SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001126-23 T2

PAUL AND NANCY VALENTINE, Plaintiff-Appellee, v. CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT, Defendant-Appellant.	:	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY CAPE MAY COUNTY/LAW DIVISION DOCKET NO. CPM-L-104-23 Sat below: Honorable Michael J. Blee, A.J.S.C.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT

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I. Preliminary Statement

The City of Cape May Zoning Board of Adjustment (the "Board") acted within its discretion to deny the Valentines' variance application, and its denial was supported by both the record and the well-established, highly deferential standard applicable to variance denial. By reversing the Board, the trial court disregarded the Board's conclusion that the type of accessory use proposed by an applicant is a relevant consideration in a c(2) variance application. In this instance, it was for the Board to determine whether a minor reduction in lot coverage, with continued non-compliance overall, was a sufficient benefit to justify the intensified use of the Valentine property with the addition of a pool. This was the trial court's fundamental error, and the well-established, highly deferential standard applicable to variance denial requires reversal of the trial court's judgment and reinstatement of the Board's decision. The Board was not REQUIRED to issue a variance in this instance.

The Valentines requested two variances in order to install a pool and outdoor kitchen in their back yard: a lot coverage variance (from 52.5% to 45.8% where 40% is permitted), and a setback variance for the area between the home and pool (4.7 feet where 10 feet is required). The record confirms the Board, after meaningful discussion, did not accept the Valentines' proposition that a slight improvement in lot coverage (but still deviant) and revised drainage plan

adequately offset the proposed increased overall intensity and potential safety issues the lot coverage limit was designed to address. The Board was not required to reward the property owner with a variance just because it was reducing the coverage from 52% (a significant deviation from the maximum) to 45%, which would significantly exceed the 40% maximum.

The Board did not act in an arbitrary, capricious or unreasonable manner by denying the Valentine application. Its decision was based upon the record, within the applicable legal standard and made with appropriate discretion to the neighbor's concerns. The Board was not required to accept the Valentines' expert testimony or ignore legitimate public concerns regarding the intensity of the proposed use of the Valentine property, and the Board was not required to grant the requested relief. It made a balancing decision, and it is the Board's job, not the Court's, to engage in the balancing analysis. The trial court's judgment should be reversed, and Board's decision should be affirmed.

II. Statement of Facts

The Valentines came before the Cape May Zoning Board twice for variances to install a pool in their back yard. (85a, 92a). Their second application, at issue here, requested a variance for placement of the proposed pool 4.7 feet from an existing deck where a 10-foot setback is required, and a variance for lot coverage of 45.8% where 40% is the maximum permitted. (95a).

The Valentines' Engineer described a small improvement in lot coverage from 52.2% to 45.8% and revised stormwater drainage system. (125a, 141a). A Fire Safety Expert explained he did not believe the proposed pool would constitute a firefighting hazard (150a). The Board Engineer noted the drainage plan was an improvement, but the intensity of overall use proposed by the project was a considerable negative. (172a-174a). Public comments were relatively evenly disbursed between support for the Valentines and objection to additional development on the already non-conforming property. (177a-208a).

The Board ultimately denied the application, finding the proposed improvements failed to offset the overall intensification of the property that accompanied the introduction of a pool (particularly one squeezed into the yard close to the house and deck), and noting the setback requirement addressed safety issues aside from fire safety, such as ease of navigation around the yard and pool. (114a). The lot coverage and the distance variance, together, were a clear indication the Applicant was trying to do too much on the subject lot. These are rational conclusions with support in the record.

III. Procedural History

The Valentines filed a Complaint in Lieu of Prerogative Writ on March 15, 2023. (1a). The Board objected. (6a). Trial was held on September 26, 2023. Final Judgment overturning the Board's decision and judgement was

entered on October 30, 2023, followed by an Amended Final Judgment on November 14, 2023. (270a-291a).

As set forth below, the trial court erred in overturning the Board's determination and substituting its judgment for that of the Board. As set forth below, and in light of the record below, the Board should not be ordered to grant the Valentine's variance application.

IV. Legal Argument

A. Standard of Review: The Zoning Board Should Not Be Required to Grant a Variance (277a-280a)

The Court's role in reviewing factual determinations of local boards is clearly defined by case law, from which emerges a deferential standard of review. A board's decision is presumed valid as long as there is evidence in the record to support its determination. Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58 (1999). "A board's decision is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable." Smart SMR of New York, Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998) (quoting Sica v. Bd. of Adjustment, 127 N.J. 152, 166-67 (1992)). A board acts arbitrarily, capriciously, or unreasonably when "its findings of fact in support of [its decision] are not supported by the record . . . or if it usurps power reserved to the municipal governing body or another duly authorized municipal official." Ten Stary Pom P'ship v. Mauro, 216 N.J. 16, 33 (2013).

The challenging party bears the burden of proof in demonstrating that the action was arbitrary, capricious, and unreasonable. Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81-82 (2002).

The standard is **especially deferential** when applied to variances:

> Variance questions are entrusted to the sound discretion of the municipal zoning board hearing the application. The Legislature has recognized that local citizens familiar with a community's characteristics and interests are best equipped to assess the merits of variance applications. Accordingly, courts reviewing a municipal board's action on zoning and planning matters, such as variance applications, are limited to determining whether the board's decision was arbitrary, unreasonable, or capricious. A reviewing court must determine whether the board followed the statutory guidelines and properly exercised its discretion. **Courts give greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning.**

Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 198-199 (App. Div. 2001) (internal citations omitted) (emphasis added).

When considering whether a board acted in an arbitrary, capricious or unreasonable manner, courts are reminded that land use boards, because of their personal knowledge of local conditions and other expertise, have wide latitude in making land use decisions. Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965); Lang, 160 N.J. at 58; Pullen v. Twp. of S. Plainfield Planning Bd., 291 N.J. Super. 1, 6-7 (App. Div. 1996). A board is entitled to a presumption it not only acted fairly, but also possessed proper motives for its decisions. Kramer,

45 N.J. at 296; Lang, 160 N.J. at 58; Witt v. Borough of Maywood, 328 N.J. Super. 442, 453 (Law Div. 1998), aff'd, 328 N.J. Super. 343 (App. Div. 2000). So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of the government cannot interfere. Kramer, 45 N.J. at 296-297.

Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved. Id. The scope of judicial review is to determine whether a zoning board could reasonably have reached its decision based on the record, not whether the board could have made a better decision. Jock v. Zoning Bd. of Adjustment of Wall, 184 N.J. 562, 597 (2005).

Absent a showing of a clear abuse of discretion, a court "must not substitute its own judgment for that of the board, even if it questions the wisdom of the action." Shakoor Supermarkets, Inc. v. Old Bridge Twp. Planning Bd., 420 N.J. Super. 193, 200 (App. Div. 2011); Cell S. of N.J., 172 N.J. at 81. "Our courts recognize municipal bodies are composed of local citizens who are far more familiar with the municipality's characteristics and interest and therefore uniquely equipped to resolve such controversies." First Montclair Partner, LP v. Herod Redevelopment I, LLC, 381 N.J. Super. 298, 302 (App. Div. 2005).

Judicial review is intended to be a determination of the validity of the Board's action, not a substitute for it. CBS Outdoor v. Lebanon Planning Bd., 414 N.J. Super. 563, 578 (App. Div. 2010).

The Board's decision is not only presumed valid, but additional deference is appropriate in instances of variance denial. As set forth below, the Valentines cannot overcome this standard in light of the record.

B. The Trial Court Erred in Overturning the Board's Decision Because the Board Acted Within its Discretion in Denying the Valentine Variance Application (279a-281a)

N.J.S.A. § 40:55D-70(c) governs a board's power to grant relief from strict application of a zoning ordinance in the form of a c(1) or a c(2) variance. Applicants must prove the positive and negative criteria for the type of variance for which they apply. Cell S. of N.J., 172 N.J. at 82.

The c(1) positive criteria are "predicated on 'exceptional and undue hardship' because of the exceptional shape and size of the lot." Lang, 160 N.J. at 55 (citing Bressman v. Gash, 131 N.J. 517, 22-23 (1993)). "Typically, the contention is that the strict enforcement of the zoning ordinance, in view of that property's unique characteristics, imposes a hardship that may inhibit the extent to which the property can be used." Lang, 160 N.J. 41 at 55 (quoting Davis Enterprises v. Karpf, 105 N.J. 476, 493 (1987) (Stein, J., concurring)). "What is essential is proof that the need for the variance is occasioned by the unique

condition of the property that constitutes the basis of the claim of hardship." Lang, 160 N.J. 41 at 56.

Section c(2) provides an alternative ground for bulk or dimensional variances. It contemplates that, "even absent proof of 'hardship' pursuant to c(1), a bulk or dimensional variance that advances the purposes of the MLUL can be granted if the benefits of the deviation outweigh any detriment." Lang, 160 N.J. 41 at 57. By definition, "no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property." Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 563 (1988). The focus of a c(2) case is "on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community." Id.

As to the negative criteria, relief can never be granted unless it can be granted without substantial detriment to the public good and unless it will not substantially impair the purpose of the zoning plan. Commercial Realty & Res. Corp. v. First Atl. Properties Co., 122 N.J. 546, 554-555 (1991). On either determination, "[c]ourts give greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning." Med. Ctr. at Princeton, 343 N.J. Super. at 199.

2. The Court Erred in Finding the Applicant Satisfied the Negative Criteria Applicable to C-1 and C-2 Variances (282a-284a)

The record clearly demonstrates the Valentines failed to satisfy the negative criteria, "that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." N.J.S.A. § 40:55D-70(d). "The statutory mandate that the grant of the variance occur 'without substantial detriment to the public good' focuses on the impact the variance will have on the specific adjacent properties affected by the permitted deviations from the ordinance." Lang, 160 N.J. at 57 (1999).

The trial court's determination rests solely on the expert presentations regarding location of the pool equipment (140a), drainage (141a) and fire safety (147a). (282a). However, the Board's conclusion arose from the Applicant's proposed continued excessive lot coverage and an accessory use that would, without question, increase overall intensity of use at the property and virtually ensure the property would never be brought into compliance with the lot coverage maximum. As Board Engineer Craig Hurless explained:

> . . . lot coverage is a control on the intensity of development on the lot and that includes buildings, structures, paved areas, materials used for patios, driveways, swimming pools, which was added or similar facilities divided by the total area of the lot. So, one of the things – this is a balancing test. So, is the development of this lot too intense based on the lot coverage? So, that's what the Board is going to weigh tonight with regards to the lot coverage variance.

This is an entirely legitimate concern, and is not arbitrary or capricious. See Borough of Saddle River v. 66 East Allendale, LLC, 216 N.J. 115, 144 (2013) (noting deficiency for failure to address how granting a bulk variance permitting a particular property a more intense use than permitted under the zoning ordinance benefits the community and represents a better zoning alternative.).

Neighbors voiced concerns about the intensity of the proposed lot coverage affecting quiet enjoyment of their own homes (178a), causing disruption within the neighborhood (187a; 191a) and affecting the surrounding properties' quality of life (199a). The objections were legitimately rooted in the fact that there would be more activity and noise centered around the outdoor development, in violation of the lot coverage limit (201a-202a). These sentiments met with virtually no response from the Valentines.

The trial court's focus on the Valentine's expert testimony failed to appreciate the record, which demonstrates the majority of the Board did not believe the proposed decrease in lot coverage offset intensification of the property with the introduction of a pool. (119a; 283a-284a). Instead, the Board noted lot coverage could be reduced without intensifying the property overall, and the proposal failed to bring the property into compliance. One Board Member pointed out the proposal without a pool would bring lot coverage down

to 42.4%, and without an outdoor kitchen or pool the property would be nearly conforming at 40.4% (165a). The Resolution summarized:

> The Board fully recognizes that a pool is a permitted accessory use, although the Board also acknowledges the public's view (which is a rational one) that a pool is an intense accessory use. Although lot coverage is primarily directed towards drainage issues, the Board engineer repeatedly said that lot coverage is also a way to help limit the intensity of the development of a property. In this instance, although the Board would like to see the property have better drainage and compliant lot coverage, the Board does not accept the proposition that it must accept the introduction of a pool on this property (and the associated variance for distance from a property) simply because the Applicants will violate the lot coverage ordinance less than it does now. With regard to the distance from the pool to the structure, the Board did not accept the testimony from the expert and from the fire official that the pool could be safely located only four and a half feet from the deck. The Board acknowledges that one of the purposes (or at least as historically described by the Board Engineer) for the distance requirement between the pool and the structure is for fire safety, but there are other considerations for having this requirement. Requiring a ten-foot distance between the pool and the structure also helps ensure there is appropriate space in the rear yard for a pool, and also having areas around the pool may improve the safety of the navigation in and around the pool.

(119a).

The Board legitimately concluded the inadequate distance between the pool and the deck coupled with continued excessive lot coverage disinclined it from granting the requested variance. The record demonstrates the Board applied and followed the statutory guidelines, thoroughly evaluated the negative criteria and properly exercised its discretion to deny the variance.

3. The Applicant Failed to Meet the Positive Criteria Required for a C-1 and C-2 Variance (285a-287a)

a. The C(2) Positive Criteria (285a-286a)

Although the Board could deny the Valentine Application on negative criteria alone, the Application also failed to meet the c(2) positive criteria, requiring the benefits of the deviation to outweigh any detriment. Lang, 160 N.J. 41 at 57 (1999). A c(2) variance is not justified when "merely the purposes of the owner will be advanced." Kaufmann, 110 N.J. at 563. Rather, the community must actually receive a benefit because the variance represents a "better zoning alternative for the property" Id. The focus of the c(2) positive criteria is on the characteristics of the land that present an opportunity for improved zoning and planning for the benefit of the community. Id. While zoning boards are required to effectuate the goals of the community's zoning and planning ordinances, "[t]he Legislature undoubtedly intended through the [c](2) variance to vest a larger measure of discretion in local boards in a limited area of cases." Id. at 564, 566.

As set forth above, neither the Board nor the public agreed that the overall intensification of the Valentine property represented a better zoning alternative or provided a benefit for the community.

b. The C(1) Positive Criteria (288a-288a)

The c(1) variance positive criteria focus on the physical characteristics of the subject property. The granting of a variance requires a showing of either "exceptional narrowness, shallowness or shape of specific property", "exceptional topographic conditions or physical features uniquely affecting a specific piece of property" or "an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon," such that "the strict application of any regulation. . . would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property. . ." N.J.S.A. § 40:55D-70(c)(1). While the term "undue hardship" involves the underlying notion that no effective use can be made of the property in the event that the variance is denied, Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 605 (1980), in the context of a c(1) variance, the applicant must demonstrate the hardship "inhibit[s] the extent to which the property can be used." Kaufmann, 110 N.J. at 562. Nevertheless, a landowner is not entitled to have property zoned for its most profitable use. Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 350 (1973).

While the shape of a lot and location of a building may impact the ability to install an accessory use, or limit the size of the accessory structure, that does

not always equate to a "hardship." Having a lot that is too overdeveloped for a pool, or having a rear yard that is too small for the size pool one desires, is not truly a "hardship," and certainly not such a hardship that a board MUST conclude it is sufficient to overcome the negative criteria. While the trial court understood the Board's analysis, it erred in replacing the Board's judgment with its own judgment on the characteristics of the property. (286a).

V. Conclusion

The Board properly analyzed the application and law, and determined an accessory use such as a pool can have a different, and more intense, impact on the variance weighing process. It was for the Board to determine if the Applicant's proposed minor reduction in coverage, but not a reduction to full compliance, was a sufficient benefit to justify the intensification of the use of the property with a pool. The trial court erred in substituting its judgment for the Board's. The trial court's decision should be reversed, and the decision of the Board should be reinstated.

Respectfully submitted,
KINGBARNES

Dated: March 4, 2024

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PAUL and NANCY VALENTINE Plaintiff/Respondent v. CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT Defendant/Appellant	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001126-23 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT, LAW DIVISION, CAPE MAY COUNTY DOCKET NO. CPM-L-104-23 Honorable Michael J. Blee, A.J.S.C. Sat below

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PRELIMINARY STATEMENT

A cornerstone of sound decision-making by local land use boards is the requirement that the board's actions be supported by evidence in the record. A resolution grounded in arbitrary comments and concerns from board members or the public does not satisfy the foregoing requirement. In the present case, the findings of the City of Cape May Zoning Board of Adjustment (the "Board") are both contrary to the record below and based on unsupported comments and concerns of the Board Members and the public. Notwithstanding the substantial and unrebutted evidence and expert testimony presented by Respondents, Paul and Nancy Valentine (the "Valentines" or "Respondents"), the Board unreasonably rejected the same.

In sum, the Board's focus in the Valentines' application for variance relief associated with installation of an in-ground pool (which is a permitted accessory use on the Valentines' property) was evidently the potential negative impacts resulting from a pool use (i.e., noise) rather than properly inquiring into the effect the individual variances would have on the neighboring property owners and the zoning ordinance. The Board's and the public's distaste for swimming pools is not a valid basis to deny minor variance relief related to this otherwise-permitted accessory use.

STATEMENT OF FACTS

The Valentines are the owners of property located at 1312 Maryland Avenue in the City of Cape May (the "Property"). The Property measures 60' x 125', which is conforming in the applicable R-2 Zoning District. The Property is the site of a lawfully-existing single-family home constructed in 1980. 129a:21-22. The home currently has two nonconforming conditions, as follows: 24.7' front yard setback where a 25'setback is required and 52.2% lot coverage where 40% maximum is permitted.

Pools are a permitted accessory use in the R-2 Zoning District. Prior to 2009, swimming pools and their connected aprons, walkways, and patios, were required to be 10' from all property lines. However, pools were not subject to any required setback from the principal structure. 81a-83a. On December 15, 2009 (subsequent to the construction of the Valentines' home) the City of Cape May (the "City") adopted Ordinance No. 195-2009, which provides, pertinent part:

> All swimming pools, measured from the waters edge, shall be at least 10 feet from any principal structure; provided that this Subsection A(2) shall not apply to any swimming pool which (a) is wholly above grade; (b) occupies an area less than 100 square feet; and (c) is covered by a rigid cover when not in use.
>
> Cape May, N.J., Code § 525-62A.

As a result of the 2009 zoning change, construction of an inground pool in the Valentines' rear yard became virtually impossible absent variance relief.

I. The Valentines' First Application

The Valentines have twice made application to the Board seeking approvals to install a swimming pool at their home. The Valentines' first application is not the subject of this appeal, but is relevant to these proceedings. In the first application, the Valentines requested four variances, specifically: to exceed the maximum permitted lot coverage of 40%, where 52.2% is preexisting and a reduction to 48% was proposed; to permit the pool equipment to be installed 7'from the side yard where 10' is required; to exceed the maximum patio width of 30', where 39.1' was proposed; and to permit the pool to be located 4.7' from the principal structure where 10' is required. 85a-91a. Although swimming pools are permitted accessory uses in the R-2 zoning district, the Board received various comments from neighbors who were generally opposed to swimming pools. 88a-89a. The Board refused the Valentines' request to adjourn the hearing and revise the plans, and voted 6-0 to deny the application. 85a-91a. The Board's decision was memorialized on July 28, 2022 in Resolution No. 07-28-2022. Id.

The Board Engineer, Craig Hurless, instructed the Board that the requirement for the 10' setback between the pool and the principal structure was

to make the second story locations accessible by ladder when fighting fires. 87a. Although the City's fire department submitted a report with no comment on the first application, the Board expressed concern that the fire department did not provide a detailed response. 90a. The Board further found "[t]he distance between the pool and the home was important enough to be passed by the Town Council, at the urging of certain persons concerned with firefighting, and there was no expert testimony to indicate the fire safety considerations could be resolved within only a 4.7-foot distance." Id. The Board was persuaded by the testimony of the public who were opposed to swimming pools generally. Id.

II. The Valentines' Second Application

The Valentines submitted a second variance application which is the subject of this appeal. The second application differed from the first application in several material respects and directly addressed the concerns and findings of the Board in the first application. First, two variances were eliminated by reducing the width of the patio and relocating the pool equipment 16' from the side property line, which exceeded the 10' required setback. 112a. Second, the pool was relocated so that the 4.7' setback was now measured to the attached first-floor open deck (rather than the principal building itself), increasing the distance from water's edge to the house itself to 14.6'. Id. Third, the overall lot coverage was further reduced from the previous application and the Valentines'

voluntarily proposed to install an engineered stormwater management system to further improve upon the existing nonconformity. 105a.

The Valentines current application sought only two variances. First, the Valentines sought variance relief from Section 525-15 of the City of Cape May Code to exceed the maximum permitted lot coverage of 40%, where 52.2% is preexisting and a reduction to 45.8% was proposed. 95a. In connection with this reduction of impervious coverage, the Valentines also proposed to install an engineered stormwater management system (141a:17-20) and replace the existing gravel, which covers a substantial portion of their yard and deviates from the City's landscape design standards, with grass and landscaping. 127a:10-21.

Second, although the second application relocated the pool to be more than ten (10') feet from the Valentines' home, the pool remained within ten (10') feet of the deck on the rear of the Property, necessitating variance relief. While detached decks are an accessory use that may be located within 10' of a pool, attached decks become part of the principal structure by definition. Cape May, N.J., Code § 525-55A(5). Structure is defined as "a combination of materials to form a construction for occupancy, use or ornamentation whether installed on, above, or below the surface of a parcel of land." Id. at § 525-4. Thus, while the proposed pool would be located 14.6' from the Valentines' house, because the

deck is defined as part of the principal structure, variance relief was required. As a result, the Valentines sought variance relief from Section 525-61(A)(2) of the City of Cape May Code for the pool setback requirements from the principal structure, where a 10-foot setback is required and a setback of 4.7 feet was proposed to the existing open deck. Photographs of the rear yard and existing deck are included in Appellant's Appendix at 113a.

III. <u>The Hardship Criteria</u>

Andrew Schaeffer, an expert in engineering and planning, testified in support of the Valentines' application. Mr. Schaeffer testified that the long, narrow shape of the existing home does not leave room behind the home for a pool and the now-required 10' distance between the pool and the principal structure. 138a:6-13. He noted that the original builders were not able to plan for the future because the house was constructed prior to the 10' setback requirement. 138a:9-13. Specifically, Mr. Schaeffer testified that these unique circumstances create a hardship that impedes the Valentines' ability to install a pool, stating:

> In terms of hardship, as we discussed before, the building was placed and configured in terms of its size and location and setbacks without the benefit of the current setback for the pool to principal structure mostly and also the rear setback. If those setbacks had been required then, they probably would've left room by reconfiguring the house for a future pool and in this case, they're suffering in hardship because they did not have that because that

> information didn't exist in 1980 when the house was constructed or the deck for that matter either.

15a3:19-25-154a:1-5.

Mr. Schaeffer also indicated that lot coverage is a pre-existing nonconforming condition. The existing 52.5% lot coverage exceeds the maximum 40% permitted, not including the gravel, which if included, would result in approximately 90% existing lot coverage. 155a:2-10. Mr. Schaeffer testified that this pre-existing condition created a hardship. 156a:4-6. The Board Engineer also noted the Property's existing drainage issues. He explained that lot has a high point in the middle, causing the water from the back half of the Property to drain to the rear. 172a:18-23. Plaintiff proposed a reduction to 45.8% in addition to improving the site with stormwater management that forces the water to the street. 155a:2-10.

IV. The (C)(2) Criteria

Mr. Schaeffer testified that the Valentines' application as a whole benefits several purposes of zoning contained in N.J.S.A. 40:55D -2, specifically:

a. To encourage municipal action to guide appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals and general welfare (*noting that reducing impervious coverage and improving stormwater management runoff will promote the public welfare*);
b. To secure from fire, flood, panic and other natural and man-made disasters (*by improving stormwater management and reducing runoff*);

g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens (*by making accommodation for the development of this residential accessory structure*); and

i. To promote a desirable visual environment through creative development techniques and good civic design and arrangement (*by replacing concrete with pavers, replacing gravel with landscaping, and other improvements to the site*)

156a-157a.

V. The Negative Criteria

Mr. Schaeffer also opined that the grant of the variances satisfied the negative criteria. 157a:9-17. He testified "the setback for the pool was designed to provide fire safety and we have found other ways to provide fire safety here in this particular case." 157a:22-25, 158a:1. He further advised that the reduction in lot coverage and installation of the stormwater management system can only improve the conditions of the neighbors with regards to flooding or nuisance water. 158a:12-18. With respect to the neighbors, Mr. Schaeffer noted that the pool will be at or more than what is required in terms of setbacks to the adjoining lots, so the variances will have no impact on the neighbors. 158a:2-11. Mr. Schaeffer concluded that "the benefits far outweigh the detriments and I can't see any detriments that would be provided with this development." 157a:14-17.

The purpose of the 10' pool setback requirement and the potential negative impact of the variance was discussed at length. 171a-173a. The Board previously acknowledged that the distance requirement was enacted for fire safety purposes, finding in the previous resolution "with respect to the requirement that the pool be 10' from the principal structure, the Board Engineer indicated that the separation between the pool and the house was to ensure that second story locations were accessible by ladder when fighting fires." 87a. The Board Engineer reiterated the reasoning in the second application, stating "I was around in 2009 when the pool ordinance was crafted and I was involved in the discussions and I believe that distance from the structure for safety reasons, so that, you know, fire or safety personnel can access structures. . ." 171a:14-18. The Board also noted this in the resolution memorializing its denial of the current application. 119a.

Lewis H. Conley was introduced and accepted as an expert in fire safety.[1] Mr. Conley provided substantial testimony in concluding that the pool's location does not impact fire safety. 148a-152a. Mr. Conley testified that that laddering to the second story would take place from the existing deck, and even in the most difficult place to ladder, only 3.5' from the building is required to safely

[1] Although Mr. Conley provided testimony regarding fire safety, he is also a professional land surveyor and planner who represented the Board in the 1970s and has since appeared before the Board many times. 145a-146a.

reach the second story of the home, leaving 7 additional feet of deck. 148a:14-22. Mr. Conley opined that "this configuration actually lends itself very well to laddering operations" (149a:16-17) and concluded "the deck becomes somewhat of an enhancement to the firefighting procedure." 152a:7-8.

The City's fire chief, Alex Coulter, submitted a detailed report reaching the same conclusion, writing "[t]he existing deck, which will be remaining, offers enough area to deploy ground ladders to the upper floors of the structure maintaining a safe working angle for firefighters. The pool will not be a hinderance to firefighting operations since the existing deck, where we would deploy ground ladders, will be remaining and is sufficient area for this operation." 54a. Chief Coulter's letter was provided to Board Members at the hearing. 151a:5-8. Chief Coulter concluded "After evaluating the location of the proposed pool and the area of the existing deck I have no issues with the installation of the swimming pool." 54a.

The Board Engineer also spoke to the negative criteria, noting that the potential negative impacts of the application were pool equipment noise, public safety, and drainage. However, Mr. Hurless testified that those impacts had been addressed, noting that pool equipment noise was addressed (172a:10-12), that testimony was provided regarding public safety (172a:15-16) and that any negative potential for drainage issues has been mitigated by the addition of the

stormwater management system. 173a:7-9. Mr. Hurless advised that the proposed drainage system is "a better situation than what we have now existing." 173a:6-7.

The Board Engineer also opined as to the objective nature of lot coverage controls, stating "lot coverage is a control on the intensity of development on the lot and that includes buildings, structures, paved areas, materials used for patios, driveways, swimming pools, which was added or similar facilities divided by the total area of the lot." 173a:22-25, 174a:1. Mr. Hurless stated that the appropriate question is: "is the development of this lot too intense based on the lot coverage?" 174a:3-4. [emphasis added].

VI. The Public Comment

There were neighbors both in support and opposed to the variances. Those opposed to the application generally objected to the pool as a use. Importantly, every objector testified that a deviation from the lot coverage or pool setback requirements (i.e., the variances) would have no personal impact:

> Mr. Catanese: Okay. Tell me how the four feet seven inch setback to the deck will affect you personally?
>
> **Mr. O'Neill: Personally, it won't affect me at all.**
>
> Mr. Catanese: Thank you very much. Now, can you also tell me how the reduction in the impervious coverage will affect you personally?
>
> **Mr. O'Neill: It won't affect me at all.**

181a:17-25.

* * *

Mr. Catanese: How will the reduction in impervious coverage cause you to suffer?

Mr. McMullin: It will because it will allow the pool to be built.

Mr. Catanese: All right. So, it's the pool?

Mr. McMullin: It's the pool.

188a:15-21.

* * *

Mr. Catanese: Tell me how the reduction in impervious coverage will affect you personally, sir?

Mr. Cochrane: I – I don't know that it will affect me at all.

Mr. Catanese: And tell me how the distance from the pool to the house of 16 feet and 4.7 to the deck will affect you personally, sir?

Mr. Cochrane: The only way it is going to affect me personally is the noise I am going to hear when I sit at my back porch.

Mr. Catanese: From the pool"

Mr. Cochrane: From the pool noise and the deck noise because there is going to be a kitchen out there now. So, there's going to be more activity on that deck than there already is.

201a:11-25

* * *

Mr. Catanese: So, is it a fair statement that your concern is just with the pool, any pool, every pool?

Mr. Dudley: Absolutely

193a:1-5

The concerns of the neighbors were solely focused on the potential noise from parties and were completely unrelated to the variances sought by the Valentines. *See*, 180a:2-4, 187a:13-16, 187a:69-73.

Several neighbors, however, supported the application. Mr. Haviland testified that he lives directly behind the Valentines and that the water runoff from The Valentines' property currently causes a "lake" in his rear yard each time it rains. He supported the application, stating:

> I am all for it because that lake sits there and it takes days for that to go away. So, that will be a drastic improvement to the back of my yard and I know it's going to, you know, help everybody else that's behind there as well because standing water is not good for anybody.
>
> 184a:12-17.

The source of the existing runoff and pooling problem was later confirmed by the testimony of the Board Engineer who testified that this lot is graded to the rear property line. 172a:18-23. Mr. Hurless concluded that the application would result in an improved drainage situation: "[t]hey provided a drainage system that collects the water in the rear and allows it to discharge to the front. That's a better situation than what we have now existing. So, that's a positive aspect. The negative potential has been mitigated by the addition of that drainage system." 173a:3-9.

Another neighbor who is located directly adjacent to the Property and closest in proximity to the proposed location of the pool was represented by counsel, who offered argument in support of the application and indicated that the variances pose no issue. 205a-206a.

VII. The Board's Prior Pool Setback Approvals

The Valentines also introduced evidence of previous applications in which the Board granted pool setback variances. 159a-160a. In 2022, the Board approved a 5'10" pool setback to a two-story portion of the principal structure at 20 Patterson Street. 62a-70a. In another application decided in 2021, the Board approved a pool with a setback of 1.3' from a four-story structure at 1620 New York Avenue. 71a-80a. A photo depicting the magnitude of the variance relief approved by the Board was introduced at the hearing. 55a. The Board approved the setback variance on (c)(1) hardship grounds, based on the excessive front yard setback, finding that "the proposed pool cannot be built anywhere else on the property….." 75a-76a. A variance for lot coverage, similar to the variance requested by the Valentines, was also granted in that application, where 30% is permitted, 36.6% was existing, and 34.85% was approved. 71a-80a. The Board specifically found that the additional coverage that the pool creates is porous, in the sense that the pool will capture any water instead of having the water reach an impervious area." 76a. In fact, the Valentines introduced evidence indicating that four (4) applications for pool setback variances were presented to the Board since the start of 2019 and every one was approved. 56a-80a.

VIII. The Board Members' Comments

Comments made by the Board Members evidence improper considerations by the Board. One Board Member asked if the Property had a mercantile license in an apparent attempt to determine whether it was a rental property (168a:16-25, 169a:1-15), and another mused that the Valentines should have determined whether or not they could install a pool without variance relief prior to purchasing the Property, despite the fact that hardships attach to the land and are not personal to the owners. 168a:1-8. Other Board Members raised new concerns regarding the 10' setback requirement that were not raised in first application or by any of the professionals, stating: "It's just too close to the house. It's too close to the main structure. It's only four foot and if you were going to install this, maybe this isn't relevant to the law, but it's just too close to have kids walking that close to the pool. Four foot is – this is four foot, you know? It's, like – you're going to have kids walking by there. I don't feel it's safe, but I feel the law is very clear that is has to be that distance from the main structure." 236a:14-23.[2] Another Board Member expressed concerns of an individual jumping off the two-foot high deck into the pool (despite decks being otherwise permitted adjacent to pools), and after being informed that there

[2] It is important to note that nothing in the Zoning Code prohibits a detached deck from being located within 10' of a pool. *See*, Cape May, N.J., Code § 525-55A(5).

would be a railing around the deck, stated "[w]ell, he can stand on top of a railing and jump off as well." 152a:19-25, 153a:1-6.

The Board voted to deny the application, with four (4) board members opposed and two (2) in favor.

IX. The Board's Resolution

The Board's decision was memorialized on January 26, 2023 in Resolution No. 01-26-2023: 3 (the "Resolution"). 114a-120a. The Board's findings indicate that "the Board, having denied the application," has determined that none of the standards were met for any of the variances. . ." 119a. The Board reconciled its decision to deny the lot coverage variance by finding that, although lot coverage is a mechanism to control intensity of development, the installation of an in-ground pool "intensified" the development on the Property despite the overall decrease in lot coverage. Id. The Resolution states, in pertinent part: "[a]lthough lot coverage is primarily directed toward drainage issues, the Board engineer repeatedly said that lot coverage is also a way to help limit the intensity of the development of a property," and "[a] majority of the Board did not believe the decrease in lot coverage offset the intensification of the property with the introduction of a pool." Id. [emphasis added]. The Board recognized that pools are a permitted

accessory use, but also "acknowledge[d] the public's view (which is a rational one) that a pool is an intense accessory use." Id.

The Board declined to accept the unrebutted testimony of the Valentines' fire safety expert Mr. Conley and even rejected the report from Chief Coulter concluding that the pool's location posed no fire safety concerns. The Board acknowledged that the purpose of the 10' setback was for fire safety, but arbitrarily found that the setback requirement was also grounded in other considerations that were not mentioned in the previous resolution denying the Valentines' first application. Id. Specifically, the Board found that "there are considerations for having this requirement. Requiring a ten-foot distance between the pool and the structure also helps ensure there is appropriate space in the rear yard for a pool, and also having areas around the pool may improve the safety of the navigation in and around the pool." Id. The Resolution points to the comment made by one Board Member that 4.7' was too close to have children walking around the pool. 119a, 236a:14-23.

PROCEDURAL HISTORY

The Valentines filed this complaint in lieu of prerogative writ against Board seeking reversal of the Board's decision denying their application for variance relief pursuant to N.J.S.A. 40:55D-70(c)(1) and (c)(2). On October 30, 2023, the trial court entered a Final Judgment finding that the Board's decision

to deny the variances was arbitrary, capricious and unreasonable, reversing the Board and granting the requested variances. An Amended Final Judgment was subsequently entered on November 14, 2023.

LAW AND ARGUMENT

I. Standard of Review (277a-282a)

New Jersey Court Rule 4:69 governs challenges to municipal action. In prerogative writ matters tried on the record made by a local agency, "the state of the record ordinarily controls, the substantial evidence rule applies to fact finding, the agency's action is presumed valid and reversible only if arbitrary, capricious or unreasonable, and the court is not bound by determination of legal issues..." *Pressler & Verniero*, Rules Governing the Courts, R. 4.69, Comments 5.2 and 5.3.

On review of a grant or denial of a variance in the Appellate Court, the standard of review is the same as that applied by the Law Division. N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004). The reviewing court must determine whether the board below followed the statutory guidelines and properly exercised its discretion. *Cox*, New Jersey Zoning and Land Use Administration (2024), at 33-1. (*citing* Burbridge v. Mine Hill Tp., 117 N.J. 376 (1990)). Assuming an adequate basis in the record for a board's conclusions, deference to its judgment is ordinarily

appropriate. Cox, *supra*, at 33-3.1 (*citing* Kramer v. Bd. Of Adjust., Sea Girt, 45 N.J. 268 (1965)). [emphasis added].

Accordingly, "it is essential that the board's actions be grounded in evidence in the record." Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 196-97 (App. Div. 2009) (*citing* Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 562 (App.Div.2004)). Failure to abide by this obligation will deem the board's actions arbitrary, capricious and unreasonable. Wilson, 405 N.J. Super. at 196-97.

"Although the MLUL reposes considerable power in municipal zoning boards to deny or grant variances, that power must be exercised cautiously. Prudence dictates that zoning boards root their findings in substantiated proofs rather than unsupported allegations." Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 88 (2002). Accordingly, a board's decision is also arbitrary, capricious, and unreasonable when it affords undue weight to non-expert testimony and complaints of the public and disregards qualified expert testimony. Id. While a board has discretion to reject expert testimony, "it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 338 (App. Div. 2004) (*citing* Cell South of N.J., 172 N.J. at 87 and Kramer v. Bd. of Adjustment, 45 N.J. 268, 212 (1965)).

The trial court correctly determined that the Board's decision to deny the Valentines' request for variance relief from the maximum lot coverage and distance between the pool and principal structure requirements was arbitrary, capricious and unreasonable. Accordingly, the decision of the trial court to reverse the decision of the Board should be affirmed.

II. The Valentines Satisfied the Positive Criteria under N.J.S.A. 40:55D-70(c)(1) and (c)(2) (279a-280a; 285a-288a)

N.J.S.A. 40:55D-70(c) justifies variance relief in two circumstances: (1) under subsection (c)(1), where the characteristics of the land or the existence of a lawfully existing structure create "exceptional practical difficulties or hardship," and (2) under subsection (c)(2), which requires no showing of hardship, but rather requires proof that granting the variance would advance the purposes of zoning, and that the benefits outweigh any detriment. Variance relief under (c)(1) or (c)(2) is also conditioned upon proof of the negative criteria by "showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Id. As set forth more fully below, the Valentines satisfied their burden under subsection (c)(1) and (c)(2) for both the lot coverage and pool setback variances.

A. Variance Relief is Appropriate Under N.J.S.A. 40:55D-70(c)(1)

The Board erred in denying the Valentines' application pursuant to the hardship criteria in N.J.S.A. 40:55D-70(c)(1), which permits variance relief where:

> (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exception topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of [any zoning regulation] would result in peculiar and exceptional practical difficulties or hardship.

There is no requirement that an applicant prove that a specific piece of property would be zoned into inutility. Rather, the (c)(1) applicant need only demonstrate that the property's unique characteristics inhibit the extent to which the property can be used. Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 55-56 (1999) *See also*, Cox, *supra*, at 6-2.9.

In the present case, the hardship standard arises from the location and orientation of the existing house, since hardship can be created not only by the subject lot, but also by existing, non-conforming structures on a lot. Cox writes:

> Subsection c(1) speaks of an extraordinary and exceptional situation uniquely affecting a specific piece of property *or* the structures lawfully existing thereon. This language, which resulted from the 1985 amendments, recognizes that hardship can be created not only by the physical characteristics of the land, but by reason of the existence of a structure already located on it which may create an "exceptional situation" sufficient to justify a zoning variance. See

> Hawrylo v. Board of Adjustment, 249 N.J. Super. 568 (App. Div. 1991).
>
> Cox, *supra*, at 11-6.3. [emphasis added].

In Lang v. Zoning Board of Adjustment, 160 N.J. 41 (1999), the zoning board granted a hardship variance to a property owner who wanted to replace an above-ground swimming pool with an in-ground swimming pool where the existing paved driveway and garage required that the pool be located in the side yard setback. The driveway and garage occupied a substantial portion of the side and rear yard of the applicant's narrow property. Id. The board concluded that, in addition to the narrowness, size, and shape of the property, the location of the existing driveway and garage would "severely limit and perhaps preclude the installation of any reasonably sized in-ground swimming pool in the rear yard of the subject property." Id. at 49. The court found that a conforming lot or even the existing non-conforming lot without the garage would obviate the need for a side yard variance. Id. at 59. Based on these unique characteristics, the board determined that strict enforcement of the zoning ordinance would result in exceptional and undue hardship, and therefore the applicant was entitled to variance relief. Id. The board also noted that applicant's lot had been "substantially affected by subsequent R-2 district requirements that have established onerous limitations on owners of such properties that are notably smaller than subdivided lots of a later vintage." Id. at 49. The court concluded

that it was "the unusual narrowness of the applicant's property in relation to the ordinance's minimum width and the width of the properties in the vicinity, combined with the existing structures on the property, that constituted the reasons why the setback and area variances were required." Id. at 61.

In a similar case, Wilson v. Brick Township. Zoning Board. of Adjustment, 405 N.J. Super. 189 (App. Div. 2009), the applicant sought variance relief pursuant to (c)(1) from the setback and lot coverage requirements. The property was improved with a single-family dwelling located 41' from the front property line, leaving only 18' from the back of the house to the rear property line. The applicant sought approval to permit a deck in the rear yard setback. The zoning ordinance required a setback of 15' from the rear property line, therefore requiring variance relief for any proposed deck larger than 3'. The board denied the application and the court reversed the denial of the rear yard deck setback variance, holding:

> Consequently, because the lawfully existing dwelling's placement on the lot creates an extraordinary and exceptional situation resulting in peculiar and exceptional practical difficulties to an owner who wishes to place a deck larger than three feet in his rear yard and because none of the negative criteria would be affected by this development, the variance with respect to the rear yard deck setback should have been granted.
>
> Id. at 20.

Here, as in Lang and Wilson, the location and configuration of the existing long, narrow building creates a unique situation that "inhibits the extent to which the property can be used". Lang, 160 N.J. at 55-56. The house has combined side yard setbacks of 22' where only 15' total is required. 112a. The Valentines' engineer testified as to the (c)(1) hardship criteria with respect to the setback requirement, specifically, that the shape of the existing home does not leave room behind the house for the pool. 138a:6-13. The Board's argument that "having a lot that is too overdeveloped for a pool, or having a rear yard that is too small for the size pool one desires, is not truly a hardship," is not supported by case law and directly conflicts with Wilson, Lang and the plain language of the MLUL. Db14. "[T]he lawfully existing dwelling's placement on the lot creates an extraordinary and exceptional situation resulting in a peculiar and exceptional practical difficulties" to the Valentines. Wilson, 405 N.J. Super. at 201.

Additionally, the Board fails to consider that the construction of the home predated the requirements that swimming pools be setback 10' from a principal structure and included in the calculation of lot coverage, similar to the subsequently enacted bulk requirements in Lang. 81a-83a. Mr. Schaeffer testified that, had the pool setback requirement been in place prior to the construction of the home or the deck, the property owners could have left room

for a pool by reconfiguring the size and location of the home. 153a:19-25, 154a: 1-5. In sum, strict enforcement of the setback requirement in light of the unique shape of the existing structure inhibits the Valentines' ability to install a pool.

With respect to lot coverage, the existing structures on the property that exceed maximum lot coverage justify (c)(1) variance relief. *See*, Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 562 (1988) (quoting Davis Enterprises v. Karpf, 105 N.J. 476, 493 (1987) (Stein, J., concurring)) ("The existence of a nonconforming structure may justify a variance from maximum land-coverage requirements.") Mr. Schaeffer testified that this pre-existing condition created a hardship. 156a:4-6. The existing lot coverage of 52.5% exceeds the maximum 40% permitted, not including the gravel, which if included, would result in approximately 90% existing lot coverage. 155a:2-10. Notwithstanding the clear evidence of hardship, the Valentines proposed to substantially improve the nonconforming lot coverage. Plaintiff proposed a significant reduction to 45.8% in addition to improving the site with an engineered stormwater management system. 155a:2-10.

B. Variance Relief is Appropriate Under N.J.S.A. 40:55D-70(c)(2)

The Board also erred in denying the Valentines' application pursuant to N.J.S.A. 40:55D-70(c)(2), which requires no showing of hardship, but rather that the purposes of the Municipal Land Use Law would be advanced by a

deviation from the zoning ordinance requirements. N.J.S.A. 40:55D-70(c)(2) provides for variance relief where "in an application or appeal relating to a specific piece of property the purposes of this act . . . would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment." Professor Cox explains:

> What must be shown is that the application (1) relates to a specific piece of property; (2) that the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirement; (3) that the variance can be granted without substantial detriment to the public good; (4) that the benefits of the deviation would substantially outweigh any detriment and (5) that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.
>
> Cox, *supra*, at 29-3.3 [citations omitted].

In adopting N.J.S.A. 40:55D-70(c)(2), it was the intent of the Legislature to broaden the "c" variance by adopting alternative criteria. Trinity Baptist v. Louis Scott Hold., 219 N.J. Super. 490, 500 (App. Div. 1987). Granting a (c)(2) variance must be "rooted in the purposes of zoning and planning itself and must advance the purposes of the MLUL." Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 562 (1988). No (c)(2) variance is justified when only the purposes of the owner will be advanced; rather, the proper focus for a (c)(2) variance is "the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community." Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 563 (1988) (emphasis in original). *See also*, Lang, 160

N.J. at 57 (the (c)(2) variance "must actually benefit the community in that it represents a better zoning alternative for the property"). Therefore, variance relief under section (c)(2) is appropriate when it "would put the land more in conformity with the community's development plans and thereby would advance the purposes of zoning." Chesterbrooke Ltd. P'ship v. Planning Bd. of Tp. of Chester, 237 N.J. Super. 118, 130 (App. Div. 1989).

Variance relief is warranted under (c)(2) because the existing nonconforming condition will be improved. Our Supreme Court's discussion in Burbridge v. Mine Hill, 117 N.J. 376, 388 (1990), although in the context of the expansion of existing nonconforming uses, is instructive:

> When the application before a board is to expand a nonconforming use, the competing considerations are clear: if the variance is denied, the hope is that the nonconforming use will wither and die; on the other hand, as long as the nonconforming use exists and is thriving, the Board obviously would want to make it conform as best it could with the current use-designation in the zone. When the special-reasons concept is applied to cases in which expansion is sought for pre-existing nonconforming uses, appearance, aesthetics, and compatibility of the use in the neighborhood become uniquely significant, especially when, as in this case, there is not any evidence that it is ever going to wither and die.

The court further noted [w]hen a nonconforming use cannot be eliminated, a municipality may and should seek to harmonize the use with its environs." Id. Of course, because the current case does not involve a use variance, the Valentines' burden is substantially lower than the standard applied in Burbridge.

The present case involves a nonconforming structure (i.e. impervious coverage) associated with a conforming use, therefore the goal of improving the existing nonconformity by reducing the lot coverage from 52.2% to 45.8% justifies relief.

In addition to the decrease in lot coverage, the Valentines proposed to install an improved stormwater drainage system that provided a direct benefit to the neighboring property owners. Our courts have found that a (c)(2) variance is warranted when the relief would result in improved drainage. In Jacoby v. Zoning Board. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450 (App. Div. 2015), the applicant sought a parking variance to permit less parking than required for a large office building. The applicant proposed to eliminate the existing asphalt parking and install parking decks. Id. The court found that the "reduction in the number of parking spaces will promote a desirable visual environment, *N.J.S.A.* 40:55D-2(i), by eliminating surface asphalt parking, and will prevent a degradation of the environment, *N.J.S.A.* 40:55D-2(j), by eliminating the stormwater runoff to the residential neighborhood to the south through the planting of an added tree buffer in place of the asphalt parking. Id. at 471. Thus, replacing the surface parking with parking decks and trees creates an opportunity for improved zoning and planning that will benefit the community." Id.

The aesthetic improvements proposed by the Valentines further justify the grant of a (c)(2) variance. In Lang, discussed above, the board found that the variances sought could be granted under (c)(2) because the replacement of the existing above-ground pool and deck with the in-ground pool and landscaping was "aesthetically preferable and more visually desirable to the community." Lang, 160 N.J. at 49; s*ee also,* Bressman v. Gash, 131 N.J. 517, 530-531 (1993) (holding that a board properly granted a (c)(2) variance to permit a smaller rear yard setback for a newly constructed house because it would enable the applicant to build a more attractive house than alternate plans, and therefore create a desirable visual environment). Even in d variance cases, which are held to the more stringent "special reasons" standard, "aesthetic improvement alone can be a sufficient special reason to justify a variance to expand a pre-existing nonconforming use." Burbridge, 117 N.J. at 376.

The Valentines presented overwhelming proofs that the benefits of the deviation substantially outweighed any harm, and in fact, constituted a better zoning alternative than the existing conditions. Mr. Schaeffer testified that the Valentines' application benefits several purposes of zoning contained in N.J.S.A. 40:55D -2, including that it will promote public welfare and provide security from flooding by reducing impervious coverage, improving stormwater management, and reducing runoff; provide sufficient space for residential uses

by making accommodation for the development of this residential accessory structure; and promote a desirable visual environment by replacing the concrete and gravel with pavers and landscaping. 156a-157a. Similar to the improved drainage in Jacoby, Mr. Shaeffer opined that the reduction in lot coverage and installation of the stormwater management system can only improve the conditions of the neighbors with regards to flooding or nuisance water. 158a:12-18. The statements of the Board Engineer also confirm that this represents a better zoning alternative to the existing conditions. With respect to the reduction in lot coverage, Mr. Hurless stated "the negative potential has been mitigated by the addition of that drainage system." 173a:7-9. The need for improvement was confirmed by Mr. Haviland (who lives directly behind the Valentines and supported the application, noting that the property currently sheds water and floods his yard) and the Board Engineer, who explained that the lot has a high point in the middle, causing the water from the back half of the Property to drain to the rear, and concluded that the proposed drainage system is a "better situation than what we have now existing." 172a:18-23, 173a:6-7.

Mr. Schaeffer also spoke to the aesthetic improvements to the lot by replacing the gravel landscape with greenery and replacing the concrete with pavers, which promotes a desirable visual environment. 157a:4-8. The existing conditions exceed the maximum lot coverage by significantly more than what is

proposed and include poor grading and drainage impacting neighboring properties and gravel landscaping contrary to the City's design standards. The proposed development will bring the Property more into conformity than what presently exists both in terms of lot coverage but also with respect to "appearance, aesthetics, and compatibility" which are "uniquely significant, especially when, as in this case, there is not any evidence that [the existing nonconforming lot coverage] is ever going to wither and die." Burbridge, 117 N.J. at 388.

Based on the above, the unrebutted testimony presented by the Valentines clearly demonstrates that the purposes of zoning are advanced by this application, and represent a better zoning alternative to the community.

III. The Valentines Satisfied the Negative Criteria (282a-285a)

N.J.S.A. 40:55D-70 provides "[n]o variance or other relief may be granted under the terms of this section … without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." As explained by the Supreme Court in Lang,

> the statutory mandate that the grant of the variance occur "without substantial detriment to the public good" focuses on the impact the variance will have on the specific adjacent properties affected by the permitted deviations from the ordinance. The requirement that the grant of the variance not "substantially impair the intent and the purpose of the zone plan and zoning ordinance" focuses on whether

> the grant of the variance can be reconciled with the zoning restriction from which the applicant intends to deviate. Unlike use variances, reconciliation of a dimensional variance with the zone plan and zoning ordinance is a relatively uncomplicated issue, and depends on whether the grounds offered to support the variance, either under subsection c(1) or c(2), adequately justify the board's action in granting an exception from the ordinance's requirements.
>
> Lang, 160 N.J. at 57-58 [emphasis added].

Accordingly, the proper focus is on the potential impact caused by the deviation from the bulk requirements under the zoning code. "[E]very variance constitutes, by definition, a departure from and impairment of the zone plan. The negative criteria asks whether such departure is '*substantial*.'" Cox, *supra*, at 8-2.1. (emphasis added). Therefore, "[t]he magnitude of the deviation from the bulk or dimensional requirements of the zoning ordinance and the impact on the zoning plan are often a matter of degree and that a board's consideration of a variance should recognize that fact." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 32 (2013).

Importantly, "care must be taken to direct the evaluation of a request for a bulk variance to those purposes of zoning that are actually implicated or triggered by the requested relief." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 32 (2013). This issue was addressed in Ten Stary Dom, where the Supreme Court affirmed the reversal of denial of a bulk variance for lot frontage. The board denied the requested variance, basing its decision on the concerns of neighboring

property owners about the drainage system, as well as fire safety and aesthetic concerns. The court explained:

> However, not every deviation from the prescribed bulk standards implicates the same concerns.
>
> Thus, if an applicant seeks a variance from setback requirements, traditional zoning concerns such as preservation of light, air, and open space may be valid inquiries in an assessment of the impact of the requested variance. If an applicant seeks a variance from lot coverage requirements, drainage may be a valid inquiry in an assessment of the impact of the requested variance on the surrounding properties.
>
> . . .
>
> On the other hand, some variances from prescribed bulk requirements may not implicate some of the otherwise valid zoning purposes advanced by other bulk variances. For example, a minor deviation from a height restriction has no impact on lot coverage and the valid goal of maintaining sufficient undeveloped area on a lot to foster light, air, and open space. A deviation from prescribed lot frontage may have no impact on any valid zoning purpose other than the stated public interest in location of all lots on a public street." Id. at 33. [emphasis added].

The court found that the board improperly considered drainage in evaluating whether a variance from the frontage requirements undermined the zoning plan. Specifically, the court held that "the record reveals that the Board utilized the occasion of a request for a variance to delve into other concerns that can be adequately addressed in another fashion," such as during the building permit application process. The court also noted that the board disregarded the testimony of the fire chief that the lot would be accessible by apparatus and the

inclusion of the fire suppression system in its finding that the lack of street frontage posed a risk to fire safety. The court concluded that the record did not support the conclusion that the applicant failed to satisfy the positive and negative criteria and affirmed the reversal of the variance denial.

In the present case, the record is overwhelming that the deviations from the setback and lot coverage requirements have no detriment, much less a substantial detriment, on the neighboring property owners, and further do not impair the intent and purpose of the zone plan. Importantly, every person that objected to the Valentines' application admitted that the variances themselves would have no detriment. 181a:17-25, 188a:15-21, 201a:11-25. Although the Board represents that neighbors raised "concerns about the intensity of the proposed lot coverage," the neighbors only objected to pools in general, which is wholly irrelevant because pools are a permitted accessory use in the zone.

Similar to Ten Stary, the Board's findings relating to the nature and extent of the use are not a proper consideration in the context of a lot coverage variance. The Resolution acknowledges that lot coverage variances typically implicate drainage concerns, but despite the reduction in lot coverage and improved drainage, the Resolution states: "[a] majority of the Board did not believe the decrease in lot coverage offset the intensification of the property with the introduction of a pool. The Board accepts and adopts the position that the lot

coverage could be reduced without intensifying the use with a pool. . .” 119a.[emphasis added]. The Board’s findings hinge on the Board Engineer’s statement that lot coverage is a way to help limit the intensity of the development of a property, but Engineer did not conclude that pools were a more intense use than other uses. In fact, the Board Engineer opined as to the objective nature of lot coverage controls, stating “lot coverage is a control on the intensity of development on the lot and that includes buildings, structures, paved areas, materials used for patios, driveways, swimming pools, which was added or similar facilities divided by the total area of the lot.” 173a:22-25, 174a:1. Mr. Hurless stated that the appropriate question is: “is the development of this lot too intense based on the lot coverage?” 174a:3-4 [emphasis added]. Therefore, the intensity of the development must be based on the lot coverage, which is being decreased, and not on the nature and extent of an otherwise-permitted accessory use (i.e., the pool).

The Board’s findings are also contrary to the City’s zoning code, which provides clear instruction that for purposes of lot coverage, pools are to be treated no different than a house, driveway or shed. Cape May, N.J., Code § 525-4 (defining lot coverage as “[t]hat area of a lot that is covered by buildings, structures, paved areas, or materials used for patios, driveways, swimming pools or similar facilities divided by the total area of the lot”).

Instead, the Board applied a subjective standard, assigning an arbitrary weight to pools in calculating lot coverage. Objective standards, such as the ones contained in the City's zoning code, are essential to guide a board's exercise of discretion. Cox explains:

> It has been held that a failure to enact "clear and ascertainable standards to guide... the board" would result in an improper delegation of the zoning power to the board. PRB Enterprises, Inc. v. South Brunswick, *supra* at 9. In PRB, the Court found that an ordinance permitting "low traffic generating" neighborhood retail stores failed to meet the standards of the statute in that the term was undefined and the ordinances did not establish "objective" standards by which traffic generation could be "measured, classified, and applied... in a consistent manner" which could have been properly included among the criteria to be weighed by the board. Id.
>
> Cox, *supra*, at 25-1.1

The Supreme Court in PRB Enterprises, Inc. v. South Brunswick, 105 N.J. 1, 9 (1987) held "[i]f the governing body intended to vest discretion in the Planning Board to approve or disapprove a particular use within the district, it could do so only by classifying it as a conditional use and enacting clear and ascertainable standards to guide the exercise of the Board's discretion. Otherwise, the power to exclude a category of uses based on traffic considerations remains an incident of the zoning power exercisable only by the governing body."

Here, the subjective test implemented by the Board for lot coverage is the same type of improper exercise of zoning power the Supreme Court in PRB sought to prevent. The Board plainly acted outside the scope of its authority by

determining, based on no qualified testimony and without making any factual findings, that pools have an added intensity compared to other structures, such as a deck or addition to a principal structure, in calculating lot coverage. Thus, the Board's determination that the pool, which is a permitted accessory use, "intensifies" the lot coverage is arbitrary, capricious, unreasonable, and an improper exercise of zoning power properly granted to the governing body.

The Board relies on Borough of Saddle River v. 66 East Allendale, LLC, 216 N.J. 115, 144 (2013) in support of its argument that the reduction in lot coverage would increase the intensity of use at the property. However, this case does not support the Board's position. In Saddle River, the court's analysis focused on competing appraisals in a condemnation proceeding, specifically evaluating each party's expert assumptions regarding "highest and best use" of the subject property under applicable zoning regulations. The issue before the court was the sufficiency of the evidence presented to a jury regarding the likelihood of obtaining variance relief to determine the amount of compensation in a condemnation action. The subject property was a vacant split-zoned parcel. There was no dispute that a bank building would be the highest and best use of the property. However, there was disagreement regarding the size of the bank building and the resulting just compensation due to the condemnee. The sole variance upon which the parties and the court speculated was to exceed the

maximum lot coverage. The jury returned a verdict based upon the larger building, accepting the condemnee expert's testimony regarding the likelihood of variance relief. On appeal, the appellate court determined the condemnee's experts failed to address how the bulk variances would meet the positive and negative criteria, and ultimately reversed the trial court's order and remanded the matter for new proceedings. However, the court's references to "intensity" have no relation to the bank "use," rather, the intensity only relates to the excess lot coverage itself. The only conclusion that can be drawn from this case is that if lot coverage is decreased, intensity decreases as well.

Although it is well-established and even conceded by the Board that exceeding the allowable lot coverage typically implicates drainage concerns, the Board did not consider the Valentines' expert and the Board Engineer's comments that the Valentines' overall reduction in lot coverage and proposed stormwater management system would mitigate existing drainage concerns and improve conditions on site. The Board made no findings regarding the improved drainage that would result from a grant of the Valentines' requested variance relief, and instead based its denial of the lot coverage variance on a subjective determination of a pool's intensity.

In fact, the Valentines' application would have a positive impact by improving drainage. Both Mr. Schaeffer and the Board Engineer spoke to the

existing drainage issues on the Property, and how the Valentines application would result in improved drainage. 158a:12-18, 172a:18-23, 173a:6-7. This was also confirmed by Mr. Haviland, who lives behind the Property and testified that the existing drainage situation negatively affects his property by causing a "lake" in his rear yard when it rains. 184a:12-17.

The Valentines provided similar unrebutted testimony concluding that the location of the pool presented no fire safety concerns. The Board Engineer testified that the minimum distance between the pool and the structure became a requirement so fire personnel can access structures, which was acknowledged by the Board in both resolutions. 171a:14-18, 90a, 119a. The testimony from the Valentine's expert in fire safety as well as a letter from the City's own fire chief both concluded the location of the pool presented no fire safety concerns, and therefore, presented no detriment to the neighboring property owners. Notably, this testimony (and relocation of the pool) was provided in direct response to the Board's denial of the Valentines' first application, where the Board found that the Valentines did not provide any expert testimony related to fire safety. 90a. In the second application, the Board's Resolution speculated that the 10' requirement also "helps ensure there is appropriate space in the rear yard for a pool, and also having areas around the pool may improve the safety of the

navigation in and around the pool" despite no credible testimony to support either of these findings in the record of proceedings.[3] 119a. [emphasis added].

As in Ten Stary, the Board decided the Valentines' request for a lot coverage and setback variances based upon concerns that are unrelated to the variances and are regulated in another fashion: noise is regulated by the noise ordinance (Cape May, N.J., Code § 340-1 *et seq*.) and the pool and pool equipment are fully compliant with the setback requirements from the property lines, which was a modification that was made specifically to address the neighbors' concerns regarding noise in the first application,

The testimony of the neighbors clearly demonstrates that the variances themselves have no detriment to the neighboring property owners, much less the required substantial detriment to offend the negative criteria. Moreover, the variances do not substantially impair the intent and purpose of zoning or the zone plan. All potential negative impacts have been adequately addressed and the proposed development would bring the property into greater conformance with the current zoning. Therefore, the negative criteria has been satisfied.

[3] In fact, both of these findings are contrary to current zoning. There is no required setback between a detached deck and a pool, and there would be sufficient space in the rear yard for a pool and detached deck of the same size without variance relief. *See*, Cape May, N.J., Code § 525-55.

IV. The Board's Decision is Arbitrary, Capricious and Unreasonable (277a-282a)

The Board's decision is not grounded in evidence in the record and impermissibly relies on non-expert testimony, and therefore is arbitrary, capricious and unreasonable, and not entitled to deference. "Prudence dictates that zoning boards root their findings in substantiated proofs rather than unsupported allegations." Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 88 (2002). Thus, a board may not rely on non-expert testimony and concerns of the neighbors to support its denial of an application. *See,* Id. (finding that zoning board improperly disregarded expert testimony in favor of public complaints of the negative visual impact and effect on property values). *See also*, N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319 (App. Div. 2004) (rejecting board's reliance on unsubstantiated comments about negative impact on aesthetics).

The Board's unsubstantiated denial is similar to one reversed in a recent decision of this Court, 15 High St. v. Borough of Helmetta Planning Board, No. A-1490-20, 2022 N.J. Super. Unpub. LEXIS 386 (App. Div. Mar. 10, 2022)[4]. In Helmetta, the applicant requested site plan approval to develop age-restricted apartments with use, density and bulk variances. Id. The applicant presented

[4] Plaintiff acknowledges that this is in unpublished Appellate Division case, however, is compelled to include it due to its relevance to the underlying facts. A copy has been provided as Pa001-003.

unrebutted expert testimony from an engineer, architect, traffic consultant and planner. Id. The only item introduced by the board was the review letter from its own engineer. Id. Several members of the public and board members, however, expressed opinions and concerns. Id. The appellate court affirmed the trial court's reversal of the board's decision and remand for a grant of all variances requested for the reasons detailed by the trial judge. Id. The court stated:

> Judge McCloskey found the Board failed to present any contrary expert testimony to rebut or challenge plaintiff's expert s' testimony. He held "by giving short-shrift to the plaintiff's experts' unrebutted testimony here, the Board in voting to deny the application ignored the greater weight of the evidence in the record that supported a grant." As a result, Judge McCloskey determined denial of plaintiff's application was arbitrary, capricious, unreasonable, and improperly based on "the veiled or even expressed whims of the Board" rather than substantial evidence in the record. The judge stated, "the record . . . is bereft of substantial evidence to support what was set forth in the Board's Resolution here and despite what it purported to detail otherwise."
>
> Based on our review of the record, the Board's decision is not entitled to any deference because the denial of plaintiff's application was arbitrary, capricious, and unreasonable.
>
> Id. at 5-6 [alterations in original].

Moreover, a board may not rely on the speculative beliefs of the neighbors in analyzing the negative criteria. In a similar case, Homes of Hope, Inc. v. Mount Holly Township. Zoning Board. of Adjustment, 236 N.J. Super. 584, (Super. Ct. 1989), objectors to a conversion from a single family to a two-family

residence complained of additional traffic, anticipated drug problems, undesirable tenants and tax losses. The court reversed the board's denial of a d variance, holding:

> There was no proof that the conversion would make any significant addition to existing traffic. Objections by witnesses who anticipated drug problems, undesirable tenants and tax losses are speculative and inappropriate. Zoning benefits outweigh zoning harms. The granting of the variance will not substantially impair the intent and purpose of the master plan and zoning ordinance.
>
> Id. at 594 [internal quotations removed] [emphasis in original].

Here, the trial court correctly concluded that the Board's findings to support the denial are improperly grounded in the speculative concerns of the neighbors and their objections to the pool itself rather than the variances requested and failed to consider the substantial testimony of the Valentines' experts. 281a. The only expert testimony presented regarding the pool setback, which included both testimony from the Valentines' fire expert and the letter of the City's own fire chief, concluded that the pool posed no safety risks. Despite this, and without any other contrary evidence, the Board concluded that the pool could not be safely located 4.7' from the deck. The Resolution instead raises new concerns that were not contemplated when the Valentines first applied to the Board, specifically that the pool's location did not allow for adequate navigation around the pool and that there is not appropriate space in the rear yard for a pool. These findings lack credible evidential support in the record, with the only support

being comments made by the Board Members regarding children walking around the pool or people jumping off the 2' deck (or alternatively, jumping off the railing that will prevent people from jumping off the deck). 236a:17-23. It is evident that the setback variance was denied based on the "veiled or even expressed whims of the Board." 15 High Street, 2022 N.J. Super. Unpub. LEXIS 386 at 5.

The Resolution explicitly acknowledges that the Board's denial of the lot coverage variance is grounded in the speculative comments of the public, stating: "the Board also acknowledges the public's view (which is a rational one) that a pool is an intense accessory use," and "[t]he neighbors, both on this application and in others, often comment that pools are a very intense use. . ." 119a. The Board's brief confirms this as well. Db10. Not only are the objections to the application by the public based on pools as a use, rather than the impact of the variances, but the objections are based on speculative beliefs that the pool will result in parties and excess noise. These findings are not supported by any credible evidence or grounded in any findings of fact. In fact, and contrary to the Board's assertion that the neighbor's concerns about potential noise were "met with virtually no response from the Valentines," Mr. Valentine specifically testified that there will not be any "wild parties" and the "lights are out by 9:30." 213a:6-8.

It is evident that the Board's decision is grounded in comments and concerns from Board Members and the public rather than the qualified expert testimony which was unreasonably rejected by the Board. Accordingly, the Board's decision is arbitrary, capricious and unreasonable, therefore the decision of the trial court should be affirmed.

CONCLUSION

Based on the above, the Board's denial of the Valentines' application was arbitrary, capricious and unreasonable. The Valentines presented substantial testimony to support the grant of variance relief pursuant to N.J.S.A. 40:55D-70(c)(1) and (2). The Board unreasonably rejected the qualified expert testimony presented by the Valentines and impermissibly hinged its denial on the speculative comments of the public and the Board Members, which failed to focus on the impact of the variances themselves, and instead condemned pools generally. Mr. Valentine's own testimony summarized it best: "Their objections are basically to the quality of their neighbors, basically saying if you put in a pool, you're a bad neighbor and you're going to have parties. I have to be honest with you. You can have parties without a pool. You can be a really bad neighbor without a pool. You can have drunken people in your backyard without a pool. You can have loud music at 12 o'clock at night without a pool." 211a:11-18.

For the foregoing reasons, the Valentines respectfully request that the trial court's decision reversing the Board and granting the Valentines the requested variances for the pool setback and lot coverage be affirmed.

Respectfully submitted,

/s/ Andrew D. Catanese

Dated: April 3, 2024

ANDREW D. CATANESE, ESQUIRE
Attorney for Plaintiffs

/s/ Kathryn A. Monzo

Dated: April 3, 2024

KATHRYN A. MONZO, ESQUIRE
On the Brief

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001126-23 T2

PAUL AND NANCY VALENTINE, Plaintiffs-Appellees, v. CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT, Defendant-Appellant.	:	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY CAPE MAY COUNTY/LAW DIVISION DOCKET NO. CPM-L-104-23 Sat below: Honorable Michael J. Blee, A.J.S.C.

CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT'S REPLY LETTER BRIEF

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Re: Paul and Nancy Valentine v. City of Cape May Zoning Board of Adjustment
CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT'S REPLY BRIEF
Appellate Division Docket No: A-001126-23

Dear Mr. Orlando:

Please accept this letter brief pursuant to R.2:6-2(b) in reply to the Responding Brief filed on behalf of Paul and Nancy Valentine.

I. Legal Argument

A. The Standard Requires Deference to the Zoning Board

As set out in the Board's initial brief, review by the trial court should have been, and by this Appellate Court must be, limited and highly deferential to the local Board.

"The courts must affirm any municipal zoning board's decision unless it is arbitrary, unreasonable or capricious." Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965). The legislature "empowered boards to make such decisions, based on the fact that local people, familiar with the community's characteristics and interest, are best equipped to assess the merits of a variance application." Ward v. Scott, 16 N.J. 16, 23 (1954). Courts defer to a municipality's informal interpretation of its ordinances, and provide greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning. Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 561 (App. Div. 2004); Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 198-199 (App. Div. 2001) (internal citations omitted).

> [T]he judicial philosophy of sympathetic approach to local zoning decisions is even more cogently applicable to a case where we review a denial of a variance than where we review a grant, for generally speaking more is to be feared from a breakdown of a zoning plan by ill-advised grants of variances than by refusals thereof. . .

Mahler v. Board of Adjustment, 94 N.J. Super. 173, 186 (App. Div. 1967) (internal citations omitted).

The trial court erred in reversing the Board's legitimate determination that a minor reduction in lot coverage was not a sufficient benefit to justify the additional development proposed, the intensified use to be introduced to the property, and the near certainty that the Valentine lot would never be brought into compliance if the requested variances were granted. The Board legitimately determined that different accessory uses can have different impacts on the balancing process, which the trial court erroneously rejected conceptually in favor of its own judgment. The trial court's decision should be reversed, and Board's variance denial reinstated.

B. The c(1) Positive Criteria

The Valentine application did not meet the c(1) positive criteria for any of the reasons set out in the Respondents' Brief.

> [A] c(1) variance requires proof of the 'positive criteria,' which are predicated on 'exceptional and undue hardship' because of the exceptional shape and size of the lot. . . Typically, the contention is that the strict enforcement of the zoning ordinance, in view of that property's unique characteristics, imposes a hardship that may inhibit the extent to which the property can be used.

Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 55 (1999) (internal citations omitted). "In a c(1) variance context, a board of adjustment or reviewing court should consider whether the structure proposed is so unusually large that its size,

rather than the unique condition of the property, causes the need for a variance." Id. at 56.

The core issue arising from the Valentine application is the scope and impact of the proposed development rather than any unique condition of the property. Unlike the applicant in Lang, the Valentine lot is not "exceptionally narrow" or "one of the narrower and smaller lots" in the neighborhood. Lang, 160 N.J. 41 at 49. The Valentine lot is the same exact size and shape as every other lot in the area. See 47a. The Valentine property does vary from the neighboring properties, except to the extent it is already fully developed with a large home, exterior decks and an exterior patio, which the Valentines seek to expand to include an even larger patio, outdoor kitchen and a pool. (43a-47a). The Board was well within its discretion in concluding the slight proposed decrease in lot coverage did not justify adding a new accessory use that would increase overall intensity and essentially ensure the property would never comply with the zone's lot coverage limit. (119a; 165a; 283a-284a).

This case is also distinguishable from Wilson because the Valentine property already has outdoor decks and a patio. This is not a case where the "lawfully existing dwelling's placement on the lot creates an extraordinary and exceptional situation resulting in peculiar and exceptional practical difficulties."

Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 201 (App. Div. 2001); Respondent's Brief at 24. The Valentines are not precluded from having usable outdoor space, as the home already has outdoor decks and a patio. Instead, they seek to expand their outdoor development with additional patio space, a kitchen and a pool. The Board's and the neighbors' concerns about overdevelopment and impact on the surrounding area were legitimate, and the Board was permitted to consider the degree to which the property would be further developed and intensified by the proposed plan. The trial court erred in overturning the Board's determination on the c(1) positive criteria.

C. The c(2) Positive Criteria

Subsection c(2) provides, "even absent proof of 'hardship' pursuant to subsection c(1), a bulk or dimensional variance that advances the purposes of the MLUL can be granted if the benefits of the deviation outweigh any detriment." Lang, 160 N.J. at 57.

> [C]onfusion about the meaning of c(1) 'hardship' should not slosh over into the interpretation of the c(2) standard. The c(2) variance is entirely different, and the Legislature has made one thing clear about it: the grant must be rooted in the purposes of zoning and planning itself and must advance the purposes of the MLUL. . .
>
> By rooting the c(2) variance in the purposes of the MLUL, the Legislature has confined the discretion of boards: they cannot rewrite ordinances to suit the owner or their own idea of what

> municipal development regulations should be. Rather, the board should seek, as we think this Board did, to effectuate the goals of the community as expressed through its zoning and planning ordinances.

Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 562, 564 (1988).

The New Jersey Supreme Court has also recognized the legislature's "apparent objective and strong legislative policy of encouraging municipalities to make zoning decisions by ordinance rather than by variance. That is, the MLUL's legislative scheme emphasizes the role of planning in land use regulation and zoning, not ad hoc decision-making." Chesterbrooke Ltd. P'ship v. Planning Bd. of Twp. of Chester, 237 N.J. Super. 118, 127 (App. Div. 1989) (citing Medici v. BPR Co., 107 N.J. 1, 5, 23-24 (1987)).

The trial court erred in disregarding the local Board's determination that different accessory uses can have different impacts on the weighing process for a c(2) variance. The Board understood the city's zoning code treats swimming pools differently from other accessory uses[1], and did not agree the proposed development represented a "better zoning alternative" or provided a benefit that

[1] See Cape May City Code § 525-62A, requiring swimming pools and connected patios to be located (1) 10 feet from any property line; (2) 10 feet from the principal structure; (3) enclosed by a fence, and; (4) provide a four-foot-wide planted green space along rear property lines to increase infiltration, add buffering, improve aesthetics and provide space for grading and conveyance of stormwater.

outweighed the detriment to the surrounding properties or community. The Board ultimately determined the proposed development only truly benefitted the applicant, and the property would only ever conform with the zoning code if it denied the application. (119a; 165a). These are entirely legitimate conclusions and are not unreasonable, arbitrary and capricious.

The Burbridge case cited in Respondent's brief applies less restrictive standards to the expansion of an existing, non-conforming use as opposed to a new prohibited use, and actually supports the Board's determination inasmuch as it recognizes a Board may deny a variance with the hope the nonconformity "will wither and die." Burbridge v. Mine Hill Township, 117 N.J. 376, 387-89 (1990). Nevertheless, the Burbridge case is also distinguishable as it addressed the expansion of a commercial use within a residential zone, there was no opposition to the application, and the New Jersey Supreme Court affirmed the Board's decision on the variance, along with a "host of [nineteen] restrictions to regulate the nonconforming use." Id. at 382.

D. The Negative Criteria

Even if the board was compelled for some reason to accept the applicant's view of the positive criteria (which the Board is not compelled to do), the Valentine application certainly did not satisfy the negative criteria, which

requires a variance to occur, "without substantial detriment to the public good," with a focus on the impact the variance will have on adjacent properties. Lang, 160 N.J. at 57. The record is replete with the Board's concern regarding the impact of the proposed development and the adjacent neighbors' legitimate concerns about safety, quiet enjoyment and the character of their neighborhood. The trial court's decision usurped the Board's reasoned judgment that the proposed decrease in lot coverage failed to offset intensification of the property and an increased impact on the neighbors and neighborhood with the introduction of a pool.

E. Conclusion: The Board's Decision Was Not Arbitrary, Capricious and Unreasonable

The Board legitimately concluded the inadequate distance between the pool and the deck coupled with continued excessive lot coverage weighed against granting a variance. There was just too much packed on one lot, and there was no compelling reason to encourage that to continue indefinitely. The record demonstrates the Board considered the application and the community's reactions, applied and followed the statutory guidelines, thoroughly evaluated the positive and negative criteria and properly exercised its discretion to deny the variance. The trial court erred when it granted this applicant the

extraordinary relief of COMPELLING the local Board to GRANT a variance. The Board's decision should be reinstated.

II. Conclusion

For these reasons, the trial court's decision should be reversed, and the decision of the Board reinstated.

Respectfully submitted,
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