. Planning Bd. of Tp. of West Orange,
209 N.J. Super. 499, 522 (App. Div.),
cert. denied 107 N.J. 46 (1986)16

Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment,
172 N.J. 75, 89 (2002)17, 18

Grasso v. Borough of Spring Lake Heights,
375 N.J. Super. 41, 48-49 (App. Div. 2004)18, 20

Grubbs v. Slothower, 389 N.J. Super. 377, 388
(App. Div. 2007)19, 20, 22, 28, 29, 30, 31

Medici v. BPR Co., 107 N.J. 1 (1987)19, 20

Rowatti v. Gonchar, 101 N.J. 1, 50-51 (1985)
.....17

Ten Stary Dom Ptp. v. Mauro, 216 N.J. 16, 30 (2013)32,33

Statutes

N.J.S.A. 40:55D-220, 23, 25, 33

N.J.S.A. 40:55D-70(c) (2)32

N.J.S.A. 40:55D-70(d) (5)3, 17, 19

APPELLANT'S APPENDIX TABLE OF CONTENTS

Resolution of Denial (2022-23) by the Toms River
Zoning Board of Adjustment, dated April 28, 2022Pa1

Amended Resolution of Denial (2023-37) by the
Toms River Zoning Board of Adjustment, dated June 8, 2023 ..Pa16

JD Jamestowne, LLC Site Plans, dated January 13, 2022Pa45

Complaint in Lieu of Prerogative Writs,
dated June 21, 2022Pa49

Answer to Complaint in Lieu of Prerogative Writs,
dated July 21, 2022Pa61

Pretrial Order, dated September 15, 2022Pa69

Written Decision, dated April 5, 2023Pa72

Final Order, dated April 10, 2023Pa102

Order After Status Conference, dated July 31, 2022Pa103

Order Dismissing Plaintiff's Complaint
with Prejudice, dated October 27, 2023Pa104

Zoning Board Hearing Transcript, September 9, 2021Pa105

Zoning Board Hearing Transcript, December 9, 2021Pa227

Zoning Board Hearing Transcript, January 27, 2022Pa321

Zoning Board Hearing Transcript, March 24, 2022Pa468

Notice of Appeal, dated November 29, 2023Pa495

Certification of Transcript Completion and DeliveryPa499

PROCEDURAL HISTORY

Plaintiff, JD Jamestowne, LLC (hereinafter "Plaintiff" or "JD Jamestowne"), filed an application for development (the "Application") with Defendant, Toms River Township Zoning Board of Adjustment (hereinafter "Defendant" or the "Board"), seeking approval of a d(5) density variance, lot consolidation, preliminary major site plan approval, along with variance and design exception relief for property designated as Block 610, Lots 1, 2, 3, 5, 11, 30, 31 and 33 on the official Tax Map of the Township of Toms River. (Pa2).

The Board held public hearings on the application on September 9, 2021, December 9, 2021, January 27, 2022 and March 24, 2022. (Pa5). At said hearings Plaintiff presented witnesses and evidence to the Board in support of the application. On April 28, 2022, the Board adopted a written Resolution denying the Application. (Pa1-15).

On June 21, 2022, Plaintiff filed a Complaint in Lieu of Prerogative Writs challenging the denial of the Application. (Pa49-60). On July 21, 2022, the Board filed an Answer to the Complaint in Lieu of Prerogative Writs. (Pa61-68). A pretrial conference was held before the Honorable Marlene Lynch Ford, A.J.S.C. on September 15, 2022. (Pa69). On September 15, 2022, Judge Ford issued a Pretrial Order scheduling trial for January 23, 2022. (Pa69-71).

Trial was ultimately held before the Honorable Francis R. Hodgson, Jr., A.J.S.C. on March 20, 2023. (1T).¹ On April 10, 2023, Judge Hodgson issued an Order remanding the matter back to the Board to articulate its findings and to adopt a resolution consistent with the opinion. (Pa102). On June 9, 2023, the Board issued an Amended Resolution of Denial. (Pa16-44).

A Case Management Conference was held on July 31, 2023. (Pa103). Thereafter, Judge Hodgson issued a Case Management Order permitting the parties to submit updated trial briefs and scheduling trial for October 27, 2023. (Pa103; 2T). On October 27, 2023, Judge Hodgson issued an Order dismissing Plaintiff's Complaint with prejudice. (Pa104). Thereafter, on November 29, 2023, Plaintiff filed a Notice of Appeal appealing that Order. (Pa495-498).

STATEMENT OF FACTS

Plaintiff is the owner of property commonly known as Jamestowne Village Apartment Complex located at Walnut Street & James Street, Toms River, New Jersey 08753 and identified as Block 610, Lots 1, 2, 3, 5, 11, 30, 31 and 33 on the Tax Map of the Township of Toms River (the "Property"). (Pa2). The Property is primarily located in the EMF-18 Existing Multi-Family Zone,

¹ 1T refers to the Transcript of Trial dated March 20, 2023.

2T refers to the Transcript of Trial dated October 27, 2023.

with some portions located in the MF-8 Multi-Family Zone. The Property is comprised of approximately 17.9 acres. (Pa109).

The Property is currently improved with 18 apartment buildings with 266 units. (Pa6). Lots 2 and 5 were subsequently acquired by Plaintiff and are currently vacant. (Pa109). Plaintiff filed an application for development with the Toms River Zoning Board of Adjustment ("Board") seeking approval of a density variance pursuant to N.J.S.A. 40:55D-70(d)(5), lot consolidation, preliminary major site plan approval, along with variance and design exception relief to construct six (6) new apartment buildings, and new parking and driveways at the site (the "Application"). (Pa2-6).

Specifically, the requested d(5) density variance sought approval of 20 units per acre, where the maximum permitted density is 18 units per acre (319 units total). (Pa2). Currently, the property consists of 266 units so there is a 53-unit deficit between what is permitted and currently exists. Therefore, the d(5) density variance only pertains to the addition of the 47 units over and above the permitted amount of 319 units. (Pa389).

In addition to the D(5) density variance, the Application sought the following variance and design exception relief (Pa2-4):

- a. A bulk variance for a 9.6' buffer area width, whereas a minimum buffer width shall be 20' permitted, pursuant to Section 348-8.4A(1) of the Township Land Development Ordinance (the "Ordinance");
- b. A Variance for noncompliance to Section 348-8.4A(4) of the Ordinance which states no structure, activity, storage of materials or parking of vehicles shall be permitted within the buffer area, except that where permitted by the board of jurisdiction the buffer area may be broken for vehicular or pedestrian access and appropriate directional and safety signs provided;
- c. A bulk variance for 26' between buildings with windows, whereas, a minimum of 60' is required, pursuant to Section 348-8.18C(3) of the Ordinance;
- d. A bulk variance for a principal building length of 256', whereas, a maximum length for a principal building of 175' is required, pursuant to Section 348-8.18E of the Ordinance;
- e. A bulk variance for a multifamily dwelling setback from accessory drive and internal roadways of 25.9', whereas, a minimum of 35' is required, pursuant to Section 348-8.18G of the Ordinance;
- f. A bulk variance for a principal building setback from parking area of 10', whereas, a minimum of 20' is required, pursuant to Section 348-8.18H of the Ordinance;
- g. A bulk variance to Section 348-8.18M of the Ordinance stating a "Building must have no more than two dwelling units in a line without setbacks and/or breaks in building elevation of at least five feet", whereas none are provided;
- h. A bulk variance to Section 348-8.201(1) of the Ordinance stating "Parking not permitted in front yard setback in residential zones for other than single and two family uses," whereas, on this application parking is proposed in the front yard for multifamily uses;
- i. A bulk variance for 573 on-site parking spaces, whereas, the minimum required on-site parking spaces

is 671, pursuant to Section 348-8.200(15) of the Ordinance;

- j. A Design Exception for sidewalks to be constructed on only one side of the internal streets, whereas, sidewalks must be constructed on both sides of all internal streets, pursuant to Section 348-8.25A(1) of the Ordinance;
- k. A Design Exception for 4 drives located on Walnut Street and 3 drives on James Street, whereas, not more than one two-way access drive shall be permitted on any street, pursuant to Section 348-8.2043);
- l. A Design Exception for providing dead end parking circulation, whereas dead end parking circulation aisles are prohibited, pursuant to Section 348-8.20J(7);
- m. A Design Exception for an existing condition where 0 feet of space is provided for islands separating parking stalls from circulation and entrances/exit drives, whereas parking lots having 50 or less spaces shall have 10' wide islands separating parking stalls from circulation and entrances/exit drives, pursuant to Section 348-820J(8);
- n. A Design Exception for 4 entrances proposed for Walnut Street (1191.81' of frontage) and 3 exist/proposed for James Street (567.63'), whereas, parking lots which have a capacity for parking more than 50 vehicles located on properties having a frontage in excess of 500' on any one street, shall be permitted two-way and one-way access drives providing for not more than two entrance and two exit movements on the street. Properties having a frontage in excess of 1,000' on any one street may be permitted to have additional access drives subject to the approval of the Zoning Board of Adjustment, pursuant to Section 348-8.20K(8);
- o. A Design Exception for non-compliance of all entrance drives extending a minimum distance of 100' back from the street curb line or to an access aisle, pursuant to Section 348-8.20K(2);
- p. A Design Exception for non-compliance of all exit drives extending a minimum distance of 60' back from

the street curb or to a major access aisle, pursuant to Section 348-8.20K(3);

- q. A Design Exception for non-compliance of having no parking stalls utilize the required entrance and exit drives or major circulation drives as access aisles, pursuant to Section 348-8.20K(4);
- r. A Design Exception for not having a five-foot minimum width landscaping area provided along the fence or wall enclosing the refuse storage area and showing the landscaping to be provided on the site plan submitted for Zoning Board of Adjustment approval, pursuant to Section 348-8.27C; and
- s. A Design Exception for non-compliance with the requirement of having all areas of the site not occupied by buildings, pavement, sidewalks, required screening, required parking area landscaping, required safety islands or other required improvements shall be landscaped by the planting of grass or other ground cover acceptable to the Zoning Board of Adjustment and a minimum of two shrubs and one tree for each 250 square feet of open space. For this application the required number of shrubs and trees are not provided. Pursuant to Section 348-8.4C (8).

Furthermore, the Application sought approval of the following existing legal nonconforming conditions (Pa4-5):

- a. Principal buildings shall not exceed 175' in length, whereas, an existing building is 384.8' in length;
- b. The multifamily dwelling setback from an accessory drive and internal roadways is required to be 35', whereas, 10.5' exists currently;
- c. The principal building setback from the parking area is required to be 20', whereas, 11' exists currently;
- d. Building must have no more than two dwelling units in a line without setbacks and/or breaks in building elevation of at least five feet, whereas, none are provided on the property currently;

- e. Parking not permitted in front yard setback in residential zones for other than single and two family uses, whereas, parking is proposed and currently present in the front yard for multifamily uses;
- f. Minimum required on-site parking is 488 parking spaces, whereas, currently there are 390 on-site parking spaces;
- g. 250 square feet of active recreation area must be provided per dwelling unit (required 66,500 square feet of active recreation area, whereas, 56,163 square feet of active recreation area is provided);
- h. Sidewalks must be constructed on both sides of all internal streets, whereas sidewalks are only constructed on one side of the internal streets;
- i. Not more than one two-way access drive or two one-way access drives shall be permitted on any street, whereas, 4 drives are located on Walnut Street and 3 drives are located on James Street currently;
- j. For parking lots having 50 or less spaces, islands separating parking stalls from circulation and entrances/exit drives shall be at least 10' wide, whereas, 0' are provided currently;
- k. Parking lots, which have a capacity for parking more than 50 vehicles located on properties having a frontage in excess of 500' on any one street, shall be permitted two-way and one-way access drives providing for not more than two entrance and two exit movements on the street. Properties having a frontage in excess of 1,000' on any one street may be permitted to have additional access drives subject to the approval of the Zoning Board of Adjustment. Whereas, 4 entrances are proposed for Walnut Street (1,191.17' of frontage) and 3 exists/are proposed for James Street (777.25' of frontage);
- l. All areas of the site not occupied by buildings, pavement, sidewalks, required screening, required parking area landscaping, required safety islands or other required improvements shall be landscaped by the planting of grass or other ground cover acceptable to the Zoning Board of Adjustment and a minimum of two

shrubs and one tree for each 250 square feet of open space, whereas, currently the property does not comply with this requirement;

- m. Dead-end parking circulation aisles do not provide continuous flow through the parking field/area is prohibited, whereas, currently the property does not comply with this requirement; and
- n. The width of the buffer area shall be 20', whereas, the current width of the buffer area is 9.6'.

Plaintiff presented the Application to Defendant Board over the course of four public hearings on September 9, 2021, December 9, 2021, January 27, 2022 and March 24, 2022. (Pa105-Pa494).

Plaintiff presented the testimony of its civil engineer and professional planner, Matthew Seckler, PE, PP, PTOE of Stonefield Engineering & Design, LLC, and its licensed architect, Matthew Evans, AIA of Evans Architects.

In addition, the current property manager of the apartment complex, Karen Palmer, also testified. Plaintiff's experts testified that the final proposal was to construct six (6) new multi-family buildings. (Pa6). This would include 100 new units (88-1 bedroom units, 8-2 bedroom units and 4-3 bedroom units), bringing the total number of units on the property to 366 (where 266 currently exist and 319 is permitted) (Pa6). Applicant initially sought approval for 138 total units but reduced same to 366 units to address concerns of the Board and its professionals. (Pa233).

A final proposed Site Plan, last revised on January 13, 2022, was submitted to the Board depicting the proposed locations of the new buildings. (Pa45-48). Multiple times throughout the application process and hearings, Plaintiff committed to complying with the Township's Mandatory Affordable Housing Set-Aside Ordinance and as such the requisite number of units in the proposed development would be allocated as "affordable" units per the Township Code, accomplishing a significant zoning and planning benefit for the Township. All of the 2-bedroom and 3-bedroom units are to be designated as affordable housing in accordance with COAH requirements. (Pa352).

The proposed improvements include modifications to existing parking lots and three new parking lots bringing the total number of proposed parking spaces on the site to 573 (where 671 would be the minimum amount required under the Residential Site Improvement Standards (RSIS) if the new proposed units were developed). (Pa6). Currently there are 388 parking spots in the complex, where 488 is required under the RSIS. (Pa252). Therefore, currently 79.5% of the required parking in the complex exists and the application would maintain 79.5% of the required parking with the additional development. (Pa252).

However, the existing parking ratio of 1.46 parking spaces per unit would actually be increased to 1.56 spaces per unit.

(Pa387). Karen Palmer, who has been the property manager at the site since 2016, also testified regarding the procedures for issuing parking decals. (Pa333). In addition, Ms. Palmer confirmed that since she began as property manager in 2016, she has never observed any parking issues or operational issues with parking; specifically stating that there is plenty of parking on the site and they have never received a complaint from a tenant regarding lack of parking. (Pa334).

Furthermore, Plaintiff's traffic experts testified that the improvements would only increase traffic on average to about one new car every minute spread out amongst the whole complex.

(Pa225). The application also provides for seven proposed trash enclosures, as well as upgrading the existing trash enclosures, which are currently not fully enclosed, to provide new fencing and screening. (Pa354). The application also provides for an increase in the amount of courtyard area, additional concrete sidewalks, landscaping, lighting and four underground stormwater management systems. (Pa6).

In addition, the application ensured that 42.4 percent of the site would remain as open space, including courtyards, recreation areas, and passive grassy areas, whereas only 20 percent of open space is required. (Pa364). Plaintiff's professional engineer and planner, Mr. Seckler, went through the requested variances in detail before the Board. (Pa384 to

Pa401). Mr. Seckler made clear that the vast majority of the variances being sought "are for existing buildings in existing conditions that are unrelated to the proposed buildings that were added to this site." (Pa385).

For instance, the variance for buffer width, where 20 feet is required and 9.6 feet is provided relates to the existing lack of buffer area on the western side of the property that has been in that condition for almost 50 years. (Pa385). The variance requested regarding structures located within a buffer also relates to an existing condition. (Pa385).

Regarding maximum length of buildings, the Application sought a variance for a proposed 256 long building, whereas a 348.8 long building is already existing on the site. (Pa385-386). In addition, the requested variances related to multifamily dwelling setbacks from internal roadways, principal building setbacks from parking areas, dwelling units in a line without a setback, and parking in front yard setbacks are all conditions that currently exist on the site, and some of those existing conditions are more significant variances than those requested in the Application. (Pa386).

Regarding the variance for minimum parking spaces, the Application would bring the site into closer compliance with RSIS parking requirements, as it would increase the 1.46 parking space per unit ratio to 1.56. (Pa387). Mr. Seckler closed his

analysis of the requested variances by reviewing the primary request in the application, i.e., the requested d(5) density variance to permit 20 units per acre, whereby 18 units per acre is required. (Pa389 to Pa401).

Mr. Seckler testified that in order to determine whether a d(5) density variance should be granted, a Board needs to consider the factors showing whether the site is capable of supporting the additional density. (Pa389). It must be noted that the proposed additional density in the Application is the addition of 47 units, as 100 new units are proposed, but the existing site is currently 53 units short of the maximum permitted amount.

Mr. Seckler testified that water and sewer infrastructure on site are sufficient to support the addition of 47 more units. (Pa389). Mr. Seckler testified that the enhancements to the current garbage refuse areas coupled with the addition of seven new garbage refuse areas will be capable of handling the increase in garbage from the additional 47 units beyond the permitted amount. (Pa390). Mr. Seckler testified that the recreational area on site provides enough square footage to account for the additional units and that Plaintiff had committed to working with the Board when seeking final approval to finalize the design of recreational areas to suit the residents. (Pa389 to Pa390).

Furthermore, Mr. Seckler testified that the site is capable of handling the additional parking needs and the traffic generated by the addition of the 47 units. (Pa391 to Pa392). Specifically, Plaintiff's traffic study considered the addition of the 100 proposed new units and determined that the site is capable of handling the increased traffic, which comes out to be about one new car every three minutes. (Pa392 to Pa393).

Mr. Seckler also pointed out that one of the other positive elements of the Application is that it will be providing the required 15% of affordable housing to the site, whereas currently there is no affordable housing on site, which helps move the site closer to compliance than it is today. (Pa394 to Pa395). Mr. Seckler opined that he did not see any negatives to the application and that locating needed housing developments, including affordable housing, in existing residential areas capable of handling increased density is a preferred method than locating such housing in farmlands or other undeveloped areas. (Pa396 to Pa397). Furthermore, the intent of the application was to maintain the existing style of the site and compliments the existing development, as opposed to bringing in something different. (Pa397).

The Application also proposed to provide upgrades to the stormwater management system adopting the latest NJDEP standards. (Pa397 to Pa398). Mr. Seckler testified that the

Application is not detrimental to the zone plan or master plan. (Pa399). No expert testimony was presented by the Board's professionals, or any interested party, contrary to the evidence presented by Plaintiff's professionals.

After Plaintiff's summation at the final hearing, the Board did not have any meaningful discussions or deliberations, and went right into the vote. (Pa484 to Pa492). The Board members failed to properly consider the expert testimony presented by Plaintiffs and simply summarily dismissed the testimony. Some of the Board members listed some of the aspects of the Application that they did not like; however, none of the Board members specifically considered whether the variances requested satisfied the positive or negative criteria.

In addition, none of the Board members specifically analyzed the requested d(5) density variance by applying the relevant positive criteria (special reasons) or negative criteria. Furthermore, the Board improperly considered off-site projects and hypothetical scenarios from those projects without any evidence regarding same in rejecting the Application.

This included discussion of an apparent "major redevelopment" in town unrelated to this application. (Pa294 to Pa287). This also included concerns about traffic from a Veterans Affairs clinic potentially being developed in the area. (Pa489). It also included further concerns about "horrendous

traffic" that was completely contrary to the evidence presented. (Pa491).

In addition, there were unsubstantiated concerns about the drainage system potentially failing at some point that was cited as support for voting against the Application. (4T23-9 to 25). Furthermore, Board members inaccurately referred to the Application as an expansion of a non-conforming use and cited that as a reason for voting against the Application. (Pa484; Pa492)

Ultimately, the Board voted to deny the Application by a vote of seven (7) in favor and zero (0) against. (Pa488 to Pa492). On April 28, 2022, the Board adopted a written resolution denying the Application. (Pa44). On June 21, 2022, Plaintiff filed a Complaint in Lieu of Prerogative Writs challenging the denial of the Application on the grounds that the denial was arbitrary, capricious and unreasonable, and that the Board adopted a legally deficient Resolution. (Pa49 to Pa58).

On August 5, 2023, Judge Hodgson issued a written decision determining that the Board's Resolution was legally deficient without specifying the analysis undertaken by the Board in denying the application. (Pa72 to Pa101). Therefore, Judge Hodgson remanded the matter back to the Board to adopt a legally sufficient Resolution to properly articulate its findings and

reasoning, while retaining jurisdiction on the alternate merits of the case. (Pa101).

On June 9, 2023, the Board issued an Amended Resolution of Denial. (Pa16 to Pa44).

On June 9, 2023, the Board issued an Amended Resolution of Denial. (Pa16 to Pa44). The merits of Plaintiff's Complaint were reheard by Judge Hodgson on October 27, 2023. (Pa104). On October 27, 2023, Judge Hodgson issued an Order dismissing Plaintiff's Complaint with prejudice. (Pa104).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN CONCLUDING THAT THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS AND UNREASONABLE, AND WAS SUPPORTED BY THE SUBSTANTIAL CREDIBLE EVIDENCE OF RECORD. (2T41 to 71).

When reviewing a trial court's decision regarding the validity of a local board's determination, the Appellate Division is bound by the same standards as was the trial court. Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). The courts give deference to the actions and factual findings of local boards and may not disturb such findings unless they were arbitrary, capricious or unreasonable. Id. at 560.

In Anastasio v. Planning Bd. of Tp. of West Orange, 209 N.J. Super. 499, 522 (App. Div.), cert. denied 107 N.J. 46

(1986), the court noted that while the words "arbitrary and capricious" may sound harsh, they are simply the standard of appellate review for local government action. Rather the arbitrary and capricious standard is analogous to the "substantial evidence" standard; i.e., whether there was sufficient credible evidence to support the ultimate decision. Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 89 (2002) (citing Rowatti v. Gonchar, 101 N.J. 1, 50-51 (1985)).

Furthermore, a local board's "legal determinations are not entitled to a presumption of validity and are subject to the de novo review." Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 197 (App. Div. 2009). In other words, a "trial court's interpretation of the law and the legal consequences that flow from the established facts are not entitled to any special deference." Manalapan Realty v. Township Committee of Manalapan, 140 N.J. 366, 378 (1995).

A. Density Variance

The substantial credible evidence of record does not support the Board's denial of Plaintiff's application for density variance relief pursuant to N.J.S.A. 40:55D-70(d)(5), thereby mandating reversal pursuant to the Municipal Land Use Law.

N.J.S.A. 40:55D-70(d) provides that a board of adjustment shall have the power to:

In particular cases for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit: (1) A use or principal structure in a district restricted against such use or principal structure, (2) an expansion of a nonconforming use, (3) deviation from a specification or standard pursuant to section 54 of P.L. 1975, c. 291 (C.40:55D-67) pertaining solely to a conditional use, (4) an increase in the permitted floor area ratio as defined in section 3.1 of P.L. 1975, c. 291 (C.40:55D-4), (5) an increase in the permitted density as defined in section 3.1 of P.L. 1975, c. 291 (C.40:55D-4), except as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings, which lot or lots either an isolated undersized lot or lots resulting from a minor subdivision or (6) a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure. A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board, or two-thirds of the full authorized membership, in the case of a regional board, pursuant to article 10 (C.40:55D-77 et seq.) of this act.

An application for a (d) variance can only be granted when both the positive and negative criteria of the statute are satisfied. Generally, an applicant must establish the positive criteria by showing there are "special reasons" for approving the application, and the negative criteria by "showing that such variance and other relief can be granted without substantial detriment to the public good and [the relief granted] will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 48-49 (App. Div. 2004) (quoting N.J.S.A. 40:55D-70(d)). However, "[t]he standard for establishing special

reasons depends on the type of (d) variance at issue.” Grasso, supra, at 49 (citing Cell S. of N.J., Inc., supra, at 83).

For instance, in Medici v. BPR Co., 107 N.J. 1 (1987), the New Jersey Supreme Court established the appropriate standard of review for a conditional use variance pursuant to N.J.S.A. 40:55D-70(d)(1), which requires the zoning board of adjustment to find:

that the use promotes the general welfare because *the proposed site is particularly suitable for the proposed use*.. that the grant of a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance.. [and that] the variance ‘will not substantially impair the intent and purpose of the zone plan and zoning ordinance.”
[Id. at 4 (quoting N.J.S.A. 40:55D-70(d) (emphasis added)).]

However, New Jersey courts now apply a relaxed standard of review to variance applications seeking deviations from the density requirements in a particular zone pursuant to N.J.S.A. 40:55D-70(d)(5). Grubbs v. Slothower, 389 N.J. Super. 377, 388 (App. Div. 2007). According to the court in Grubbs, “[d]ensity variances for permitted uses in the zone should not trigger the application of Medici’s more stringent standard” ... as a “density variance seeks a departure from certain regulations applicable to a use the municipality has chosen to permit, not prohibit, in the zone.” Ibid. The court stated the following in regards to the analysis that should be applied:

Such requests need not demonstrate that the property is "particularly suitable to more intensive development" in order to prove "special reasons" under the MLUL. Randolph Town Ctr., supra, 324 N.J. Super. at 416, 735 A.2d 1166. *Rather, in considering such applications, zoning boards of adjustment should focus their attention on whether the applicant's proofs demonstrate "that the site will accommodate the problems associated with a proposed use with [a greater density] than permitted by the ordinance."* Id. at 417, 735 A.2d 1166.

Since special reasons supporting a particular variance request "must be tailored" to the purpose served by the restriction in the ordinance, Grasso, supra, 375 N.J. Super. at 52, 866 A.2d 988, we examine the purpose of restricting density in a particular zone. The MLUL explicitly recognizes the regulation of the density of development as a general purpose of zoning that contributes to "the well-being of persons, neighborhoods, communities and regions and preservation of the environment." N.J.S.A. 40:55D-2(e). Density restrictions, in the residential context, and FAR restrictions, in the commercial setting, both serve to limit the intensity of the use of the land to be developed. Commercial Realty, supra, 122 N.J. at 561...

Special reasons are those that promote the purposes of zoning as set forth in N.J.S.A. 40:55D-2. Burbridge, supra, 117 N.J. at 386-87, 568 A.2d 527; Medici, supra, 107 N.J. at 10, 18, 526 A.2d 109. Though not expressly stated in the MLUL, the preservation of character of a neighborhood or property values in that neighborhood have also been recognized as legitimate purposes of zoning. Home Builders League of S. Jersey, Inc. v. Twp. of Berlin, 81 N.J. 127, 145, 405 A.2d 381 (1979). A successful applicant for a density variance therefore must show that despite the proposed increase in density above the zone's restriction, and, thus, the increased intensity in the use of the site, the project nonetheless served one or more of the purposes of zoning and was consistent with the overall goals of the MLUL. [Grubbs, supra, at 389 (emphasis added).]

Plaintiff's engineer and planner, Matthew Seckler, directly addressed the Grubbs criteria regarding whether the site can

support the additional density of 2.6 units per acre. (Pa388 to Pa394). Mr. Seckler introduced the d(5) analysis by clarifying the actual extent of the density variance being requested:

[W]e have maximum density of 18 units per acre, where we are seeking a variance to get to 20.6 units [per] acre. So, 2.6 units per acre greater than what is permitted.

Obviously, it's a site of considerable size. It's 17.7 acres, so that ends up being 319 units being permitted and 366 units being proposed, so our - we are over by 47 units. So, again, the variance we're seeking as it relates to the D(5) is 47 units or 2.6 units per acre. Again, large sites so the number of units per acre is multiplied out there..

Now, as it relates to D(5) variances, it's a very different threshold for a Board than a D(1) variance. If we are seeking a use variance, there is specific requirements. It's dangers and proofs that we need to put on the record.

A D(5) variance, the measurement is more akin to a conditional use variance where we're really look at, specifically, can this site support this additional density? This additional density, the additional 2.6 units per acre that we have here, can the site support it? And, there are certain measurements that you can look at in terms of trying to determine can a site support additional density.
[(Pa388 to Pa389).]

Specifically, Mr. Seckler testified that the onsite infrastructure, including water and sewer utilities, would be able to support the additional 47 units, which he confirmed with the various utility companies. (Pa389). As far as garbage pickup, Mr. Seckler concluded that the addition of seven new garbage refuse areas is an extreme enhancement that would more than account for the additional 100 total units, or 47 beyond

the allowable number of units. (Pa390). In addition, the garbage refuse areas will be screened and include new landscaping, which will enhance the look of the site. (Pa390).

Furthermore, Mr. Seckler testified that there is sufficient amount of recreation area on the site to support the additional density. (Pa390). Specifically, 250 square feet of recreational area would be required for each of the additional 47 units, which the site provides. (Pa390). Plaintiffs also agreed to work closely with the Board in designing new aspects of the recreational areas, including a new playground, as the Application proceeded to final approval. (Pa391).

Based on extensive analysis of the current parking situation at the site, and the fact that the Application would be maintaining the same percentage of required parking with the new parking proposed, Mr. Seckler determined that the site can support the additional 47 units in density. (Pa391 to Pa392). Mr. Seckler also reiterated that their traffic study determined that the proposed additional density would add about one new car every three minutes to the total traffic burden on the site. (Pa392). Therefore, the site is capable of supporting the additional traffic on the site. (Pa392 to Pa393).

Summarizing the Grubbs criteria analysis regarding whether the site can support the additional density, Mr. Seckler stated the following:

But, again, the threshold you look at for D(5) variances, can the site support that additional 2.6 units per acre. So again, when I go down and look at my planning proofs and I start checking off, utilities are available, the parking is available, the refuse is available, the amount of traffic being added, again, one new car every three minutes, is not a substantial increase on the roadway network. I'm getting to a point where I'm looking at that D(5) variance and seeing that this site can support the additional variance.

We have the open space. We have the recreational space. So, I look at, again, all of these conditions, all of these things that you know could be a negative by having additional density, and I don't see it on this site as proposed.

So, again, from a D(5) variance perspective, I believe that we meet the burden of proof as it relates to the [Grubbs] case, which one of the, you know, case law cases that you look at in terms of looking at D(5) variances. And, in fact... the site can support this additional density and we are not held to the same standard as a D(1) variance.
[(Pa393 to Pa394).]

Mr. Secker then proceeded to go through the additional positive criteria analysis to show how this application promotes the purposes of the MLUL (N.J.S.A. 40:55D-2) in a number of ways. Plaintiffs considered the opinions of residents at the site regarding the current garbage situation and specifically sought to address those concerns and provide a benefit to the residents and the community in substantially increasing the number of garbage enclosures, while also enhancing the look with screening and landscaping. (Pa394).

Importantly, Mr. Seckler noted that the application is promoting the general welfare by providing significant

affordable housing. (Pa394). Plaintiffs proposed providing 15% affordable housing out of the new units developed, where there is none currently on site and none is required. (Pa394 to Pa395).

Mr. Seckler also noted that the Application would be redesigning open space within the site and provide for greater amenities, including connected walking paths and more of a community feel. (Pa395). In addition, the new development within the site would be required to comply with the latest DEP standards as it relates to stormwater management, which would be a benefit to a site that was built in the 1960s. (Pa397 to Pa398). Regarding the positive criteria, Mr. Seckler went on to state the following:

So, when I look at the variances that we're seeking and balance, you know, the positive and negatives for this application, I look at the fact that, you know, when we're looking at the negatives for this project, I don't see a substantial negative to the additional units that we are seeking beyond what is permitted by the EMF-18 zone.

I do see, you know, in balancing these positives, this upkeep of the site, the additional landscaping, all these amenities that can be added at this point, and I see that as a positive. I see an efficient use of land. Infill development is always seen as a positive. You know, when you have an area in Toms River that is so - you know, has a wide variety of land, you know, I'd rather see development in existing development areas, as opposed to adding development, adding affordable housing, things like that, undeveloped farmland, and basically changes the character on the outside of the focal area. I'd rather put it here. It's right near - it's right near promotion corridors. It's right near

other housing. It's in the multi-family zone. This is where multi-families should be.

In terms of the design of the buildings. Again, I think that you know this applicant, they built, you know, four-story, five-story, twelve-story buildings, you know, in urban areas. This is a site that has been developed based on the design of the [1960s] garden style apartments. That's what we're looking to put in place here. We're not looking to wipe it clean and bring something different. We're actually looking to something that would compliment the existing development here.

So, I think from an efficient use of land and also a visual... I think we see some benefits with this application. Again, cleaning up the trash enclosures, the landscaping. All those items... enhance visual environment.

[(Pa396 to Pa397).]

Mr. Seckler's testimony makes clear that the application promotes a number of the purposes of zoning as set forth the in the MLUL; specifically, by promoting the general welfare, providing adequate open space and space for residential and recreational purposes, by promoting a desirable visual environment and encouraging the efficient use of land. See N.J.S.A. 40:55D-2(a)(c)(g)(i) and (m).

Regarding the negative criteria, Mr. Seckler noted that some of the potential concerns (i.e., near residential developments, visual concerns, etc.) are actually enhanced by the Application's plan. (Pa398 to Pa399). He further stated stated that "looking at the zone plan and master plan, I don't see any significant or any detriments in terms of if this variance is granted that it is an outright - an outright

negative towards the existing master plan or zoning ordinance, so I believe we could meet that threshold, as well. (Pa399).

In summation, Plaintiff's counsel provided further analysis of the d(5) variance criteria for the Board's consideration, stating:

The D5 density variance was improved throughout this process as you've heard me state. We are now... only 47 units over the allowable density as a result of those multiple reductions in the proposal and the scale-back proposal.

The courts have been clear as to what is the burden of proof and what is the analysis when you're looking at a D5 density variance.

The analysis is can the site accommodate the increased density that's proposed? When faced with that question this evening, I think you could answer that clearly, yes.

We've demonstrated this through multiple meetings that there is adequate parking currently, that there will be adequate parking for the new units, based on our last revision to provide RSIS parking at those levels for the new units, so when you address the density variance and you're asking yourself can the site accommodate the additional units, again for the reasons that we've articulated throughout the process, the answer to that is yes...

As this Board knows, you're all to base your decision on what's been presented through testimony and evidence. As I stated, that evidence has been provided both through technical and expert testimony from the applicant, but also for the operational and on an application like this...

You heard from the person that's responsible for this facility on a day-to-day basis that there are no existing tenant complaints for parking, there are no existing issues regarding a lack of available parking and the property manager talked in great detail as to how they assigned parking spaces...

I think those aspects, as well as the unrefuted traffic data that was supplied to [you] on multiple occasions clearly demonstrates that the parking is sufficient.

We've now agreed to park the new units as the RSIS standards and because of all that evidence that was presented, you are in a position when you can grant the density variance, we demonstrated that the site can accommodate the new units without any detrimental impacts on the surrounding area.

The testimony that was presented was unrefuted. We haven't had competing traffic studies. We weren't presented with a list of police violations or parking summonses. You received no contrary information other than the... analysis presented by the applicant's professionals, the applicant's property manager.

The courts in New Jersey had said that when you're making a decision, again relying solely on the evidence that's presented, it's inappropriate to speculate or give a hypothetical as to what could happen.

Board's are resigned to make a decision as to the evidence and the testimony that's been presented to you, and I would submit to this Board that based on the road we've traveled with the scaled back proposal, the concessions that the applicant has made throughout this process, most importantly the last concession of being sure that the new units will be parked in accordance with today's standards.

All of that testimony and evidence provides you with the ability to grant the variances that we're requesting and the preliminary site plan approval.
[(Pa478 to Pa482).]

As has been shown, over a period of four hearings before the Board, Plaintiff presented substantial expert testimony and supporting evidence in its application for a d(5) density variance. Neither the Board's professionals, nor any objector the Application, presented any expert testimony or evidence

refuting the evidence presented by Plaintiff. Furthermore, the Board spent absolutely no time deliberating about the requested d(5) variance or the positive and negative criteria.

Immediately after Plaintiff's counsel finished his final summation, the Board went directly into its vote on the application. (Pa483 to Pa484). Again, there was no deliberation amongst the Board members, no evidence presented refuting Plaintiff's testimony and no discussions whatsoever regarding the d(5) variance criteria.

After a motion for denial was made, the Board members voted and set forth minimal reasoning behind their votes. (Pa484 to Pa492). Only a few of the Board members even mentioned density as a concern leading to their vote against the Application, and not a single Board member specifically addressed the positive or negative criteria as it relates to a d(5) variance request. In addition, the Board also failed to properly consider if the requested d(5) variance could be reconciled with the Master Plan.

The Board's initial April 28, 2022 Resolution of Denial made no mention whatsoever of the d(5) density variance, let alone addressed the requisite positive and negative criteria. On remand, the Board issued an Amended Resolution in which it did recite the correct standard of review for a d(5) density variance under Grubbs; however, rather than actually setting

forth reasons as to how the site cannot accommodate the increased density, on all points the Board simply dismisses Plaintiff's substantial expert testimony by finding it not credible. Of course, this was the Board's only option on remand as the record was closed and at no point did the Board hear, from either their own professionals or the public, any testimony or evidence refuting the credible evidence presented by Plaintiff.

In the Amended Resolution, regarding the positive criteria under Grubbs, the Board dismissed the unrefuted testimony of Plaintiff's engineer and planner, Mr. Seckler, on all points, including parking, trash, traffic and open space. Regarding parking, the Board completely disregarded the fact the percentage of required parking on the site will be staying exactly the same (Pa252), and that the existing parking ratio of 1.46 parking spaces per unit would actually be increased to 1.56 spaces per unit. (Pa387). Furthermore, the Board ignored the testimony of the site's property manager, Karen Palmer, who testified she has never observed any parking issues or operational issues with parking, and has never received a complaint from a tenant regarding lack of parking. (Pa334).

Regarding traffic, the Board again dismissed Plaintiff's expert testimony as to the minimal impact on traffic and instead

focused on speculative concerns about traffic from a Veterans Affairs clinic potentially being developed in the area.

The Board determined that the project would exacerbate an existing problem of trash removal, while failing to acknowledge the fact that the project will enhance trash removal for the entire site by providing for seven new trash enclosures, as well as updating all existing trash enclosures, which are currently not fully enclosed, to provide for new fencing and screening. (Pa354).

Further, the Board concluded that the project would have a negative effect on open space; however, as testified by Plaintiff's expert, the application ensures that 42.4% of the site is to remain as open space, including courtyards, recreation areas, and passive grassy areas, whereas only 20% of open space is required. (Pa364). There is clearly a significant amount of open space on the site to accommodate the increase in density. Plaintiff also agreed to work closely with the Board in designing new aspects of the recreational areas, including a new playground, at final approval.

Regarding the negative criteria under Grubbs, the Board relies on the above-mentioned Board dismissals of Plaintiff's expert testimony as proof that various aspects of the site will be negatively affected. The Board went on to cite the negative criteria standard under Grubbs by stating that the applicant

would need to "demonstrate that the increase in density would not have a more detrimental affect on the neighborhood than construction of the project in a manner consistent with the zone's restrictions." Id. at 390. However, the next sentence in the opinion states that "[f]or example, the applicant might demonstrate that the increased proposed density was only minimally greater than the permitted density in the zone or in adjacent areas." Ibid. That is exactly what is being proposed here as the d(5) density variance is only seeking the addition of 2.6 units per acre on a 17.9 acre site.

To that point, the Board continuously refers to the increase in density of 100 units, which is inaccurate and misleading as the d(5) density variance only pertains to the addition of the 47 units over and above the permitted amount of 319 units. Therefore, any analysis conducted under the Grubbs standard must be done with 47 units under consideration, not 100 units, as was clearly applied to the Board's consideration.

Most egregiously, the Board once again stated in its Amended Resolution that "the Board noted that the site is currently non-conforming with regard to density, before any additional units further increased density." (Pa37). As stated above, this is completely false. Currently, there is a 53-unit deficit between what is permitted and currently exists. If the Board is reviewing this application with the false belief the

site is currently nonconforming as it pertains to density, then clearly the Board's denial is arbitrary, capricious and unreasonable.

While the Board may have rectified some of the technical legal deficiencies in the initial Resolution by citing the appropriate standard and case law, the Board's analysis and findings remain flawed and in complete contravention of the substantial, credible expert testimony presented by Plaintiff.

The trial court concluded that Plaintiff failed to demonstrate that the Board's decision was arbitrary, capricious and unreasonable. However, the court simply deferred to the Board's ultimate conclusions, which were based solely on the Board's decision to completely disregard the unrefuted testimony from Plaintiff's experts. Therefore, the Board's denial of the d(5) density variance request was arbitrary, capricious and unreasonable and must be vacated.

B. Bulk Variances

Pursuant to N.J.S.A. 40:55D-70(c)(2), a planning board is permitted to grant variances to allow departure from regulations established under the MLUL when in an application relating to a specific piece of property the purposes of the Act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment.

As in all variance cases, the applicant bears the burden of proving both the positive and the negative criteria. Ten Stary Dom Ptp. v. Mauro, 216 N.J. 16, 30 (2013). The negative criteria under N.J.S.A. 40:55D-70 "requires proof that the variance will not result in substantial detriment to the public good or substantially impair the purpose of the zoning plan." Ten Stary Dom Ptp., supra, 216 N.J. at 30.

As stated in the previous section, Mr. Seckler's testimony makes clear that the Application satisfies the positive criteria for a c(2) variance in that it promotes a number of the purposes of zoning as set forth the in the MLUL; including promoting the general welfare, providing adequate open space and space for residential and recreational purposes, by promoting a desirable visual environment and encouraging the efficient use of land. See N.J.S.A. 40:55D-2(a)(c)(g)(i) and (m).

Specifically, the Application would improve the garbage collection process on the site, while also enhancing the look of the garbage refuse areas with screening and landscaping. (3T74-6 to 21). Additionally, the Application is promoting the general welfare by providing significant affordable housing. (Pa394). Furthermore, the new development within the site would be required to comply with the latest DEP standards as it relates to stormwater management, which would be a benefit to a site that was built in the 1960s. (Pa397 to Pa398). Regarding the

variance for minimum parking spaces, the Application would bring the site into closer compliance with RSIS parking requirements, as it would increase the 1.46 parking space per unit ratio to 1.56. (Pa387).

Regarding the negative criteria for a c(2) variance, Mr. Seckler made clear there is no detriment to the public or zoning plan as the vast majority of the variances being sought "are for existing buildings in existing conditions that are unrelated to the proposed buildings that were added to this site." (Pa385). For instance, the variance for buffer width, where 20 feet is required and 9.6 feet is provided relates to the existing lack of buffer area on the western side of the property that has been in that condition for almost 50 years. (Pa385). The variance requested regarding structures located within a buffer also relates to an existing condition. Regarding maximum length of buildings, the Application sought a variance for a proposed 256 long building, whereas a 348.8 long building is already existing on the site.

In addition, the requested variances related to multifamily dwelling setbacks from internal roadways, principal building setbacks from parking areas, dwelling units in a line without a setback, and parking in front yard setbacks are all conditions that currently exist on the site, and some of those existing

conditions are more significant variances than those requested in the Application. (Pa386).

After a motion for denial was made, the Board members voted and set forth minimal reasoning behind their votes. (Pa484 to Pa492). However, not a single Board member specifically addressed the positive or negative criteria analysis for a "c" variance. The Board members set forth some minimal explanations regarding some aspects of the application that they did not like, without clearly analyzing the requests under the statutory criteria required.

The Board attempts to rectify this in its Amended Resolution by simply rejecting the substantial, credible expert testimony presented by Plaintiff and relying on the Board's flawed assumptions. Therefore, the Board's denial of the requested bulk variances was arbitrary, capricious and unreasonable and must be vacated.

C. Improper Considerations

In addition to the insufficient analysis and consideration of the variance criteria, the Board improperly considered off-site projects and hypothetical scenarios from those projects without any evidence regarding same in rejecting the Application. This included discussion of an apparent "major redevelopment" in town unrelated to this application. (Pa284 to Pa287).

This also included concerns about traffic from a Veterans Affairs clinic potentially being developed in the area. (Pa489). It also included further concerns about "horrendous traffic" that was completely contrary to the evidence presented. (Pa491).

In addition, there were unsubstantiated concerns about the drainage system potentially failing at some point that was cited as support for voting against the Application. (Pa490). The Board members also inaccurately referred to the Application as an expansion of a non-conforming use and cited that as a reason for voting against the Application. (Pa484; Pa492).

CONCLUSION

For the foregoing reasons, Plaintiff, JD Jamestowne, LLC, requests that the Court reverse the decision of the trial court.

**MONTENEGRO, THOMPSON
MONTENEGRO & GENZ P.C.**
Attorneys for Plaintiff-Appellant

By: /s/ Ryan M. Amberger
RYAN M. AMBERGER, ESQ.
For the Firm

Dated: February 21, 2024

JD JAMESTOWNE, LLC
Plaintiff-Respondent

v.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

CIVIL ACTION
DOCKET NOS: A-000937-23T4
ON APPEAL FROM SUPERIOR COURT

LAW DIVISION, DOCKET NO:
OCN-L-1309-22

**TOMS RIVER TOWNSHIP ZONING
BOARD OF ADJUSTMENT**

SAT BELOW:
HON. FRANCIS R. HODGSON, A.J.S.C.

Defendant-Respondent

**BRIEF OF RESPONDENT,
TOMS RIVER TOWNSHIP ZONING BOARD OF ADJUSTMENT**

ROTHSTEIN, MANDELL, STROHM, HALM & CIPRIANI

98 East Water Street
Toms River, NJ 08753
(732) 363-0777

Attorneys for **Respondent, Toms River Township Zoning Board
of Adjustment**

By: **Robin La Bue**
rlabue@rmshc.law
Atty ID: 021872009

Dated: April 5, 2024

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....1

PROCEDURAL HISTORY.....2

STATEMENT OF FACTS.....3

LEGAL ARGUMENT

I. STANDARD OF REVIEW.....11

II. THE BOARD'S DENIAL OF THE PLAINTIFF'S APPLICATION13
 WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE

III. PLAINTIFF HAS FAILED TO DEMONSTRATE ENTITLEMENT14
 TO THE GRANT OF D(5) VARIANCE RELIEF

CONCLUSION29

TABLE OF AUTHORITIES

Cases

Anastasio v. Planning Bd. of Tp. of West Orange, 209 N.J. Super. 499 (App Div.)12
certif. den. 107 N.J. 46 (1986)
Beadling v. William Bowman Assoc., 355 N.J. Super. 70 (App.Div. 2002).....14
Burbridge v. Mine Hill Tp., 117 N.J. 376 (1990)..... 12
CBS Outdoor v. Lebanon Plan. Bd., 414 N.J. Super. 563, 587 (App. Div. 2010).....13
Davis Enters. v. Karpf, 105 N.J. 476, 485 (1987).....12-13
Grubbs v. Slothower, 389 N.J. Super. 377, 389 (App. Div. 2007).....15, 17-18
Home Builders League of S. Jersey. Inc. v. Twp. of Berlin, 81 N.J. 127 (1979).....22
Kaufmann v. Planning Bd. for Warren Township, 110 N.J. 551 (1988).....12
Kenwoods Assocs. v. Board of Adj. Englewood, 141 N.J. Super 1 (App. Div. 1976).....13
Kramer v. Bd. of Adjustment, Sea Girt,45 N.J. 268 (1965).....12, 15
Med. Ctr. v. Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177 (App.Div.2001).....12
Med. Realty v. Bd. Of Adj., 228 N.J. Super. 226 (App. Div. 1988).....13
Price v. Strategic Capital Partners. LLC, 404 N.J. Super. 295 (2008).....21, 22, 26-27
Reich v. Fort Lee Zoning Board, 414 N.J. Super. 483 (App. Div. 2010).....14-15
Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189 (App. Div. 1960).....14
Ten Stary Dom Ptp. V. Mauro, 216 N.J. 16 (2013)11
T.W.C. Realty v. Zoning Board of Adjustment, 315 N.J. Super. 205 (Law Div. 1998).....19-20

Statutes

N. J. S. A. 40:55D-222
N. J. S. A. 40:55D-709, 19, 21-22

PRELIMINARY STATEMENT

Appellant's development in the Township of Toms River was a previously existing multi-family housing development that had been constructed "post-World War II.". Prior to the appellant's acquisition the property had a history of being poorly maintained, and a major generator of neighborhood parking and traffic congestion. The area of the existing development was in excess of seventeen acres and was developed in excess of the density requirements for the zone. The appellant subsequently acquired two small contiguous properties which together added a half-acre or less to the total area. With the addition of this half-acre, the appellant sought to add six new apartment buildings comprised of 100 additional residential units further expanding an already nonconforming apartment complex.

Approval of appellant's application would have required the grant of a d (5) density variance, as well as numerous bulk variances. Appellant made no attempts to comply with the updated zoning standards, rather seeking to build out the property beyond what the property could sustain, and the surrounding neighborhood could reasonably accommodate.

PROCEDURAL HISTORY

Appellant, JD Jamestowne, LLC, filed an application for development with the Defendant, Toms River Township Zoning Board of Adjustment, for approval of a multifamily development requiring a d(5) density variance along with various other bulk variances for property designated as Block 610, Lots 1, 2, 3, 5, 11, 30, 31 and 33 in the Township of Toms River.

The Board held public hearings on the application on September 9, 2021 (Pa105), December 9, 2021 (Pa227), January 27, 2022 (Pa321) and March 24, 2022 (Pa468). On April 28, 2022, the Board adopted a written Resolution denying the application. (Pa1) On June 21, 2022, Appellant filed a Complaint in Lieu of Prerogative Writs challenging the denial of the Application. (Pa49) A trial was held on March 20, 2023, a written opinion issued on April 10, 2023, remanding the matter to the Toms River Township Zoning Board of Adjustment in order for the Board to articulate its findings with respect to the d (5) variance and the adoption of a memorializing resolution. (Pa72) On June 8, 2023, the Toms River Township Zoning Board of Adjustment adopted Resolution 2023-37, amending Resolution 2022-22 denying the requested relief. (Pa16)

A trial was held on October 27, 2023. Following oral argument Judge Hodgson issued an Order dismissing Appellants complaint with prejudice. (Pa104). The Notice of Appeal was filed on November 29, 2023. (Pa495-498)

STATEMENT OF FACTS

Appellant, JD Jamestowne, LLC applied to the Township of Toms River Board of Adjustment ("The Board"), for a density variance, lot consolidation, preliminary and major site plan approval along with variance and design exception relief to construct seven new apartment buildings, an addition to one of the existing buildings and new parking and driveways at the site located in the EMF-18/MF-8 Zones and designated as Block 610, Lots 1, 2, 3, 5, 11, 30, 31 & 33 on the Official Tax Map of the Township of Toms River, commonly known as between Walnut Street and James Street, Toms River (the "Property" or "Site").

(P a 0 1 7)

The application required the grant of ten variances:

1. A Density Variance for **20 units per acre** (366 Units total) where the maximum permitted density is **18 units per acre** (319 units total).
2. A bulk variance for a **9.6' buffer area width**, whereas a minimum buffer width shall be **20' permitted**, pursuant to Section 348-8.4A (1) of the Township Land Development Ordinance (the "Ordinance").
3. A Variance for **noncompliance** to **Section 348-8.4A(4)** of the Ordinance which states No structure, activity, storage of materials or parking of vehicles shall be permitted within the buffer area, except that where permitted by the board of jurisdiction the **buffer area** may be broken for vehicular or pedestrian access and appropriate directional and safety signs provided;
4. A bulk variance for **26'** between buildings with windows, whereas, a **minimum of 60'** is required, pursuant to Section 348-8.18C (3) of the Ordinance.

5. A bulk variance for a **principal building length of 256'**, whereas, a maximum length for a principal building of **175' is required**, pursuant to Section 348-8.18E of the Ordinance.
6. A bulk variance for a **multifamily dwelling setback from accessory drive and internal roadways of 25.9'**, whereas, a **minimum of 35' is required**, pursuant to Section 348-8.18G of the Ordinance.
7. A bulk variance for a **principal building setback from parking area of 10'**, whereas, a **minimum of 20'** is required, pursuant to Section 348-8.18H of the Ordinance.
8. A bulk variance to Section 348-8.18M of the Ordinance stating a "Building must have **no more than two dwelling units in a line without setbacks and/or breaks in building elevation of at least five feet**", whereas **none** are provided.
9. A bulk **variance** to Section 348-8.20I (1) of the Ordinance stating, "**Parking** not permitted in **front yard setback** in residential zones for other than single and two family uses," whereas, on this application parking is proposed in the front yard for multifamily uses.
10. A bulk variance for **573** on-site parking spaces, whereas, the minimum required on-site parking spaces is **671**, pursuant to Section 348-8.20O (15) of the Ordinance; (Pa017-Pa018)

The applicant also requested several design exceptions:

1. A **Design Exception** for **sidewalks to be constructed on only one side of the internal streets**, whereas, sidewalks must be constructed on both sides of all internal streets, pursuant to Section 348-8.25A (1) of the Ordinance.
2. A **Design Exception** for **4 drives located on Walnut Street and 3 drives on James Street**, whereas, not more than one two-way access drive shall be permitted on any street, pursuant to Section 348-8.20J (3).
3. A **Design Exception** for providing **dead end parking circulation**, whereas dead end parking circulation aisles are **prohibited**, pursuant to Section 348-8.20J (7).

4. A **Design Exception** for an existing condition where **0 feet of space** is provided for islands separating parking stalls from circulation and entrances/exit drives, whereas parking lots having 50 or less spaces shall have **10' wide islands** separating parking stalls from circulation and entrances/exit drives, pursuant to Section 348-820J (8).
5. A **Design Exception** for 4 entrances proposed for Walnut Street (**1191.81' of frontage**) and 3 exist/proposed for James Street (**567.63'**), whereas, parking lots which have a capacity for parking more than 50 vehicles located on properties having a frontage in excess of 500' on any one street, shall be permitted two-way and one-way access drives providing for not more than two entrance and two exit movements on the street. Properties having a frontage in excess of 1,000' on any one street may be permitted to have additional access drives subject to the approval of the Zoning Board of Adjustment, pursuant to Section 348-8.20K (8).
6. A **Design Exception** for non-compliance of all entrance drives extending a minimum distance of 100' back from the street curb line or to an access aisle, pursuant to Section 348-8.20K (2).
7. A **Design Exception** for non-compliance of all exit drives extending a minimum distance of 60' back from the street curb or to a major access aisle, pursuant to Section 348-8.20K (3).
8. A **Design Exception** for non-compliance of having no parking stalls utilize the required entrance and exit drives or major circulation drives as access aisles, pursuant to Section 348-8.20K (4).
9. A **Design Exception** for not having a five-foot minimum width landscaping area provided along the fence or wall enclosing the refuse storage area and showing the landscaping to be provided on the site plan submitted for Zoning Board of Adjustment approval, pursuant to Section 348-8.27C; and
10. A **Design Exception** for non-compliance with the requirement of having all areas of the site not occupied by buildings, pavement, sidewalks, required screening, required parking area landscaping, required safety islands or other required improvements shall be landscaped by the planting of grass or other ground cover acceptable to the Zoning Board of Adjustment and a minimum of two shrubs and one tree for each 250 square feet of open space. For this

application the required number of shrubs and trees are not provided. Pursuant to Section 348-8.4C (8). (Pa018-Pa019)

This relief is in addition to nonconformities already existing on site:

1. **Principal buildings** shall not exceed **175' in length**, whereas, an existing building is **384.8' in length**.
2. The **multifamily dwelling setback** from an accessory drive and internal roadways is required to be **35'**, whereas, **10.5'** exists currently.
3. The **principal building setback** from the parking area is required to be **20'**, whereas, **11'** exists currently.
4. Building must have **no more than two dwelling units** in a line without setbacks and/or breaks in building elevation of at **least five feet**, whereas, **none** are provided on the property currently.
5. **Parking is not permitted in front yard setback in residential zones** for other than single and two family uses, whereas, parking is proposed and **currently present in the front yard for multifamily uses**.
6. The minimum required **on-site parking** is **488** parking spaces, whereas, currently there are **390** on-site parking spaces.
7. **Recreation area.** 250 square feet of active recreation area must be provided per dwelling unit (required **66,500 square feet** of active recreation area, whereas, **56,163 square feet of active recreation area is provided**).
8. **Sidewalks** must be constructed on both sides of all internal streets, whereas sidewalks are **only constructed on one side of the internal streets**.
9. **Not more than one two-way access drive or two one-way access drives** shall be permitted on any street, whereas, 4 drives are located on Walnut Street and 3 drives are located on James Street currently.
10. For parking lots having 50 or less spaces, islands separating parking stalls from circulation and entrances/exit drives shall be **at least 10' wide**, whereas, **0' are provided** currently.

11. Parking lots, which have a capacity for parking **more than 50 vehicles** located on properties having a **frontage** in excess of **500'** on any one street, shall be permitted two-way and one-way access drives providing **for not more than two entrance and two exit movements** on the street. Properties having a **frontage** in excess of **1,000'** on any one street may be permitted to have **additional access drives** subject to the approval of the Zoning Board of Adjustment.
 - a. **Four (4) entrances** are proposed for Walnut Street (**1,191.17' of frontage**) and **three (3)** exists/are proposed for James Street (**777.25' of frontage**).
12. All areas of the site not occupied by buildings, pavement, sidewalks, required screening, required parking area landscaping, **required safety islands** or other required improvements shall be **landscaped** by the planting of grass or other ground cover acceptable to the Zoning Board of Adjustment and a **minimum of two shrubs and one tree** for each 250 square feet of open space, whereas, **currently the property does not comply with this requirement;**
13. **Dead-end parking circulation aisles** do not provide continuous flow through the parking field/area is **prohibited**, whereas, currently **the property does not comply with this requirement;** and
14. The **width of the buffer** area shall be **20'**, whereas, the **current width** of the buffer area is **9.6'**. (Pa019-Pa020)

The site is currently improved in excess of the permitted density for the EMF-18 zone with 18 buildings and a total of 266 units. The existing site improvements include a 39,225 square foot courtyard area; a 16,908 square foot courtyard area; curbed and paved parking areas that accommodate 390 parking spaces including 15 non-conforming handicapped parking spaces, concrete sidewalks, landscaping, lighting, and storm water management. The site is encumbered with access

easements, sewer easements, and drainage easements and is serviced by public water and public sanitary sewer. (Pa025)

Throughout 4 hearings before the Board on September 9, 2021, December 9, 2021, January 27, 2022, and March 24, 2022, the Appellant presented testimony in support of the application: amending the application several times during the process. The final proposal consisted of 6 new multi-family buildings including a total of 100 new units. (Pa022) The total number of all apartment units on the site was proposed at 366, a number far in excess of the permitted density in the EMF-18 zone. The proposed improvements include modifications to the existing parking and the addition of three new parking lots for a total of 573 parking spaces. Additional improvements include 7 proposed trash enclosures, the increase of the 16,908-sf courtyard to 31,768 sf, 59,504 sf of additional courtyard areas, additional concrete sidewalks, landscaping, lighting and 4 underground storm water management systems. The demolition would include replacing the 39,225-sf courtyard area with 40,995 sf of open space area, removal of the existing improvements on Lot 2, removal of the existing improvements on Lot 5, removal of concrete sidewalk, concrete curb, fencing, trees and lawn area, and modifications to utilities. (Pa023).

Following the conclusion of the appellant's application and after reviewing the evidence submitted, the Board, by a vote of 7 to 0, found that the

Applicant had not demonstrated an entitlement to the requested preliminary major site plan approval, the d(5) density variance and the associated bulk variance relief under either of the alternative bases for relief under subsections c (1) and c (2) of N.J.S.A.40:55D(70). (Pa035)

The Board found that the requested relief only intensified the non-conformity of the site with no benefit to the public. (Pa041) Further, the Board recognized that the proposed locations of the various improvements are unnecessary and would detrimentally impact how the Site and surrounding areas function as a whole. The Board further recognized that the proposed development would not provide substantial benefits, including an aesthetically pleasing environment, and a suitable area to locate the Applicant's additional multifamily housing, all with a large detrimental impact on the surrounding neighborhood. (Pa042) The Board recognized that the Applicant's use exceeds the density allowed in the zone as it currently exists and the development proposal is inconsistent with the stated purpose of the EMF-18 and MF-8 Zones. As such, the Board found that the proposal constituted a substantial impairment of the intent and purpose of the Master Plan and the Township Ordinances. (Pa039-Pa040)

On remand, the Board clarified and further explicated their findings, Board member Nels Luthman found that site is non-conforming as the density is already over the density for that zone. He determined that the property manager presented

no mention of a waiting list to get into the existing apartment complex. He stated that he found the testimony of the applicant's Planner, Matthew Seckler, to be not credible. The Planner's explanation as to the availability of other, suitable sites where apartments could be constructed in conformity with the zoning ordinances was insufficient and unsatisfactory. His testimony regarding public transportation was unpersuasive as to the positive nature of the existence of a bus stop at Hooper Avenue. His testimony that this project would improve the site was found not to be credible. Proposals to improve solid waste removal should be remedied currently, with no need for additional improvements from this application. (Pa031-Pa034)

Board Member Luthman also addressed findings as to "negative criteria." He found that the property for the new proposed buildings would be coming from the open space already existing at the apartment complex and would diminish the open space of the persons that already live at the apartment complex. This is in addition to the space that would be utilized for parking, which would diminish space even more on this non-conforming site. He found that the parking at the site was already substandard and the Applicant's Planner's testimony in this area was not credible, as he stated that the Traffic Manual, which is the "bible to all traffic engineers" and did not apply. The Planner also did not account for the parking for the apartment complex which occurs on Walnut Street. (Pa032-Pa033)

Board Member Luthman stated that the additional 100 units proposed would require numerous bulk variances which would add to the non-conformity. No proper setback for the parking lot and proposing that the buildings would be longer than they should be, is just to squeeze 100 units into a site already non-conformity. He found that the project would impair the zoning plan, that the applicant failed to set forth sufficient proofs as to the uniqueness of the property, and that approval of the application would constitute spot zoning. (Pa033)

The other voting board members echoed Mr. Luthman's cogent findings and the amended resolution was adopted.

LEGAL ARGUMENT

STANDARD OF REVIEW

When a trial court reviews any decision where the municipality was allowed to exercise discretion, the judge is charged with the recognition that the Legislature has vested the municipality with discretion to make the decision involved. Booth v. Board of Adj. of Rockaway, 50 N.J. 302, 306 (1967). A rebuttable presumption arises that the municipality has properly exercised its discretion. Harvard Enterprises, Inc. v. Board of Adj. of Madison, 56 N.J. 362, 368 (1970).

The presumption of validity is overcome only by a demonstration that the municipal action is "clearly arbitrary, capricious or unreasonable, or plainly contrary

to the fundamental principles of zoning or the [zoning] statute.” Riggs v. Tp. of Long Beach, 109 N.J. 601, 611 (1988).

It is well established that when a reviewing court is considering an appeal from an action taken by a land use board, the standard employed is whether the grant or denial was arbitrary, capricious or unreasonable. *See* Burbridge v. Mine Hill Tp., 117 N.J. 376, 385 (1990); Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965); Med. Ctr. v. Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 198 (App.Div.2001).

The factual determinations of the board are presumed to be valid, and the exercise of its discretionary authority based on such determinations will not be overturned unless arbitrary, capricious or unreasonable. Burbridge, *supra*, 117 N.J. at 385.

A decision that a board has been arbitrary and capricious requires a finding of error. Anastasio v. Planning Bd. of Tp. of West Orange, 209 N.J. Super. 499, 522 (App Div.) *certif. den.* 107 N.J. 46 (1986). The purpose of judicial review is for the court to determine whether or not the board acted within the statutory guidelines and properly exercised its discretion. Burbridge, *supra*, 117 N.J. at 384–85. The reviewing court is not permitted to substitute its judgment for that of the board's. Kaufmann v. Planning Bd. for Warren Township, 110 N.J. 551, 558 (1988). A reviewing court is not to “suggest a decision that may be better than the

one made by the board of adjustment or planning board, but to determine whether the board could reasonably have reached its decision.” Davis Enters. v. Karpf, 105 N.J. 476, 485 (1987).

II. THE BOARD'S DENIAL OF THE APPELLANT'S APPLICATION WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE (2T41-71)

Greater deference is ordinarily given to the denial of a variance than to a grant. CBS Outdoor v. Lebanon Plan. Bd., 414 N.J. Super. 563, 587 (App. Div. 2010). In the event of the denial of a variance, the appellant has “the heavy burden of proving that the evidence presented to the board was so overwhelmingly in favor of the applicant that the board’s action can be said to be arbitrary, capricious or unreasonable.” Med. Realty v. Bd. Of Adj., 228 N.J. Super. 226, 233 (App. Div. 1988).

The burden of proving the right to relief sought in an application rests at all times upon the applicant. Ten Stary Dom Ptp. V. Mauro, 216 N.J. 16, 30 (2013). The burden rests with the applicant to establish the criteria for the grant of the variance and it must demonstrate that the affirmative evidence in the record dictates the conclusion that a denial would be arbitrary. Kenwoods Assocs. v. Board of Adj. Englewood, 141 N.J. Super 1 (App. Div. 1976).

Nowhere in Appellant's brief does he provide the Court with viable proof that the board acted in an arbitrary, capricious or unreasonable manner. Appellant continues to assert that the board did not deliberate about the requested d(s) density variance or the positive and negative criteria. As set forth below, Appellant fails to establish any legal or factual basis that would support the conclusion that the Court should enter a judgment finding the Board's decision arbitrary, capricious and unreasonable.

At the time of the initial hearing and at the hearing on remand, the Board exhaustively examined the Board's deliberations concerning the d (5) variances. The Board's determination is well-reasoned and supported by evidence in the record.

III. APPELLANT HAS FAILED TO DEMONSTRATE ENTITLEMENT TO THE GRANT OF D (5) VARIANCE RELIEF

It is well settled that a Zoning Board "has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal". Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (App. Div. 1960). 'Opinions that lack foundation are worthless. However, if an expert provides the whys and wherefores rather than bare conclusions it is not considered a net opinion'. Beadling v. William Bowman Assoc., 355 N.J. Super. 70 (App. Div. 2002). Although boards are not bound to accept expert testimony, its determination must be made on a rational and reasonable basis. Reich v. Borough of Fort Lee Zoning

Bd. of Adj., 414 N.J. Super. 483, 504-505 (App. Div. 2010) The choice to accept or reject expert testimony when reasonably made is conclusive on appeal. Kramer v. Board of Adjustment, Sea Girt

To establish "special reasons" for a density variance, the so-called "positive criteria," the applicant must show "the site will accommodate the problems associated with [a greater density] than permitted by the ordinance." Grubbs v. Slothower, 389 N.J. Super. 377, 389 (App. Div. 2007) (alteration in original) (quoting Randolph Town Ctr. Assocs. v. Twp. of Randolph, 324 N.J. Super 412, 417 (App. Div. 1999) (emphasis added)).

The Board found the Applicant's expert, Matthew Seckler, was not credible in his testimony and that he failed to establish that the site would accommodate the problems associated with the additional density in increasing the number of apartments by 100 units, to a density greater than permitted by the ordinance. (Pa031)

Specifically, the Board noted that the site as currently developed is non-conforming with regard to density, before the addition of added units further increased density. The existing parking was not in accordance with Toms River Code standards for adequate parking. Residents currently use offsite street parking on Walnut Street in addition to the onsite parking lot. Board Member Luthman found the Applicant's Planner to be not credible due to the fact that the Applicant's

Planner stated that the Traffic Manual, which is considered to be the “bible to all traffic engineers” did not apply. Parking is currently substandard, and the addition of new units would only serve to exacerbate this problem. (Pa032) Overall, the Board found that the Applicant’s Planner’s testimony as to the parking was not credible and carried little weight. The expert testimony did not address concerns as to what would happen if parking was prohibited on Walnut Street in the future. Further, the expert testified that if parking needs increased, there was no additional available space. The proposed reconfigured parking onsite would locate spaces closer to the residences, as little as 10 feet away from a building, which would negatively affect the quality of life of the residence. (Pa489-Pa490)

The Board found that increased density at the site would create traffic and circulation problems. The Board found the expert’s testimony not credible as to the project’s effect upon traffic. Although the expert stated there would be no significant impact to traffic, his study also was constrained by a 30 percent margin of error. The Board further determined that this testimony held little weight and did not show that the traffic problem would be accommodated by the proposal at the site. The Board found that the expert’s traffic testimony did not account for the impact of the County’s redevelopment and construction of a new VA clinic in the area. (Pa489)

The Board further found that the increase in density would significantly affect existing open space at the site. The expert testified that parking would be utilizing

existing open space at the site, thereby further reducing open space and negating any type of passive recreation. The Board found that, although the applicant was adding additional area to the site, the open space on site was being reduced. (Pa492)

The Board made findings as to the solid waste storage issue at the site. It found that there was an obvious trash and dumping at the site that currently exists without the proposed expansion. The expert testimony did not provide any credible evidence that the project at the site would accommodate the problem. The Board, again, found that the project would exacerbate an existing problem of solid waste removal at Jamestowne apartment complex. (Pa035)

Based upon the above analysis, the Board found that the first prong of the Grubbs positive criteria could not be met, and that the Applicant could not meet its burden of proof. (Pa038)

As part of the second element of the positive criteria for a density variance, the applicant is required to establish "that despite the proposed increase in density above the zone's restrictions," the project will nevertheless serve "one or more of the purposes of zoning and was consistent with the overall goals of the MLUL." Grubbs v. Slothower, 389 N.J. Super. 377, (App. Div. 2007).

The Board found that the expert's testimony was not credible in establishing that any of the purposes of zoning were served by an increase in density, nor was there any credible testimony that the increased density would serve the overall goals

of the MLUL. In fact, the Board found to the contrary that the increase in density could restrict the purposes of zoning and was contrary to the Master Plan. (Pa040)

The Board found that the expert did not testify in a credible way that the increase in density would serve the purposes of zoning. The Board found that the Applicant's Planner could not provide credible testimony to counter the fact that the residents of the site would suffer increased safety hazards due to traffic and pedestrian circulation issues. The applicant's plan removed open spaces existing at the site, which were already non-conforming and inadequate, thereby decreasing adequate light, air and open space. The ongoing solid waste removal problems would be further worsened, creating more safety issues. The Board found that the Applicant's expert could not provide any testimony to support the promotion of the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment, nor did the proposal encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight. (Pa039)

In applying the Board's findings as to the second prong of Grubbs positive criteria necessary for density variances, the Board found that the applicant did not satisfy the requirements for the positive criteria and did not meet its burden of proof.

Density variance d (5) - Negative Criteria

To satisfy the negative criteria for a density variance, the Board requires a showing that the variance "can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70.

The Board found that the Applicant did not show that the variance could be granted without substantial detriment to the public good. The problems delineated above in the analysis regarding the positive criteria have applicability in this analysis. The increased density would affect the access to open space and passive recreation for the community. The Applicant's expert did not provide credible testimony to counter this obvious deleterious effect. The public good would suffer substantial detriment as traffic would increase in the area. The applicant's expert's testimony that the increases he noted in his study would not have a substantial impact on the surrounding roadways were found to not be credible or supported. Applicant could *not* meet its burden to show that the project would not substantially impair the intent and the purpose of the Master Plan and zoning ordinance. The Board found that an increased number of units was only possible in the project by requesting numerous variances and reconfiguring parking such that cars would be much closer to buildings. The Board found the application akin to a request for spot zoning and

the grant of the relief would entail a substantial impairment to the zone plan pursuant to T.W.C. Realty v. Zoning Board of Adjustment, 315 N.J. Super. 205 (Law Div. 1998). As such, this prong of the negative criteria could not be met by the Applicant, and it did not meet its burden of proof. (Pa039-Pa040)

The second prong of the negative criteria necessary for a density variance must "demonstrate that the increase in density would not have a more detrimental [e]ffect on the neighborhood than construction of the project in a manner consistent with the zone's restrictions." Grubbs, 389 N.J. Super. at 390.

The Board found that the increase in density at the already overly developed, non-conforming site could not be constructed at the neighborhood without substantial, numerous bulk variances. Therefore, the Board found that the proposed density increase necessarily had a more detrimental effect, as the site was not able to handle the requisite parking, provide proper open space, provide passive recreation or handle the solid waste removal for the complex. The testimony provided by Applicant's Planner that apartments should be built where apartments exist was found to have no weight and not credible support for the project. Although the Applicant's Planner testified that the project would improve the site, the Board found this testimony not credible. Lessening any open space or passive recreation would not improve the site. The issues as to solid waste removal could be remedied without the need for any further projects in the community and brought up to Code.

The new proposed buildings would be coming from open space already existing at the apartment complex, in addition to the space need for parking, which would diminish space even more at this non-conforming site. (Pa040-Pa041)

Based upon the Board's findings regarding the second prong of the negative criteria, the Board found that the Applicant had not met its burden of proof.

Appellant's argument as it pertains to the d (5) analysis is that the permitted maximum density of the site is 18 units per acre. Appellant's proposed improvements to the site results in an increased density to 20.6 units per acre. As the site currently exists, Appellant would be permitted, with the addition of the two newly purchased lots, to add 53 units. Appellants proposal nearly doubles that number by requesting 100 additional units.

N.J.S.A. 40:55D-70(d)(5) permits a zoning board of adjustment to grant density variances only in "particular cases" and only for "special reasons. The role of the Court is to look at the factual testimony before the board. Price v. Strategic Capital Partners. LLC, 404 N.J. Super. 295, 304 (2008). Per the Appellants Trial Brief, in their statement of facts and throughout their hearings and undisputed by the Defendant Board, the property presently contains 266 units which results in a 53 unit above what is permitted and what currently exists, when the proposed lot consolidation is taken into account. The number of units on the site as it exists is above the permitted amount per acre in the EMF-18 zone. Appellant goes on to state

that their proposal is to add a total of 100 additional units to the property. The Appellant is proposing a total of more units than allowed by Toms River Township Borough Ordinance §348-10.17.2 for the EMF-18 Multifamily zone.

The MLUL explicitly recognizes the regulation of the density of development as a general purpose of zoning that contributes to "the well-being of persons, neighborhoods, communities and regions and preservation for the environment." N.J.S.A. 40:55D-2(e). The preservation of the character of a neighborhood or property values in that neighborhood has also been recognized as legitimate purposes of zoning." Home Builders League of S. Jersey. Inc. v. Twp. of Berlin, 81 N.J. 127, 145 (1979). "In addressing the so-called negative criteria, the applicant would need to demonstrate that the increase in density would not have a more detrimental effect on the neighborhood than construction of the project in a manner consistent with the zones" Price v. Strategic Capital Partners, LLC, *supra* at 306. "Our discussion of how an applicant might sufficiently demonstrate the positive and negative criteria in a density variance application is purely illustrative. We do not mean to imply that in any particular situation, satisfactory proof of such matters should compel the zoning board of adjustments approval of the requested variance." Id. In addressing the positive and negative criteria, in our present case, the Appellant must clearly articulate why such a significant departure from the established density does not impair the purposes of the EMF-18 or MF-8 zone. Id., at 308.

Appellant maintains that the d (5) density variance was improved throughout the process by the modification of the plans. The reduction of Appellants requested units does not bring the application into conformance with the standards of the EMF-18 zone. Because Appellant may have over asked initially, they should not be afforded “bonus points” for reducing to a lower non-conforming number of units. Appellants’ counsel stated in summation on March 24, 2022, they are "only 47 units over the allowable density as a result of those multiple reductions in the proposal." (4T11-14 to 16) It is the Board's position that 47 units above the permitted density is a substantial departure from the Township zoning ordinance and master plan. The 47 units and the additional burden on the overtaxed parking accommodations as they exist would be approved at a detriment to the surrounding neighborhood. Appellant states in its Brief on p. 28, "The Board spent absolutely no time deliberating about the requested d(s) variance or the positive and negative criteria." The deliberations and comments from the Board, its professionals, and the public is what led to the reduction of units by the Appellant through the course of four meetings. Furthermore, when Appellant suggests the board "just went into a vote with no deliberation" that is a false assumption. On the penultimate hearing date of January 27, 2022, the board and Appellant agreed to not hold the vote on that evening as there were a limited number of members and that it was the Appellants right to have a full

Board present. All of the testimony was concluded, and public comments were heard and closed. To say that the board did not have time to think about their decision between January 27, 2022, and the vote on March 24, 2022, is false.

As reflected in the transcript dated March 24, 2022, each member of the Board listed a reason for their denial when giving the vote. Board Member Jason Crispin listed eight such reasons for denial:

- The proposed density was higher than the current Township Ordinance allowed.
- The site as currently situated and previously approved was over its allowed number of units.
- The amount of design waivers requested was so numerous that it constituted a significant departure from the Township's requirements.
- Recreational space was being sacrificed for more buildings.
- The parking and impact on neighborhood traffic would be significant despite the testimony of the Appellants experts.
- There is no or insignificant buffering to the neighboring properties.
- Mr. Crispin believes in his opinion that an approval would amount to "spot zoning;" and
- The proposal is not in accordance with the Township's master plan. (Pa484-Pa485).

Board Member Nels Luthman when giving his "yes" vote for a denial stated that he found the application "detrimental to the public good and interest and went against the purpose of the master plan." (Pa485) Mr. Luthman went on to further summarize that the application would diminish the amount of open space and could create a parking problem in the future. (Pa487).

Board Member Richard Angioletti stated that his vote for denial was due to traffic concerns with the requested increased density. (Pa489). Board Member Robert Bianchini expressed in summary that the issues that led to his vote for denial had to do with the issues of the new configuration of the parking and drainage brought on by the increase in density. (Pa489-Pa490) Board Member Lynn O'Toole stated that her "yes" vote for denial was because of the increased density and its effect on traffic in the surrounding neighborhood. Ms. O'Toole also did not believe this application went along with the township's master plan. (Pa491) Board Member Anthony Colucci when giving his "yes" vote for denial stated, in summation, that the increased density is not in conformance with the master plan, the amount of parking is understated and underestimated, and the increased density is a detriment to the surrounding neighborhood. (Pa491 - Pa49211). Board Chairman Robert Alston voted "yes" for a denial and stated that he agreed with all of the statements made by Mr. Crispin as well as the departure it would be from the Township's master plan. Mr. Alston also agreed with Mr. Luthman that it would

be reducing Open Space to build more apartments in an already crowded existing space. (Pa492).

Regarding the Bulk Variances, Appellant stated in their brief and throughout the hearings that "In addition, the requested variances related to multifamily dwelling setbacks from internal roadways, principal building setbacks from parking areas, dwelling units in a line without a setback, and parking in front yard setbacks are all conditions that currently exist on the site, and some of those existing conditions are more significant variances than those requested in the Application." (Pa386). "A condition already exists" on the site is not an argument in support of new construction. The Board took the requested "c" variances into consideration during their vote. However, without the d (5) density variance the requested bulk variances were moot.

The Appellants argument that the Board used insufficient analysis and consideration is false. The Board throughout the transcripts as highlighted above and in their decisions during the vote took into consideration the surrounding neighborhood and the impact the proposed development would have on it. The impact on the surrounding neighborhood is something the board must consider. "The applicant would need to demonstrate that the increase in density would not have a more detrimental effect on the neighborhood than construction of the project in a

manner consistent with the zones" Price v. Strategic Capital Partners, LLC, 404 N.J. Super. 295, 306 (2008).

As to the positive criteria for relief under subsection “(c)(1)” the Board rejected the expert testimony of the Applicant’s Planner and found that the Applicant had not demonstrated that strict application of the zoning regulations would result in peculiar and exceptional difficulties to, or exceptional and undue hardship upon it as the owner of the Property as a result of unique conditions of the Property. Applicant’s Planner presented no credible testimony that the site was unique or that strict application would result in any peculiar and exceptional difficulties. The Board found that the requested relief only intensified the non-conformity of the site with no relief to the current residents or to the public. Further, the Board found that the proposed variances to locate the new improvements exacerbated already existing deficiencies in parking and open space and would detrimentally impact how the Site and surrounding areas function as a whole.

The Board found that due to the size of the proposal, the addition of new buildings and insufficient parking, any hardship would be self-created by the Applicant or any predecessor-in-title.

Regarding the positive criteria for relief under subsection “(c) (2)”, the Board rejected the expert testimony of the Applicant’s Planner and found that the Applicant had not demonstrated that the purposes of the MLUL will be advanced by the

requested deviations from the zoning requirements, and that the benefits to be derived therefrom do not substantially outweigh any detriments associated therewith. The expert's testimony did not obviate that fact that the existing open space will be lessened by the proposed buildings and additional parking, and thereby does not advance the purposes of the MLUL.

The Board further found that the proposed development did not provide substantial benefits to the neighborhood and in fact, would result in a substantial detriment. The development would not create an aesthetically pleasing environment, and any additional multifamily development would create significant detrimental impact on the existing apartment complex and surrounding neighborhood. The Board rejects the Applicant's expert's testimony that the impact on the environmental and traffic conditions will be relatively modest. The addition of additional traffic counts upon the already overtaxed infrastructure, and reduction in an already deficient open space area, are found not to be "relatively modest".

With regard to the negative criteria for both "c" variances, the Board rejected the expert testimony of the Applicant's Planner, and found that the Applicant has not satisfied the negative criteria and that the requested relief cannot be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

The overall detriment associated with the Applicant's proposal in increasing an already non-conforming, over-dense apartment complex. The proposal would have a significant detrimental impact on the existing traffic conditions on any of the adjacent properties. Finally, the Board found that the Applicant's use exceeds the density allowed in the zone as it currently exists, and the development proposal is inconsistent with the stated purpose of the EMF-18 and EMS-10 Zones. As such, the Board finds that the proposal does substantially impair the intent and purpose of the Master Plan or the Ordinance and is tantamount to spot zoning.

CONCLUSION

In light of the foregoing, Respondent respectfully requests that the well-reasoned opinion of Judge Hodgson be upheld upon appeal dismissing the Complaint against the Toms River Township Zoning Board.

Respectfully submitted,

Robin La Bue

Robin La Bue, Esq.
Rothstein, Mandell, Strohm, Halm & Cipriani

JD JAMESTOWNE, LLC,

Plaintiff-Appellant,

vs.

**TOMS RIVER TOWNSHIP ZONING
BOARD OF ADJUSTMENT,**

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000937-23T4

CIVIL ACTION

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY: LAW DIVISION
DOCKET NO.: OCN-L-1309-22

SAT BELOW:
HON. FRANCIS R. HODGSON,
A.J.S.C.

**REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT
JD JAMESTOWNE, LLC**

**MONTENEGRO, THOMPSON,
MONTENEGRO & GENZ, P.C.**
531 Burnt Tavern Road
Brick, NJ 08724
(732) 295-4500
bmontenegro@mtmglaw.com
Attorneys for Plaintiff

Ben A. Montenegro, Esq.
Attorney ID# 028091996
Ryan M. Amberger, Esq.
Attorney ID# 113632015
On the Brief

TABLE OF CONTENTS

PROCEDURAL HISTORY1

LEGAL ARGUMENT 3

 POINT I

 THE TRIAL COURT’S DECISION SHOULD BE REVERSED AS
 THE BOARD’S DECISION WAS ARBITRARY, CAPRICIOUS AND
 UNREASONABLE. (2T41 to 71)..... 3

CONCLUSION13

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Written Decision, dated April 5, 2023Pa72

Final Order, dated April 10, 2023Pa102

Order Dismissing Plaintiff's Complaint
with Prejudice, dated October 27, 2023Pa104

TABLE OF CITATIONS

Cases

Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment,
172 N.J. 75, 89 (2002)4

Grasso v. Borough of Spring Lake Heights,
375 N.J. Super. 41, 48-49 (App. Div. 2004)4

Grubbs v. Slothower, 389 N.J. Super. 377, 388
(App. Div. 2007)4, 13

Statutes

N.J.S.A. 40:55D-70 (d) (5)passim

APPELLANT'S APPENDIX TABLE OF CONTENTS

Resolution of Denial (2022-23) by the Toms River
Zoning Board of Adjustment, dated April 28, 2022Pa1

Exhibit A-1 to Resolution of Denial
(Google Aerial Image)omitted

Exhibit A-2 to Resolution of Denial
(C-4 Site Plan)omitted

Exhibit A-4 to Resolution of Denial
(Unit and Parking Exhibit)omitted

Exhibit A-5 to Resolution of Denial
(Colorized Site Plan, December 7, 2021)omitted

Exhibit A-6 to Resolution of Denial
(Revised Plans)omitted

Amended Resolution of Denial (2023-37) by the
Toms River Zoning Board of Adjustment, dated June 8, 2023 ..Pa16

Exhibit A-1 to Amended Resolution of Denial
(Google Aerial Image)omitted

Exhibit A-2 to Amended Resolution of Denial
(C-4 Site Plan)omitted

Exhibit A-4 to Amended Resolution of Denial
(Unit and Parking Exhibit)omitted

Exhibit A-5 to Amended Resolution of Denial
(Colorized Site Plan, December 7, 2021)omitted

Exhibit A-6 to Amended Resolution of Denial
(Revised Plans)omitted

JD Jamestowne, LLC Site Plans, dated January 13, 2022Pa45

Complaint in Lieu of Prerogative Writs,
dated June 21, 2022Pa49

Answer to Complaint in Lieu of Prerogative Writs,
dated July 21, 2022Pa61

Pretrial Order, dated September 15, 2022Pa69

Exhibit referenced in Pretrial Order
(Pretrial Memorandum)omitted

Written Decision, dated April 5, 2023Pa72

Final Order, dated April 10, 2023Pa102

Order After Status Conference, dated July 31, 2022Pa103

Order Dismissing Plaintiff's Complaint
with Prejudice, dated October 27, 2023Pa104

Zoning Board Hearing Transcript, September 9, 2021Pa105

Zoning Board Hearing Transcript, December 9, 2021Pa227

Zoning Board Hearing Transcript, January 27, 2022Pa321

Zoning Board Hearing Transcript, March 24, 2022Pa468

Notice of Appeal, dated November 29, 2023Pa495

Certification of Transcript Completion and DeliveryPa499

PRELIMINARY STATEMENT

As the Court is aware, Plaintiff, JD Jamestowne, LLC (hereinafter "Plaintiff" or "JD Jamestowne"), filed an application for development (the "Application") with Defendant, Toms River Township Zoning Board of Adjustment (hereinafter "Defendant" or the "Board"), seeking approval of a d(5) density variance, lot consolidation, preliminary major site plan approval, along with variance and design exception relief for property designated as Block 610, Lots 1, 2, 3, 5, 11, 30, 31 and 33 on the official Tax Map of the Township of Toms River. (Pa2).

On April 28, 2022, the Board adopted a written Resolution denying the Application. (Pa1-15). Plaintiff filed a Complaint in Lieu of Prerogative Writs challenging the denial as arbitrary, capricious and unreasonable, and also challenging various procedural deficiencies of the Board.

Trial was ultimately held before the Honorable Francis R. Hodgson, Jr., A.J.S.C. on March 20, 2023. On April 10, 2023, Judge Hodgson issued an Order remanding the matter back to the Board to articulate its findings and to adopt a resolution consistent with the opinion. (Pa102). On June 9, 2023, the Board issued an Amended Resolution of Denial. (Pa16-44). Thereafter, on October 27, 2023, Judge Hodgson issued an Order dismissing

Plaintiff's Complaint with prejudice. (Pa104). This appeal followed.

Plaintiff submits this Reply Brief in further support of its appeal and to further emphasize a serious error that the Board continues to make, including in its Brief filed on April 18, 2024.

Specifically, the Board has throughout the application proceedings and this litigation continuously claimed that the apartment complex site as it currently exists is nonconforming as it relates to density. This is an inaccurate claim and understanding of the facts regarding the property, which has clearly had a strong effect on the Board's decision-making. At every point throughout this litigation, Plaintiff has attempted to clarify this severe misunderstanding; however, it remains to be a part of each argument presented on behalf of the Board. Therefore, this Reply Brief will primarily focus on that point.

Plaintiff hereby incorporates the procedural history, statement of facts, and legal arguments set forth in its Appellate Brief filed on February 21, 2024 as if fully set forth herein.

LEGAL ARGUMENT

POINT I

**THE TRIAL COURT'S DECISION SHOULD BE REVERSED
AS THE BOARD'S DECISION WAS ARBITRARY,
CAPRICIOUS AND UNREASONABLE. (2T41 to 71).**

When reviewing a trial court's decision regarding the validity of a local board's determination, the Appellate Division is bound by the same standards as was the trial court. Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). The courts give deference to the actions and factual findings of local boards and may not disturb such findings unless they were arbitrary, capricious or unreasonable. Id. at 560.

The primary relief sought by the Plaintiff in its application was the request for a d(5) density variance. The Property is currently improved with 18 apartment buildings with 266 units. (Pa6). Lots 2 and 5 were subsequently acquired by Plaintiff and are currently vacant. (Pa109). The requested d(5) density variance sought approval of 20 units per acre, where the maximum permitted density is 18 units per acre (319 units total). (Pa2). Currently, the property consists of 266 units so there is a 53-unit deficit between what is permitted and currently exists. Therefore, the d(5) density variance only pertains to the addition of the 47 units over and above the permitted amount of 319 units. (Pa389).

An application for a (d) variance can only be granted when both the positive and negative criteria of the statute are satisfied. Generally, an applicant must establish the positive criteria by showing there are "special reasons" for approving the application, and the negative criteria by "showing that such variance and other relief can be granted without substantial detriment to the public good and [the relief granted] will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 48-49 (App. Div. 2004) (quoting N.J.S.A. 40:55D-70(d)). However, "[t]he standard for establishing special reasons depends on the type of (d) variance at issue." Grasso, supra, at 49 (citing Cell S. of N.J., Inc., supra, at 83).

New Jersey courts now apply a relaxed standard of review to variance applications seeking deviations from the density requirements in a particular zone pursuant to N.J.S.A. 40:55D-70(d)(5). Grubbs v. Slothower, 389 N.J. Super. 377, 388 (App. Div. 2007). Instead of having to prove that a site is particularly suitable for more intensive development, applicants need only prove to the Board that the site will accommodate the problems associated with a proposed use with greater density than permitted by ordinance. Id. at 389.

However, the Board has been unable to properly conduct the Grubbs analysis because they have continuously misrepresented

the facts as they relate to this site, specifically by claiming that the site is currently nonconforming with regard to the density.

Admittedly, it appears that this confusion may have begun with an error made by Plaintiff's prior counsel and engineer/planner at the first hearing on the application before the Board on September 9, 2021. While introducing the application at that hearing, Plaintiff's counsel stated the following:

It's important to note that the existing development which is currently 338 units already exceeds your density requirements. The addition of the units proposed intensifies that D variance is the reason why we're before this Board.
[(Pa109-110).]

Later during the first hearing, Plaintiff's professional engineer and planner, Matthew Seckler, PE, PP, PTOE of Stonefield Engineering & Design, LLC, upon being questioned by the Board's counsel, again claimed that "the site existing is non-conforming" as it relates to density. (Pa132). Therefore, during that first hearing, Plaintiff presented the application as if the site currently has 338 existing units, which would make its current density nonconforming under the ordinance.

At the next hearing on December 9, 2021, Plaintiff's engineer, Mr. Seckler, began the presentation by noting an error with the application presented at the first hearing:

So, when we were here at that earlier hearing, since that time we've made a re-submission. I would like to have our counsel hand out the exhibit...

One item that came up as we were doing our re-submission package and investigating, really, the parking ratio[] as it relates to [the number of] units[,] was that we found with our initial submission there was something incorrect with our calculation of existing number of units...

So, what you see I the exhibit at the top is an aerial exhibit with a set of buildings outlined in yellow on the right and a set of buildings outline on the left in blue. As part of our initial submission, you saw that we are proposing changes to the development in the lots that are outlined in yellow.

When we had asked the applicant for my client the number of units it had on this site for the purpose of doing the calculations of parking and density, they gave us the units that are on both the east side of the [school] lot and the west side of the [school] lot because from a leasing standpoint, it all is seen as under one roof...

So, when they gave us the number of units, it was for, basically everything they lease which is both the left side and the right side. Everything else on the application which was based on surveys and anything out in the field was solely the right side.

So, lot area was correct coverage. The impervious coverage. The landscaping - all that was correct because all that in the (indiscernible) verified through survey and going to the site. Unfortunately, knowing the unit mix and unit type, unless we're going to count every single (indiscernible) and knock on every door and look in the bedrooms, we, unfortunately, relied on our client's information to get what is correct but of a greater area than what we were anticipating as part of this application...

So, again, initially we had information that said there were 338 units existing on the site... So, in actuality, where we assumed a existing parking ratio of 1.15 parking space per unit, it was actually much greater than that because there are only 266 units on the right side. So,

again, all of our calculations should have been based on 266 units.

[(Pa239-242) (emphasis added).]

While this was of course a significant error, it was properly clarified to the Board, still at the early stages of the application, and the presentation proceeded.

During the third hearing on January 27, 2022, while Mr. Seckler was presenting the final planning testimony, he explained to the Board the final application proposed a total of 366 units on site, whereas 319 units are currently permitted under the maximum permitted density in the zone. (Pa388). Therefore, by seeking approval for 100 units, the applicant is seeking 47 units over what is currently permitted and they can currently develop. (Pa388-389).

At that same hearing, the Board's professional planner, Robert Hudak (Assistant Township Planner), was questioning Mr. Seckler recross examination, he confirmed the site is currently density compliant and stated the following:

You have a - regardless of what the current zone is, the current development is still in compliance with that - generally speaking is in compliance with the current density requirement.

[(Pa415) (emphasis added).]

It should have been abundantly clear at this point that the current density on the site was fully conforming to the ordinance, and was significantly below the maximum permitted density. However, that was apparently not clear to the Board

members, as shown by this later exchange during the third hearing between Board Member Nels Luthman and Mr. Seckler:

Q. Well, you say unlock, I say develop. We'll play the semantic game. That's fine. *So, we have a nonconforming use here?*

A. Non-conforming use -

Q. The existing Jamestowne is nonconforming?

A. The use is permitted.

Q. Right, but its nonconforming?

A. there are nonconforming design elements. Is that -

Q. Yeah?

A. I would agree to that.

Q. Okay, nonconforming. Are you improving it or making it more nonconforming by adding the density?

A. So, what I'm measuring here is that there are deviations that we are seeking, but the majority of them, we are not - we are not making the worse threshold worse, if that makes sense...

Q. - as the planner does, isn't it better to take a nonconforming use and improve it, rather than making it more nonconforming?

A. I have an issue with using the word use..

Q. Yes, it is. Density I'm talking about.

A. Right, okay.

Q. You're making it worse?

A. *We're making it noncompliant. Absolutely.*

Q. *That's - so, you're making the nonconformity more nonconforming?*

A. We -

Q. Besides the variances, you're making the density greater, which is making more noncompliant.

A. Correct, yes.
[(Pa418-419.) (emphasis added).]

Mr. Seckler did not properly respond to these questions and correct the faulty premise of the questions from Board Member Luthman. Mr. Luthman clearly indicated that he believed the density at the site was currently nonconforming, and that this application would be making it more nonconforming. Mr. Seckler attempted to clarify this but appeared to get thrown off track by the questioning. Unfortunately, and despite the numerous clarifications (including by the Board's own planner) the line of thinking expressed by Mr. Luthman appears to have remained with the Board throughout, and has continued into this litigation.

In the Board's first Resolution of Denial, dated April 28, 2022, the Board stated in its findings: "The Board recognizes that the Applicant's use exceeds the density allowed in the zone as it currently sits and the development proposal is inconsistent with the stated purpose of the EMF-18 and EMS-10 Zones." (Pa014).

In the Board's first Trial Brief, filed with Judge Hodgson on December 16, 2022, the Board again stated: "The site as it

currently sits is already over the permitted density in the EMF-18 zone.” (Page 2 of Defendant’s Trial Brief).

After Judge Hodgson remanded the matter back to the Board, the Board issued an Amended Resolution, dated June 8, 2023, which included Supplemental Findings, and noted that “Board Member Luthman found that site is non-conforming as the density is already over the density for that zone.” (Pa31). Board Member Colucci joined in Mr. Luthman’s supplemental findings on the record. (Pa34). As did, Board Members Crispin, Fontana, and Chairman Alston. (Pa34-35).

In the Decision section of the Amended Resolution, the Board once again stated: “Specifically, the Board noted that the site is currently non-conforming with regard to density, before any additional units further increased density.” (Pa37). The Amended Resolution went on to state: “The Board found that the increase in density at the already overly-dense, nonconforming site could not be constructed at the neighborhood without substantial, numerous bulk variances.” (Pa40).

Again, in the Supplemental Trial Brief submitted to Judge Hodgson on September 25, 2023, after citing the correct numbers of units proposed, existing and permitted, the Board again states: “The Board recognized that the Applicant’s use exceeds the density allowed in the zone as it currently exists...” (Page 10 of Board’s Supplemental Trial Brief). Later in the

Supplemental Brief, the Board stated "the Board noted that the site is currently non-conforming with regard to density, before any additional units further increased density." (Page 14 of Board's Supplemental Trial Brief).

Finally, on appeal, the Board is continuing to claim that the "area of the existing development was in excess of seventeen acres and was developed in excess of the density requirements for the zone." (Respondent's Brief at 1). "The Board recognized that the Applicant's use exceeds the density allowed in the zone as it currently exists and the development proposal is inconsistent with the stated purpose of the EMF-18 Zones and MF-8 Zones." (Respondent's Brief at 9). "On remand, the Board clarified and further explicated their findings, Board member Nels Luthman found that the site is non-conforming as the density is already over the density for that zone." (Respondent's Brief at 9).

The Board goes on to state in its Legal Argument: "Specifically, the Board noted that the site as currently developed is non-conforming with regard to density, before the addition of added units further increased density." (Respondent's Brief at 15). "The number of units on the site as it exists is above the permitted amount per acre in the EMF-18 zone." (Respondent's Brief at 21). In the concluding paragraph of the Brief, the Board states: "Finally, the Board found that

the Applicant's use exceeds the density allowed in the zone as it currently exists..." (Respondent's Brief at 29).

It is not the intention of this Brief to simply provide an exhaustive list of repetitive quotations from the record that Plaintiff disagrees with. However, this is a critical aspect of this case as it shows the Board has not been applying the actual facts to their analysis when reviewing Plaintiff's requests for relief. There is a massive distinction between a d(5) density variance application for a site that is already nonconforming as it relates to density (as the Board continuously represents) and a d(5) density variance application for a site that is significantly below density to the point that the applicant could develop 53 more units today without any Board approval (which are the factually correct circumstances).

Plaintiff has tried to rectify this faulty premise at the trial court, on remand and in our initial Appellate Brief. (Appellant's Brief at 31-32). However, the same claims are continuously made, even when the Board accepts our position that the request for 100 units is really a request for 47 units over what is already permitted, and argues that even 47 units is too much. (Respondent's Brief at 23).

As stated in our initial brief, the Board's position that the site is currently nonconforming as it pertains to density is completely false. Currently, there is a 53-unit deficit between

what is permitted and currently exists. If the Board is reviewing this application with the false belief the site is currently nonconforming as it pertains to density, then clearly the Board did not conduct a proper analysis under Grubbs and the Board's denial was arbitrary, capricious and unreasonable.

CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's initial brief, Plaintiff, JD Jamestowne, LLC, requests that the Court reverse the decision of the trial court.

**MONTENEGRO, THOMPSON
MONTENEGRO & GENZ P.C.**
Attorneys for Plaintiff-Appellant

By: /s/ Ryan M. Amberger
RYAN M. AMBERGER, ESQ.
For the Firm

Dated: May 7, 2024