SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-001930-24

DOROTHY GUO & HENRY ZHENG

Plaintiffs-Appellants

v.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MILLBURN, AND NARAYAN & AYRA HEGDE

Defendants-Respondents

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
ESSEX COUNTY
DOCKET NO: ESX-L-002897-24

Honorable Judge Louise Grace Spencer, J.S.C.

Sat Below

BRIEF FOR
PLAINTFF-APPELLANTS DOROTHY GUO & HENRY ZHENG

DOROTHY GUO & HENRY ZHENG
APPELLANTS
101 SAGAMORE ROAD
MILLBURN, NJ 07041
(973) 801 6179
guodorothy@aol.com; szheng0488@aol.com

TABLE OF CONTENTS

TABLE OF CONTENTS

(Continued)

TABLE OF JUDGEMENT, ORDERS AND RULING

TABLE OF AUTHORITIES

Millburn Zoning Ordinances

TABLE OF TRANSCRIPTS

Proceeding Type	Proceeding Date	Transcript Number
Defendant Zoning Board Public Hearing Transcript	January 22, 2024	1T
Trial Court Hearing Transcript	November 14, 2024	2T

PRELIMINARY STATEMENT

This appeal challenges the trial court's decision affirming the Zoning Board of Adjustment of The Township of Millburn's ("Board") approval of bulk variances for the property at 99 Sagamore Road, Millburn, New Jersey. The property owners ("Hegdes") proposed razing the existing house and reconstructing it with enlarge foundation, and a new longest driveway in a restricted steep slope area. Initially, the application sought four (4) variances related to steep slope disturbance, minimum retaining wall separation, height of front yard retaining walls, and site elevation alterations. Although the site elevation alteration variance was withdrawn at the beginning of the hearing, the Board's resolution erroneously recorded the grant of all four (4) variances.

Additionally, the Hegdes claimed the conversion of an attached existing nonconforming garage to detached storage with added patio on top does not need variance. The Board wrongly accepted this stance, allowing the nonconforming garage to remain without a variance, bypassing statutory requirements, undermining the variance process's integrity, and violating the legislative goal of eradicating nonconforming structures.

The steep slope disturbance applied for was 15 times the zoning code limit—15,052 square feet compared to the 1,000 square feet allowed—excessively and substantially challenging the intent and purpose of the Millburn Zoning Ordinance and Master Plan regarding Steep Slope Protection. While the applicants failed to provide sufficient, credible evidence to support their testimonies, both the Board's approval and trial court's affirmation relied solely on experts' testimonies, which often contradicted the materials prepared and submitted to the Board. The trial court even mistakenly suggests that as long as a variance application is not supported by opposing expert witness then the Board's approval should not

be an issue, undermining the purpose of the zoning variance application, review, and approval process. The Board failed to exercise due care and diligence in assessing the application making numerous mistakes in its decision-making process. For example, the record revealed that the proposed new construction would violates the front yard impervious coverage ratio due to extensive disturbance and the Hegdes' expert teams' miscalculation, which requires additional variance relief. However, this material miscalculation was skipped by the Board while other applicants' similar calculation was challenged by this Board at the same hearing. Furthermore, the trial court overlooked material facts and relevant laws, misapplied applicable zoning laws, and procedural irregularities compromised fairness. For example, it concluded that the garage is "completely disassociated from the primary habitable space", just by expert witness's testimony, but the same expert's submitted document along with other contradicated testimony demonstrated the exact opposite as associated.

If this bulk variance approval stands, it could set an example to nullify future steep slope disturbance limitations and perpetuate the existence of nonconforming structures, thwarting legislative intent. Therefore, both the trial court's and the Board's decisions should be reversed and remanded for further proceedings consistent with applicable legal standards.

PROCEDURAL HISTORY

On January, 22, 2024, the Zoning Board of Millburn Township heard the Application of Defendants, Hegdes, who applied bulk variance reliefs to demolish their existing dwelling and driveway and to construct new ones. [1] (See Pa229-248). Plaintiffs objected

[1] The Millburn Township's Public Hearing Transcript January 22, 2024 ("1T").

on several grounds during the Zoning hearing. The Board granted the Hegdes' application, and issued a Resolution of approval for four (4) variances, erroneously including one variance withdrew by the applicant at the hearing. (See Resolution in Pa49-Pa60). On April 26, 2024, Plaintiffs filed a Complaint in Lieu of Prerogative Writ in the Superior Court of New Jersey, challenging the Zoning Board's decision to approve the variances, which was amended on May 9, 2024 (Pa11-Pa91).

On June 14, 2024, Plaintiffs filed an Order to Show Cause (OTSC) seeking immediate relief to halt construction activities. On June 19,2024, Defendants, Hegdes, filed opposition to Plaintiffs' OTSC. On June 19, 2024, the Honorable Judge Damian D. Santomauro held hearing on Plaintiffs' OTSC. and delivered his decision to deny the OTSC request, mainly based on that a). insufficient info provided to the Court to review the case details, b). no nonmonetary irreparable harms were demonstrated, c). while the garage could be a potential issue, Plaintiffs did not demonstrate the Defendants did not meet the variance, i.e. c(1) & c(2) requirements. An order, denying application for temporary restrains and scheduling case management conference (CMC), was issued on June 19, 2024, which also requests the CMC document submission, including statements of factual and legal issues, a proposed exhibit list, outline of proposed discovery and schedule, a proposed briefing schedule and date for final hearing. (Pa92-93). After the OTSC hearing, on the same day of June 19, 2024, Plaintiffs submitted the transcript record from the Millburn Zoning Board' public hearing on Jan 23, 2024 (1T). On June 25, 2024, Defendants, Hegdes, filed an answer to amended complaint (Pa110-121). On June27, 2024, Defendant, Zoning Board, filed an answer to amended complaint (Pa94-109).

On September 18, 2024, the court issued a Case Management Conference (CMC) date of September 30, 2024, with Honorable Judge L. Grace Spencer. On September 25, 2024, Plaintiffs submitted the required statements of facts, legal arguments, and a proposed brief schedule, i.e. September 25 CMC Submission[2] (Pa122-168) in compliance with Judge Santomauro's prior CMC order. On September 30, 2024, a CMC was held, and scheduled the brief and trial date. On Oct 14, 2024, Plaintiffs filed Brief with only supplemental info to the September 25 CMC Submission (Pa173-220) per Judge Spencer's instruction. On October 23, the Court granted the Case Management Order proposed by the Defendants, Hegdes, on October 9, 2024 (Pa221-222). On October 24, 2024, Defendant, Zoning Board, submitted relevant application materials submitted by the Hegdes (certain attachments were included in the Appendix Volume II: Pa223-313). On November 14, 2024, a trial was held before Judge Spencer [3]. Judge Spencer issued an Order on February 7, 2025, denying Plaintiffs' Complaint in Lieu of Prerogative Writ. (Pa1 to Pa10). On February 28, 2025, Plaintiffs filed a Notice of Appeal. (Pa314-335).

STATEMENT OF FACTS

The property at 99 Sagamore Road, Millburn, New Jersey, designated as Lot 11, Block 101 on the Official Tax Map of the Township of Millburn, is an over-sized lot in R-4 district, twice in lot size than most properties on the uphill side of Sagamore Road. (Pa216-217, Pa243, Pa250). Due to mold issues in the existing house, the owners, the Hegdes, proposed razing the old house to build a new one. (1T6:4-8). They also claimed

[2] The Sept 25 CMC Submission (Pa5) and the brief (Pa1) were included in the Appendix because they were referenced in the trial court's February 8, 2025 Order.

[3] Trial Court's Hearing Transcript November 14, 2024 ("2T").

the existing driveway, in use since the house was built in 1962, (1T15:4-5), is unsafe and proposed a brand new relocated one. (1T6:4-8). The Plaintiffs' property is to the left when facing the house on Sagamore Road.

The proposed variance for the new construction of the house and new driveway initially included four (4): steep slope disturbance (§DRZ[4] 608.5), min retaining wall separation in steep slope areas (§DRZ 608.7.l), height of front yard retaining walls (§DRZ 609.6), and alterations of site elevations >1 foot within 5 feet of a property line in steep slope areas (§DRZ 608.7.k), (Pa 76). During the public hearing on January 22, 2024, the variance for alterations of site elevations variance was eliminated. (1T5:1-4) (Reduction 1 in Pa 47). However, the Board's Resolution still recorded the grant of all four (4) variances initially applied for. (See Pa51, Paragraph 3). Additionally, the Board allowed the continued use of a nonconforming garage for storage (Pa59, Paragraph 23), although no variance being applied for and objections for the continued existence of the nonconforming structure were raised by the Plaintiffs during the hearing (1T130:13-22)

Nonconforming Garage The existing nonconforming garage at 99 Sagamore is a partially buried stone structure situated along a steep slope, with only the front door and limited portions of the two sides visible. (See photos in Pa265-266, Pa258). It was attached to the main house via an elevator and hallway installed by the previous owner in 2006, as testified by Mr. Keller. (1T19-25 - 20:1-3). The Hegdes moved in 2011 (1T7-13). On the Zoning Calculation Form in the variance application submitted by the Hegdes, this garage was not marked as "detached" garage (Pa240, Pa220). The garage has a side yard setback

[4] Development Regulations and Zoning (DRZ) Ordinances of the Township of Millburn.

of 4.45 feet (3.93 feet according to the Plaintiffs' survey) to the Plaintiff's property line, compared to the 15 feet minimum required for an attached garage being part of the main house. (Pb15) Atop the garage is a fenced patio area, approximately 660 square feet (22 x 30 feet) in size. (Pa15, Paragraph 16; Pa36, Pa265). The "HEGDE RESIDENCE: VARIANCE APPLICATION," (Pa252) indicates a side yard setback variance is required for this existing nonconformance (ENC) in the upper right comment table section. (Pa254). Mr. Keller testified that the garage predates zoning from the '50s, and is considered an existing nonconforming condition, and we keep it. (1T84:11-20).

During the "question session" at the public hearing, the Plaintiffs raised concerns and challenged about the continued use of the garage as a storage area, requesting that the Board determine whether a variance was required. (1T83:20-84:10). During the "comment session", the Plaintiffs objected the continued use of the garage as an accessory use and provided the nonconforming garage pictures (Pa265-266; 1T129:1-25), to highlight that the problematic structure, no longer being used as a garage, supports a patio and terrace on top, which intensifies its nonconformance. It should be removed to comply with zoning code requirements. (1T130:13-18). The Plaintiffs referenced Millburn Zoning Codes, stating that accessory uses must be constructed in the rear yard and maintain a minimum side setback of 12 feet (1T130:19-22). They argued that the nonconforming structure should be removed to conform with the applicable requirements (1T130:13-22).

Steep Slope Disturbance The reconstruction and new driveway orientation, triggered extensive steep slope disturbance. According to Mr. Keller's testimony, Sagamore Road is a unique street in the community and it is one of the two streets that he considers as rural feel. It got steep slopes up and down. (1T13:19-14:5). The wider the

driveway the more steep slopes he disturbs (1T97:24-98:4). Similarly, the longer the driveway or the closer its entrance to the Plaintiffs' driveway entrance, the more steep slopes he disturbs. However, Mr. Keller testified, somewhat irrationally, that there is no code requirement regarding the proximity of its new driveway entrance. (1T59:23-60:4).

All of these properties on the upper side of Sagamore Road are challenging with the slopes. (1T115:13-15). Under Millburn Township Development Regulations and Zoning § DRZ-608. Protection of steep slope areas [5], without any ambiguity, the zoning requirements permit redevelopment, which involves constructing on areas that previously had structures or improvements, such as the old house and existing driveway. Since Hegdes intended to build a new house on the existing footprint 1T73:24-74:8), if they utilize the existing driveway, this could be a viable option without requiring a disturbance variance or requiring a significant less disturbance variance. However, despite that the Millburn Township's Steep Slope Protection Ordinance (§DRZ 608) clearly mandates "prohibition of disturbance of more than 1,000 square feet", Mr. Keller testified that they

[5] **§ DRZ-608.5 Regulations for Development in Steep Slope Areas.**

a. Prohibition on Disturbance. There shall be no disturbance of steep slope areas, except for redevelopment.

b. Limit of Disturbance. The limit of disturbance shall be established to preserve existing vegetation on each lot and shall be marked by a temporary fence to be maintained throughout construction.

§ DRZ-608.3 Definitions.

DISTURBANCE/DISTURB The placement of impervious surface, the exposure or movement of soil or bedrock, or the clearing cutting or removal of vegetation over an aggregate area of more than 1,000 square feet.

REDEVELOPMENT The construction of structures or improvements on areas which previously contained structures or other improvements.

STEEP SLOPE AREA A slope with a grade of 20% or more, which extends for a horizontal distance of 10 feet or more.

intended to design the house without regard to disturbance limit, i.e. "they want to give it a try regardless the disturbance number." (1T121:9-12). The proposed steep slope disturbance at 99 Sagamore encompasses 15,052 square feet across four (4) distinct areas. (See Pa47-48, disturbance table and color-coded disturbance chart).

Area 1 (Orange) in the front yard, covering 6,506 square feet, is intended to create a safe driveway for the owners and facilitate construction activities, serving personal needs rather than stormwater management. Area 2 (Green), located behind and lateral to the house, involves 3,969 square feet for slope stabilization, planting, and runoff management. Area 3 (Purple), the middle drainage intercept and vehicle access, covers 2,475 square feet for stormwater runoff and vehicle access. Lastly, Area 4 (Yellow), the upper drainage intercept and vehicle access includes 2,102 square feet for stormwater runoff and vehicle access.One of the reasons for the backyard disturbance, particularly in the middle area of 2,475 square feet and the upper area of 2,102 square feet, is to provide vehicle access because it is nice to get vehicles up there based on Mr. Keller's testimony (1T68:9-11). Notably, no other hillside property on Sagamore Road has backyard vehicle access, making this the first to propose such a feature. Even though the backyard disturbance could be reduced by 50% to gain the same efficacy, he saw no need to reduce it, as he perceived no negative impact. (1T68:15-20;1T102:20-23). The Board members concurred, agreeing that they should not concentrate or be caught up in the disturbance numbers. (1T141:10 -12;142: 15 -17).

While, Mr. Keller testified that Sagamore Road is a unique rural feel street in the community, nestled into the 2200-acre tree-lined reservation, got steep slopes above and below, and is very different than most of the rest of the town, (1T13:19-14:5), he also

claimed that most of the areas they're disturbing is existing manmade topography, (1T115:17-22), and 40% of the 70% slopes were created when they built the subject house (1T119:7-10), which was clearly not collaborated by the local geographic conditions. Despite this, the Board accepted this testimony as a key finding, noting in the Resolution that the disturbance area "contains a significant amount of man-made steep slopes (likely created during the construction of the existing dwelling)" (Pa56, Paragraph 14). Does this unverified man-made slope claim give them the "license" to disturb rightfully, then? The Millburn Steep Slope Protection ordinance prohibits steep slope disturbance without differentiating between man-made and natural slope [5].

The Plaintiffs argued that the bulk variance application fails to meet the statutory requirement for hardship because steep slopes and steep slope driveways are a common and shared character and feature among adjacent properties in the Sagamore neighborhood. (1T125:18-24). There are many alternatives for enhancing the driveway without the need for variance or less disturbance, such as widening the existing driveway. incorporating more curves, and adjusting the elevation level of the garage and parking area. (1T128:17-23) The Plaintiffs expressed concerns about potential detriments to the neighborhood, noting that the proposed disturbance, at such extreme extent on such a large scale, is 15 times what the zoning code allows. (1T133:11-16). They presented photos (Pa269-270) to illustrate that the disturbance would remove trees essential to the area's character, altering the neighborhood's aesthetic and potentially destabilizing the land's foundation. The Hegdes' team testified that only six (6) trees would be removed (1T106:9-112) (Pa55, Paragraph 13) for the front yard disturbance, the Plaintiffs urged the Board to require a detailed tree removal plan to show which trees will be removed before approving

the variance. (1T135:25-136:4) Ultimately, 15 trees were removed in the front yard alone, not the six proposed. (2T21:9-16). The Plaintiffs also challenged the variance as a substantial deviation from the zoning ordinance code that was reviewed by all engineers, and was set up for a purpose. This excessive variance sought and grant would be a substantial detriment to the intent and purpose of the zoning ordinance. (1T139:21-140:5). It was further documented in the Resolution as "the proposal requires too much steep slope disturbance by too great of a degree." (See Pa 57, Paragraph 17).

New Driveway Orientation and Entrance Location As indicated in the Minutes of Board Meeting on January 22, 2024 - "It is the relocation of the driveway that is triggering the need for some variance relief." (Pa89). Mr. Keller testified that the new driveway involves creating a new basement-level garage upper right of the lot (when facing the house) by extending the foundation 20 feet closer to Sagamore Road, with a living room above; (1T91:5-7; 91:25-92:3); moving the driveway entrance at the curb cut 55-feet closer to the Plaintiffs' property line and driveway entrance to get the longest run new driveway at 15 percent or less coming into the site and to access to the new basement layer garage. (1T38: 3-18). Although Mr. Keller stated that most people don't know a 20 percent slope is actually not very steep, (1T118:25-119:1), and he also stated 17 percent of grade or slope for the two cross public streets of the subject property, Maple Street and Mountain Avenue, is considered as "safe road", (1T12:20-25), he still wants the new driveway to be the longest in order to get the slope down to 15 percent or less. (1T38:6-13). Despite being aware of the Plaintiffs' concern about driveway's proximity to their property, he provided inconsistent measurements of the distance, initially stating it would be 22 feet away at the close point and 12-15 feet at the gutter line, (1T60:1-7), later changing it to 30 feet and 11

feet. (1T80:12-15). The Board mistakenly noted that the Plaintiffs "believed to be 30 feet away from the closest property". (Pa55, Paragraph 11)

The Plaintiffs contested that steep slope and steep sloped driveway, including the public cross streets/roads, have been a consistent feature of the neighborhood for over 70 years, demonstrating their usability. The proposed variance application does not address a unique hardship compared to other properties in the neighborhood. (1T126:4-15). They did an experimental slope drive test, i.e. comparable analysis of 4 driveways around 99 Sagamore property. The 99 Sagamore has the lowest slope due to its parking lot is the lowest. (1T127:9-19; 128:10-11). The previous owner had no complaint about the driveway, that was why the elevator was installed years ago, and it has been functioning well for over a decade. While the existing garage does not comply with the zoning codes, the Hegdes want to build a new garage and continue to keep the old nonconforming garage intact, which does not make any senses from the zoning perspective. (1T139:4 -17).

The Plaintiffs objected to the new driveway orientation, arguing it disrupted the neighborhood's established pattern and harmony. Near 99 Sagamore, all houses have driveways entering from the right to the left. The lot at 99 Sagamore was 173 feet wide, wider than any other house in the area, allowing for an enhancement of the existing driveway with minimal disturbance. Instead, the new design crossed from the bottom left to the upper right of the property, placing the entrance only 8 feet or less from the Plaintiff's driveway and closer to others across the street. Sagamore Road was narrow, accommodating only two cars traveling in opposite directions simultaneously. (1T130:23-131:21). The Plaintiffs presented photo (Pa268) illustrating the close proximity of the new driveway entrance to their own and two neighboring driveways across the street, and

argued that this location is unappealing to the surrounding neighborhood and negatively impacts adjacent property values, causing congestion and raising safety concerns among adjacent neighbors and other cars that pass on the street. Meanwhile, the design left nearly 200 feet between the new driveway entrance and the adjacent neighbor's driveway on the opposite side, with no driveways across the street. (1T131:22-133:10).

LEGAL ARGUMENT

Standards of Review

For variance application pursuant to **N.J.S.A. 40:55D-70c**, the applicants bear the burden of proving their application satisfy the statutory requirements. In Tomko v. Vissers, 21 N.J. 226 (N. J. 1956), the applicants' proofs, while uncontroverted, were legally insufficient to support the variance relief sought. **N.J.S.A. 40:55D-10(g)** requires that a municipal agency shall include findings of fact and conclusions based thereon in each decision on any application for development in writing in a memorializing resolution. When reviewing a complaint in lieu of prerogative writ against a zoning board's decision for variance approval, the trial court's obligation is to evaluate whether the Board's decision is "founded on adequate evidence." Price v. Hemeji, 214 N.J. 263, at 293 (2013), quoting Burbridge v. Twp. Of Mine Hill, 117 N.J. 376, at 385 (1990). If the findings lack competent evidence to support them, the court should vacate them as arbitrary, capricious, and unreasonable. Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 290-91 (N.J.1965).

Because variances should be granted sparingly, as they are exceptions to the zoning scheme, a board's factual findings are accorded less deference on an appeal from the grant of variance than from a denial. Kinderkamack Road Assocs. v. Mayor and Council,

Oradell, 421 N.J. Super. 8, 21 (App. Div. 2011). Appellate courts generally give deference to the trial court's findings, particularly those based on credibility assessments or factual determinations made during the trial. However, appellate courts do have the authority to review and overturn trial court decisions if there is a clear error in the application of the law or if the findings are not supported by credible evidence. "The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)).

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan 140 N.J. 366, 378 (1995)). While a Board of Adjustment's exercise of its discretionary authority based on its factual determinations will not be overturned unless arbitrary, capricious or unreasonable, legal determinations are not entitled to a presumption of validity and are subject to de novo review. Wyzykowski v. Rizas, 132 N.J. 509, 518-20, 626 A.2d 406 (1993).

New Jersey **Court Rule 2:10-2**, the plain error rule, applies to errors not raised below. This rule permits the appellate court to recognize plain errors that were not brought to the attention of either the trial or appellate court if doing so serves the interests of justice. Consequently, the appellate court has the discretion to raise a particular issue "where upon the total scene it is manifest that justice requires consideration of an issue central to a correct resolution of the controversy and the lateness of the hour is not itself a source of countervailing prejudice, as noted in Morales-Hurtado v. Reinoso, 457 N.J.

Super. 170, 191 (App. Div. 2018), aff'd o.b., 241 N.J. 590 (2020), Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 318 (2006). The appellate court will address issues of substantial public interest, even if they were not raised below, as established in. J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021); State v. Jones, 232 N.J. 308, 321 (2018). Zoning ordinance violations that disrupt the zoning plan's intent, harm the community's welfare or safety, or involve inconsistent application of standards are typically considered related to substantial public interests.

I. The trial court erred in determining that the detached garage continuing non-conforming use did not need a variance. (Raised Below: Order Pa 9 - 10)

A. The reconstruction of the existing nonconforming garage as a separate accessory structure is illegal.

The issue at hand is whether an existing nonconforming ("ENC") structure, specifically a garage that was attached to the principal building, can continue to be repaired and converted into a detached accessory structure after the principal building has been demolished to the ground and reconstructed as a new building. The New Jersey Municipal Land Use Law ("MLUL"), **N.J.S.A. 40:55D**, along with the DRZ Ordinances of the Township of Millburn, establish specific rules and requirements that must be adhered to in this matter, dictating how nonconforming structures can be managed when changes occur to the principal building and the nonconforming structure itself.

1. **§ DRZ-609.1** Accessory Uses in Residential Districts [Ord. No. 2471-16]

   §DRZ-609.1b "All accessory uses shall be constructed **only within rear yards**…"

   § DRZ-609.1g

   "When any accessory buildings, structures or uses are **attached to** the principal building, or located within four feet of the principal building, it **shall be considered a part of such principal building** and as such shall also comply with all bulk requirements applicable to the principal building. Decks and patios less than 18

inches above grade, and accessory buildings, structures or uses less than 100 square feet in size, are exempt from this provision and shall be considered accessory buildings, structures or uses, and subject to all accessory bulk requirements."

2. **§ DRZ-609.8** Nonconforming Lots and Structures [Ord. No. 2471-16]:

   § DRZ-609.8a
   "Any existing structure on a nonconforming lot, or any existing structure on a conforming lot which violates any yard requirements, may have additions to the principal building or construct an accessory building without an appeal for a variance, **provided** the accessory building or the addition to the principal building **does not violate any requirements of this ordinance**, **and does not extend or increase any existing nonconformity.**"

3. **§ DRZ-606.2e.1(e).(2)(b)** Side yard setback standard in the R-3 & R-4 districts

   "In the R-4 District, **the minimum side yard setback shall be 15 feet** for one-story buildings up to 18 feet in height. The minimum side yard setback for a second story, or any building greater than 18 feet in height shall be 22 feet".

4. **N.J. S.A. 40:55D-68** Nonconforming structures and uses

   "Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and <u>any such structure may be restored or repaired</u> **in the event of partial destruction** thereof."

The nonconforming garage, a partially buried stone structure located along a steep slope, has a side yard setback of 4.45 feet to the neighbor's property line, whereas 12 feet is required. It was attached to the house via an installed elevator and a connecting hallway by the previous owner before 2011, when Hegdes moved in, as testified by Mr. Keller (1T19:25-20:3; 1T7:13) (Also see Pa265). The pictures (Pa257-258) and existing house drawings (Pa260, Pa262, Pa263) submitted to the record demonstrated this attachment.

According to ordinance § DRZ-609.1. g, the existing nonconforming garage must be considered part of the principal building once it was attached to the main house by the previous owner via the installed elevator and connecting hallway, in another word, a detached garage is subject to the treatment of an attached garage once it is attached to the

principal building [6] . As a result, this attachment rendered the main building nonconforming. The main building, including the attached garage, did not comply with the minimum15-feet side yard back required under § DRZ-606.2e.1(e).(2)(b).

N.J. S.A. 40:55D-68 permits the rebuilding or restoration of a nonconforming structure only if it has been "partially" destroyed. In this case, the complete demolition of the nonconforming principal building at 99 Sagamore is not a partial destruction, resulting in that no part of the principal building, including the attached garage, can be restored or repaired. (2T12:19-13:8) "[B]y removing every part of the structure except the foundation and the footings, Plaintiff effected a "total destruction" of the front buildings." Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132 (App. Div. 2013). "[T]otal destruction of such a structure, "whether by the owner's design or by accident," terminates a nonconforming use and the owner's right to continue that use likewise ceases. Id. (quoting S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment, 373 N.J. Super. 603, 619–20, 862 A.2d 1204 (App.Div.2004)). "The extent of destruction here was clearly not partial. Absent a variance, Plaintiff had no right to restore the nonconforming structure." Motley.

B. The Board's decision regarding the continued use of the nonconforming structure is arbitrary, capricious, unreasonable, and unsupported.

The Plaintiffs contested that the structure, now supporting a patio and terrace on top, would be located in the front yard and continues to have a side yard setback of only 4.45 feet, which violates both (§ DRZ-609.1b) and § DRZ-606.2e.1(e).(2)(b), which intensified

[6] The Plaintiffs mentioned that a new ordinance (Ord. No. 2674-24), adopted on June 4, 2024, regarding garage in § DRZ 301.23, defines that an "attached garage" include a detached garage that is attached to the principal building pursuant to § DRZ-609.1. g. This definition further supports the intent of § DRZ-609.1. g. **(2T11:13-25)**

its nonconformance and necessitated its removal to comply with zoning code requirements. They objected to the garage's reconstruction as a storage unit, asserting that it exacerbated the nonconformance and should be removed to comply with the applicable code. However, the Board remained silent throughout the hearing regarding the garage. In its Resolution, there is only a partial statement regarding the evidence and decision for the nonconforming structure as: (Pa59, paragraph 23)

> "The Board further notes that no objecting member of the public presented any expert testimony to counter the expert testimony of the Applicants' witnesses, including as to the variance relief required, and that the Board finds credible Mr. Keller's testimony as to the same, including that no variance relief is required for the continued use of the detached garage structure as storage (whether partially or exclusively) as a use customarily incidental to the use of a single family home."

Clearly, the Board failed to exercise their entrusted 'peculiar knowledge of local conditions'. "A board may and indeed is expected to bring to bear in its deliberations the general knowledge of the local conditions and experiences of its individual members". Baghdikian v. Board of Adjustment, 247 N.J. Super. 45 (App. Div. 1991). The Board did not fully consider the ramifications of the nonconforming garage-related issues, and mis-applied the pertinent laws and ordinances. Its decision is arbitrary, capricious, and unreasonable. "In considering the Board's application of the terms of the statute, we recognize that questions of statutory interpretation are reviewed de novo. James R. Ientile, Inc. v. Zoning Bd. of Adjustment, 271 N.J. Super. 326, 329, 638 A.2d 882 (App.Div.1994) (noting that "interpretation is a judicial function and the conclusions of the Board of Adjustment and the trial court are not, in consequence, entitled to any special deference") (citing Cherney v. Matawan Borough Zoning Bd. of Adjustment, 221 N.J. Super. 141, 144–45, 534 A.2d 41 (App.Div.1987))." Motley.

C. The nonconforming structure must be removed.

In a hypothetical scenario where Mr. Keller recognized the need for a bulk variance under N.J.S.A. 40:55D-70c to convert the attached non-conforming garage into a storage space, he sought variance relief for its continued use. Any reasons for this repurposing would not meet the statutory requirements under N.J.S.A. 40:55D-70c (1) and (2). (Pa143-Pa147). "[G]iven the statutory objective to eradicate nonconforming uses over time, local governing bodies may not adopt ordinances that authorize the restoration or replacement of all nonconforming structures, even on the condition that the cubic size of the replacement structure does not exceed the size of the existing structure." Avalon Home & Land Owners Ass'n v. Borough of Avalon, 111 N.J. 205, 543 A.2d 950 (1988))." Motley. Allowing the garage to remain as a nonconforming structure with a patio atop undermines this policy objective and sets a dangerous precedent for future zoning enforcement. Therefore, the decision granting its continued use should be reversed.

D. The trial court overlooked critical facts & misapplied relevant legal standards.

The trial court inadequately relied on Mr. Keller's conflicting statements as a basis for its decision. Mr. Keller asserted that the garage level was completely disassociated from the primary habitable space [7], yet he also testified that the garage was attached to the principal building via an elevator and constructed hallway by the previous owner (1T19:25 to 20:3). The court failed to address the contradiction in Mr. Keller's testimony and used this conflicted information to support its findings.

[7] Five photos from Exhibit 6 in the 'CMC Sept 25' submission (Pa167-168) were included following Judge Santomauro's advice during the OTSC hearing to counter Mr. Keller's misrepresentations. These photos show other Sagamore houses with garages detached from living spaces, addressing the court's request for evidence.

Additionally, the trial court distinguished Motley from the case at hand. It failed to recognize that case law should not be compared solely at a superficial level, as each case arises from its unique factual and legal context. Case law establishes foundational principles and guidelines that serve as a framework to apply and build upon in similar legal scenarios. The case of Motley centers on the distinction between partial and total destruction of a nonconforming structure under N.J.S.A. 40:55D-68, highlighting the legal boundaries surrounding the restoration of nonconforming structure.

Furthermore, the trial court's comparison of the expansion of nonconforming use in Motley versus the Hegdes' intent to use the garage less intensely is a misconception of nonconforming use versus nonconforming structure. (Pa10) The statement regarding Hegde's reduced use associated with the converted storage unit is irrelevant in determining its continued use because this matter concerns a nonconforming structure, not a nonconforming use.

In summary, the trial court overlooked the critical facts that the existing garage was connected to the main house via an elevator and a constructed connection; and the reconstruction of the garage as a detached storage area will further intensify the nonconformance. The court failed to consider the relevant Millburn Township Ordinances regarding Accessory Uses in Residential Districts (§DRZ-609.1b;1g) and Nonconforming Lots and Structures (§DRZ-609.8a). Furthermore, the court misinterpreted and misapplied N.J.S.A.40:55D-68, which only allows for the restoration or repair of a nonconforming use or structure in the event of partial destruction. As a result, the court erroneously

concluded that the detached garage's continuing non-conforming use did not require a variance (Pa9-10), thereby invalidating its decision.

II. The trial court erred in affirming that the application met the N.J.S.A. 40:55d-70c(1) hardship requirement. (Raised Below: Order Pa 5 - 7)

The N.J.S.A. 40:55D-70c(1)(c) states: "[w]here.…(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 regulation pursuant to article 8 of this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property ….". The c(1) variance is also called as "hardship" variance. "The unique condition of the property must be the "cause" of the hardship claimed by the applicant." Lang v. Zoning Board of Adjustment, 160 N.J. 41 (N.J. 1999). "Undue hardship" is solely pertaining to the physical condition of the property and not to personal hardship of the property owner. Jock v. Zoning Board of Adjustment, 184 N.J. 562 (N.J. 2005). The hardship in question must be unique to the property and not self-created to qualify for undue hardship. Id.

While hardship is considered as "positive criteria ", [a]n applicant for a c(1) variance must satisfy the negative criteria." Ten Stary Dom Partnership v. Mauro 216 N.J. 16 (N. J. 2013). (quoting Nash v. Bd. of Adjustment of Morris Twp., 96 N.J. 97, 102, 474 A.2d 241 (1984)). "The applicant bears the burden of proving both the positive and negative criteria" for a C variance. Id. (quoting Nash).

A. The Hegdes failed to demonstrate a unique hardship due to extraordinary and exceptional conditions affecting their property, and the strict application of the zoning ordinance would result in undue hardship.

Hegdes claim that steep slopes, an unsafe driveway, and the location of the existing dwelling constitute extraordinary and exceptional physical conditions. However, these conditions are common to the neighborhood and not unique to the subject property.

Steep Slopes and Challenging Driveway are Common in the Neighborhood The neighborhood, situated on the hillside of the Wyoming section in Millburn Township, is characterized by steep slopes. or (1T13:19-14:5). Mr. Keller testified that "every single house up and down Sagamore Road on the north side would need some form of relief if built today" (1T67:8-10). A next-door neighbor stated that challenges with a steep slope lot is not unique to this property, anyone living at one of these properties would want to be able to develop a safe driveway, being able to do so will benefits the neighborhood.[8] (1T136:24-137:8). Mr. Keller testified the same next-door neighbor reinstalled rope for assistance to go to the house, then said this neighbor's driveway is not nearly as steep as the 27 percent that Hegdes have. (1T24:17-25). The Plaintiffs conducted a "slope analysis" of four nearby hillside properties (3 on the left and 1 on the right of the 99 Sagamore), demonstrating that 99 Sagamore has the lowest slope due to its parking lot being the lowest. (1T127:9-19). In Lang, the court held that a hardship must be specific to the property and not a condition affecting the general neighborhood. The applicants failed to demonstrate that the steep slopes and unsafe driveway of 99 Sagamore are unique compared to neighboring properties.

[8] The Plaintiffs attempted to comment on the next-door neighbor's driveway has the steepest slope based on their "slope analysis" following the neighbor's testimony. However, the Board Chairman stopped the Plaintiffs, and stated that "I think you had your time." (1T137:24-138:2).

Self-Created Hardship Based on Design Preferences The Hegdes explicitly requested that they not be restrained by existing conditions and instead wanted to start with a "clean sheet" (1T21:20-25). The Hegdes' professional teams focused on the proposed plan rather than to try to minimize steep slope disturbance beyond the 50 percent, and they want to give it a try regardless the disturbance number is excessive and high. (1T121:9-17). The applicants' decision to "start with a clean sheet" and prioritize their design preferences over compliance with zoning regulations suggests that the hardship is self-created. Additionally, it is indicated in the Board's Meeting Minutes – "It is the relocation of the driveway that is triggering the need for some variance relief." (Pa 89, above "Entered as Exhibit …"). Therefore, the variance relief is a result of self-initiated actions. In Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597 (1980), the court emphasized that undue hardship must not be self-created. The Court found that "[r]elated to a determination of undue hardship are the efforts which the property owner has made to bring the property into compliance with the ordinance's specifications." Id. The applicants' design preferences do not justify the variance relief.

Unnecessary Excessive Disturbance The proposed variance involves significant steep slope disturbance, including 4,577 square feet of backyard disturbance (Pa47-48; 4,577 = 2,475+2,102) for stormwater runoff & vehicle access. Mr. Keller admitted this disturbance could be reduced by 50% without compromising efficacy (1T68:7-20;102: 20-23;109:22-25). One of the reasons to have the backyard disturbance is to build a vehicle access path, which prompts significant disturbance, is deemed "unnecessary" for this neighborhood. Notably, no other residence on the uphill side has or needs vehicular access to the reservation, underscoring the lack of necessity for such backyard

disturbance. As stated in Pb11, this longest driveway design choice is not only not necessary, but maximize disturbance of 6,506 square foot alone. In Wilson v. Brick Tp. Zoning Bd., 405 N.J. Super. 189 (App. Div. 2009), the court held that the applicant must demonstrate that the variance is necessary to address the claimed hardship.

No Proof of Undue Hardship Without Variance Mr. Keller made conjectural statements, such as "they went through eight or nine schemes, certainly they think this is the least impactful and the most protective," and "one alternative is to widen the existing driveway, then the house needs to slide back 15, 20 feet in the steepest part of the house" (1T21:20-25). The alternative options were dismissed without detailed analysis or evidence, which raises questions about the necessity of the proposed design. Additionally, these statements lack evidentiary support and fail to demonstrate that the proposed design is the minimum necessary relief or the property cannot be redeveloped without the proposed variance. As discussed at Pb7, Millburn § DRZ-608 ordinance regarding steep slope clearly permit redevelopment on areas that previously had structures or improvements, such as the old house and existing driveway. Since Hegdes intended to build a new house on the existing footprint, (1T73:24-74:8). if they utilize the existing driveway, this could be a viable option without requiring a disturbance variance or requiring a significant less disturbance variance. In Ten Stary Dom, 216 N.J. 16 (2013), the court held that the applicant bears the burden of proving that the variance is necessary.

No Comparative Analysis The Hegdes did not provide evidence showing how the steep slopes, unsafe driveway, and the location of the existing dwelling on downslope of rear upgrade of 99 Sagamore differ in severity or impact from those of neighboring properties to demonstrate that their property is uniquely affected by extraordinary and

exceptional physical conditions and that, without the variance, they would face peculiar and exceptional practical difficulties or undue hardship. No evidence was provided to substantiate the claim that 99 Sagamore is the steepest property in the neighborhood. (1T115:15-16). The subject property is an oversized R4 lot, measuring 173 x 175 feet (Pa243, Pa250), significantly wider than most uphill properties on Sagamore Road, which range from 71 to 110 feet in width (Pa216-217). Hegdes asserted that the longest possible driveway, extending from the bottom left to the upper right of the house, is considered safe. This logic suggests that none of the driveways of other houses on Sagamore would be considered safe.

Based on the above facts, Hegdes failed to meet their burden of proof to provide sufficient evidence to demonstrate that they meet the hardship, aka positive criteria, requirements under N.J.S.A. 40:55D-70c(1). The proceeding record also shows that much of Board's attention was focused on understanding the numbers of steep slope disturbance in four areas, the "unique" aspect can be characterized as "unneeded". Regarding the "unique hardship", Board member Ms. Glatt remarked that "whether they are the only house that has that extreme of a hardship (steep slope) or not, it is still a hardship, and it's a safety concern. It is clear they met c(1)…" (1T140:24-141:10). Once again, "undue hardship" is solely pertaining to the physical condition of the property and not to personal hardship of the property owner. Jock. There wasn't sufficient and competent evidence to support the Board's assertive statement, i.e. the conditions of the location of the existing dwelling on downslope of rear upgrade, unsafe driveway, and the excessive steep slopes are extraordinary and exceptional conditions affecting the property and the structures thereon, which result in practical difficulties and undue hardship to the applicants, (Pa57-

58, paragraph 21), this conclusion also conveniently omitted "uniquely. The Board's decision is unsupported by the evidence in the record and should be overturn

B. The trial court misapplied the legal standards for hardship under N.J.A.A. 40:55d-70c(1), and failed to adequately evaluate whether the Board's decision was founded on adequate record.

The trial court's reasoning of statement for the hardship standard under N.J.S.A. 40:55D-70c(1) reflects a fundamental misinterpretation and misapplication of the statutory framework. The trial court overlooked the Plaintiffs' arguments, catalogued its findings, such as the unsafe current driveway, the proximity of the new driveway to the new house, and the benefits of a new stormwater management system. It also noted that the new house would be inhabitable and complimentary to the existing landscape and the neighborhood. (See Pa6). However, the court failed to recognize that none of these findings demonstrate or support that the statutory requirements of unique physical conditions causing hardship are satisfied. Subsequently, the reasoning relied on conclusory assertion that the Board recognized extraordinary circumstances affecting the Hegdes' property, without providing a coherent or evidence-based explanation of how these conditions satisfied the statutory criteria. It did not evaluate whether the Board's decision was founded on adequate evidence.

The trial court stated that, contrary to the Plaintiffs 'assertion that the Board's decision was unsupported, the record by way of the resolution reflects that the Board accepted the Hegdes' experts' testimonies, which were not contradicted by any other testimony. However, this statement lacks specificity regarding which expert testimonies were not contested. The public hearing transcript indicated otherwise, as the Plaintiffs

objected to the hardship claimed by the Hegdes' experts. (1T125:18-127:24). (Pb9-10, with further details). At the end of this reasoning, the trial court concluded that granting the variance would not harm the public good, a point irrelevant to the hardship analysis under c(1), indicating a misconception of the hardship standard. The trail court's statement of reasoning for c(1) hardship relied on irrelevant findings, did not evaluate whether the Board's decision was founded on adequate record, and misapplied the law, which undermines the validity of the analysis and the adequacy of the ruling.

III. The trial court erred in affirming that pursuant to N.J.S.A. 40:55d-70c(2) the positive criteria for variances were satisfied. (Raised Below: Order Pa 7 - 8)

"[B]y 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. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a "hardship" on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community." Wilson (quoting Kaufmann v. Planning Bd. for Warren Tp. 110 N.J. 551, 565 (1988)). "[T]he test to be applied by the local agency in considering a variance application under this section is whether the grant of approval will 'actually benefit the community in that it represents a better zoning alternative for the property.'" Valenti v. Plan, Bd., City of Absecon, 246 N.J. Super. 77, 83 (App. Div. 1990) (quoting Kaufmann, 110 N.J. at 563).

Failure to Advance Any Purposes of MLUL Mr. Keller's testimony mentioned two purposes of MLUL would be advanced. (i) The general welfare would be advanced

because they are developing a property in Sagamore community. The backyard disturbance (Area 2, 3, &4) of 8,763 square feet would provide a dry home to the property owner preventing future mold issues and also protects the neighborhood. (ii) The retaining wall height & separation variance allow less disturbance of the property and provide landscape opportunities for improved aesthetics. (1T116:1 to 117:4). Let's closely examine the claimed advancements.

Firstly, area 1, front yard disturbance of 6,506 square feet would create a safe driveway to the property owner, where this disturbance only serves the purposes of the property owners. (See Pa47-48). For a c(2) variance, approval must be rooted in the purposes of the zoning ordinance, i.e. purposes of the MLUL under N.J.S.A. 40:55D-2, rather than the advancement of the purposes of the property owner. Kaufmann. Therefore, Area1, front yard disturbance does not qualify c(2) variance.

Secondly, area 2, 3, & 4, backyard disturbances were claimed to provide better stormwater system, potentially benefiting the property owners and the neighborhood. However, it was questionable to assert that the stormwater system would benefit the entire neighborhood. In reality, only two downhill side households would be directly affected by the proposed stormwater management systems. These households currently do not experience water or flooding issues, but the proposed construction may introduce unforeseen risks due to the excessive steep slope disturbance and the removal of mature trees. Given these considerations, it is difficult to claim that such proposed construction would genuinely "advance" the community's interests. As noted in Medical Center at Princeton v. Township of Princeton Zoning Board of Adjustment 343 N. J. Super. 177,

1999 (App. Div. 2001), "variances tend to impair sound zoning". Mr. Keller did testify that the existing street gutters in [the community] are well defined and water doesn't blow past it, certainly they want to make sure that remains viable. (1T120:6-15). Therefore, while the backyard disturbance may, at most, not cause harms to the neighborhood, it is far-fetched to claim that it will protect or enhance it.

Lastly, how would the increased height of retaining wall and the reduced wall separation variance reduce the disturbance of the property? Why can't the landscape opportunities for improved aesthetics be achieved with a conforming retaining wall? The aesthetics value associate with deviation in the retaining wall was not well-explained, supported, and illogical. Ironically, this was accepted as a finding in the Board's Resolution. (See Pa56, paragraph 14 (c)).

The Proposed Plan Does Not Enhance Zoning Conformity The c(2) positive criteria include proof that the characteristics of the property present an opportunity to put the property more in conformity with development plans and advance the purposes of zoning. Ten Stary Dom. "In Kaufmann, the New Jersey Supreme Court ruled that there was sufficient public benefit to warrant a C2 variance, when it "effectuate[d] the goals of the community as expressed through its zoning and planning ordinances." Kaufmann, supra, 110 N.J. at 564, 542 A.2d 457). The decision was based in part upon the conformity of a partitioned lot to other properties in the neighborhood, and to the municipality's goal of "discouraging large lot zoning in [that] area of town." Id. at 564, 542 A.2d 457." Wilson (quoting Kaufmann). There is no competent evidence to support that the proposed plan

presents an opportunity to put the property more in conformity with zoning regulations; rather, the evidence suggests the opposite.

(a) The continued use of the nonconforming attached garage as a storage further intensifies the nonconformance, and continues obstructing open space, adequate light for the neighboring properties contradicting the intend of the side yard setback zoning ordinance.

(b) Per Pa220, Pa210 (last row in the table), the front yard impervious area ratio 31.4%[9] exceeded the 30% limit set forth in Millburn §DRZ 607.3(e)[10]. which necessitates a variance. The 23.7% front yard impervious area ratio was miscalculated by the applicants. However, no such variance was applied due to the miscalculation. (2T19:11-20:2). Notably, as indicated in the record (Pa88), the Board had previously conducted similar coverage ratio calculation and reviews in other variance application, but failed to perform the same review for Hegdes' application.

(c) Per Pa241, the proposed house height is 36.27 feet above minimum grade, using the lowest elevation point of 414.09 feet. However, New Jersey UCC Building Subcode 202, requires the lowest point to be based on the grade 6 feet away from the building when the finished ground level slopes away from the exterior wall, which is 413 to 412 feet. Consequently, the building height should be 37.36 to 38.36 feet, exceeding the maximum allowed height of 37 feet. (2T42:2-12).

---

[9] Front yard impervious ration (2971 / (54.77 x 173) = 2971 / 9475 = **31.4%.** However, the applicants erroneously continued to use the existing front yard setback 74 feet instead of the proposed 54.77 feet in the calculation.

[10] §DRZ 607.3.(e) requires that single-family dwelling shall have no more than 30% of the front yard area in paved and/or impervious surfaces.

Unsurprisingly, the Board's Resolution (Pa58, paragraph 22), fails to articulate a basis for concluding the c(2) positive criteria were met. The Board listed the bare-bones 'findings' such as the proposed construction is consistent with the character of the subject neighborhood, while improving the overall functionality and safety of the applicants' property. While the first relates to public benefit, the second pertains solely to the applicants themselves, which does not qualify as evidence to satisfy the c(2) positive criteria. Notably, the Board inaccurately described that the proposed "is sited in a 'symbiotic" manner with the natural landscape, with the structure being pushed back further form Sagamore Road than it presently exists" in the Resolution (Pa55, paragraph 12), This statement misrepresents the facts, as the plan actually involves constructing a new basement-level garage that extends nearly 20 feet forward from the existing structure's position, with a new living room to be built above it. This significant discrepancy indicates that the Board's assessment of the "proposed construction as consistent with the character of the subject neighborhood" and the visual environment was based on incorrect facts regarding the project's spatial impact.

In its Resolution (Pa58, paragraph 22), the Board merely provided conclusory statements asserting that the application advanced several purposes of MLUL, such as: (a) to provide adequate light, air and open space; (b) providing for the general welfare and safety of the subject property and the surrounding neighborhood; (c) to secure safety from a flood; (d) to promote a desirable visual environment. Ironically, despite the absence of any testimony from the applicants claiming that the above (a) and (c) were advanced, the Board simply listed them without offering or basing on any supporting findings.

Furthermore, in interpreting N.J.S.A. 40:55D-70(c)(2), the Supreme Court has concluded "that the negative criteria of the c(2) variance require 'statutory focus . . . on the surrounding properties' . . . ." Kaufmann (quoting Medici v. BPR Co., 107 N.J. 1, 22 n.12 (1987)). Despite the Plaintiffs' concerns about the negative impacts, i.e. tree removal affecting the rural atmosphere, safety and traffic congestion concerns from new driveway entrance, and the persistence of the problematic nonconforming structure, the Board did not analyze whether the "found" benefits of the deviation would substantially outweigh any detriments, but simply concluded that "any negative impact from the proposed improvements is negligible and not a substantial detriment" to support the c(2) positive criteria were met. (Pa59, paragraph 24). The Board's decision, lacking substantial and credible evidence, is arbitrary, capricious, unreasonable, and in violation of the MLUL.

Similarly, the trial court's findings were deficient in addressing the Plaintiffs' challenges, and did not adequately consider the statutory requirements and relevant facts necessary to support its conclusion that the application met the c(2) positive criteria. Its findings were simply limited to reiterating the same facts used in c(1) hardship. Then, the court relied on conclusory statements as "the record reflects the Board (a) determined that four purposes of the MLUL were met, and (b) found that any negative impact "is negligible and not a substantial detriment", as stated in the Resolution". (Pa8). The court failed to adequately apply the c(2) positive criteria and to evaluate whether the Board's decision was supported and "founded on adequate evidence". Instead, it improperly relied on the presumption of validity of the Board's statement without conducting the necessary analysis. This lack of scrutiny undermines the validity of the court's decision.

IV. The trial court erred in affirming the application satisfied the negative criteria for a variance pursuant to N.J.S.A. 40:55d-70c. (Raised Below: Order Pa 8 - 9)

Pursuant to N.J.S.A. 40:55D-70c(1)(c): "No variance or other relief may be granted …. 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." The phrase "zone plan" as used in N.J.S.A. 40:55D-70 means the master plan. Medici. 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." 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." Id.

Impair to the Intent and Purpose of Millburn Township Ordinances The Intent and purpose of the Millburn Protection of Steep Slop Areas ordinance (§ DRZ-608) is to establish development controls for lands within Township with "steep slopes" topographical conditions to mitigate potential adverse impacts from the disturbance. (See relevant § DRZ-608 requirements in Pb7 footnote 5) It prohibits disturbance in steep slope areas (§DRZ-608.5a). However, Hegdes proposed steep slope disturbance variance of 15,052 square feet - 15 times than the allowed 1,000 square feet limit. Even the Board member commented that "When I took a look at the application initially, I was like, they must be out of their minds." (1T140:20-22). Indeed, the proposal requires too much steep slope disturbance by too great of a degree, as objected by the Plaintiffs.

In the case of Briar Rose Grp. Inc. v. Planning Bd. of Denville, 2011 N.J. Super (App. Div. 2011) (Pa169-172), though unpublished, but a persuasive reference case for the steep slope disturbance variance, the Denville Board denied the proposed 17,741 square feet steep slope disturbance mainly due to the disturbance is not permitted under the ordinance. Specifically, the Denville Board noted that "the proposal provides for the disturbance of 17,741.20 square feet of steep and excessive slopes of which 17,027.27 square feet is not permitted under the ordinance." ld.

Millburn Township §DRZ-608.2 states the potential negative impacts associated with the steep slope disturbance as:

"Disturbance of steep slopes results in accelerated erosion processes from stormwater runoff and the subsequent sedimentation of water bodies with the associated degradation of water quality and loss of aquatic life support. Related effects include soil loss, changes in natural topography and drainage patterns, increased flooding potential, further fragmentation of forest and habitat areas, and compromised aesthetic values. It has become widely recognized that disturbance of steep slopes should be restricted or prevented based on the impact disturbance of steep slopes can have on water quality and quantity, and the environmental integrity of the landscapes".

Mr. Keller attempted to reconcile the excessive disturbance applied with the intent and purpose of the Millburn Steep Slope Protection ordinance by providing his conclusive statements without any scientific and/or supporting evidence. (1T118:6-120:23).

Soil Loss Mr. Keller simply testified that soil erosion control is not a concern for steep slope disturbance under 33% slope, which does not need any additional stabilization (1T118:19-22), without any scientific evidence to support. Then he said the back of the house has 23% slope, not 70%, because 40% of the 70% slope were created when the house was built. (1T119:4-7). Later, he also stated the subject property got 77% slope

behind the house to justify the underlining soil is good. (1T119:17-19). We have to ask question, were these contradicted statements considered as credible expert testimonies?

Changes In Natural Topography and Drainage Patterns Mr. Keller testified that not changing drainage patterns is because they are primarily in areas where the topography is not natural to begin with. (1T119:23-120:1) Didn't he say the 23% slope in the back of the house is natural, where he requested 8,546 square feet disturbance (it is 56% of the total variance requested)? Additionally, all uphill side houses, immediately backed by the South Mountain reservation, are built along the natural contour of the South Mountain topography. Mr. Keller testified that some old structures on the uphill side, including the garage that was built back to the 1800s (1T15:1-2), the adjacent house (93 Sagamore) that was built in 1875 (1T14:13-14). This does not support his claim that most of the disturbance area is existing manmade topography (1T115:7-22). Notably, these testimonies were accepted by the Board, as the Board documented in its Resolution "the disturbance area "contains a significant amount of man-made steep slopes (likely created during the construction of the existing dwelling)" (Pa56, paragraph 14).

Increased Flooding Potential Mr. Keller acknowledged that there is increased flooding potential, but the existing gutters pretty well defined and water doesn't blow past it, they want to make sure that remains viable. It will be in the plan. (1T120:6-15). How come the Board determined that the proposed plan will advance one of the MLUL purpose, preventing flood in its Resolution. (Pa58, paragraph 22).

Compromised Aesthetic Values Mr. Keller testified that "we are cutting mature trees and will have tree replacement plan as required, no compromise to aesthetic values.

(IT120:20-22). We have to ask "is it possible for a man-made landscape to replicate the aesthetic values, namely the existing forested vista formed by mature trees that have taken hundreds of years to grow there?" How can this be determined as the proposed plan preserves the "character of the established neighborhood"?

The Briar Rose sought variances for slopes over 20%, which was denied due to the significant concerns with the proposal, including inadequate measures for erosion, surface water runoff management, storm drainage facilities, and protective measures for downstream properties. Neither of these elements were sufficiently provided and reviewed in Hegdes' application. The Hegdes' proposed disturbance is too extensive and is detrimental to the intent and purpose of the zoning ordinances. Mr. Keller, on behalf of Hegdes, failed to provide proof that the disturbance variance not substantially impair the Intent and Purpose of Millburn Township Ordinance.

When the trial court criticized the Plaintiffs for allegedly lacking evidence on the record to support their statements regarding the variance were bad for the environment during the oral argument (Pa8), this accusation was not only inaccurate, as the transcript revealed otherwise, (2T31:20-33:25), but it also demonstrated that the trial court failed to recognize that the environmental harms associated with steep slope disturbance and mature tree removal are the intent and purpose of Millburn Zoning Ordinances of Protection Of Steep Slope Areas (§ DRZ-608), and Tree Preservation (Ord No. 2443-15).

Impair to the Intent and Purpose of Master Plan The Millburn Township Master Plan includes the following applicable land uses goals and objectives for residential areas:

Goal 1, Objective 1.0: Protect the character of established residential neighborhoods and encourage land use and development at an appropriate scale and density.

Goal 2, Objective 2.02: Improve and maintain safe and efficient pedestrian circulation in the established residential neighborhoods.

Goal 6, Objective 6.07: Support and adopt policies to protect and improve the Township's open spaces and natural resources.

More importantly, the Protection of Steep Slope Areas ordinance (§ DRZ-608) was put in place as a result of the 2010 Master Plan review recommendation. (2T33:4-13)

When being asked about impact of Master Plan, Mr. Keller simply addressed that there is really no negative impact, the Master Plan talks about preservation of character and neighborhoods and reinforcement of the township of the residential community of the highest order, and their plan does everything they want and the Master Plan wants them to do. (1T122:4-12) Mr. Keller did not provide specific details to describe the neighborhood's character and how the proposed plan would preserve and protect it. In contrast, the record revealed that the excessive disturbance of steep slopes, along with the proposed construction of the new house and driveway, and the tree removal would substantially impair the goals and objectives set forth in the Master Plan:

(a) Excessive disturbance: The extensive disturbance, involving the excavation and removal of a well-established foundation on such massively large scale, poses a significant risk to the structural integrity of the entire neighborhood's foundations.

(b) Tree removal: 6 mature tree removal, instead of the necessary15, were proposed solely for obtaining variance approval. These vanished trees drastically altered the neighborhood's defining forested landscape, and destroyed the natural resources.

(c) Modern house: The old house was a one-story split-level structure, nested among wood and trees (Pa35, Pa257-258), contributing to the area's rural and serene ambiance. In contrast, the new house is a three-story building, larger in every dimension, and has been moved forward 20 feet closer to the street, which introduces a stark contrast that diminishes the area's traditional and natural appeal.

(d) Driveway orientation: The proposed orientation of the new driveway disrupts the established uniformity of the neighborhood. While nearby houses have driveways extending from right to left, spaced to avoid direct alignment with those across the street, the new driveway runs from the lower left to the upper right, breaking the area's aesthetic consistency.

(e) Driveway entrance proximity: The proposed driveway entrance would be moved 55 feet closer to the Plaintiffs' driveway, leaving 11 feet or less away from the Plaintiffs' on the hillside (1T80:11-15), directly facing two other neighbors' driveways across the street.[11] With the street's limited width of approximately 20 feet, allowing only two cars side by side, this configuration is likely to cause traffic conflicts, difficulty in maneuvering, and increased risk of accidents involving cars and pedestrians.

(f) Historical retaining wall/structure: A significant portion of the historical retaining walls/structures near the curb, which are owned by the Township, will be demolished

[11] Mr. Keller inaccurately claimed that relocating the driveway entrance closer to the neighbors' driveways would increase curb parking space and visibility for street parking on Sagamore Road, a street that barely accommodates two cars and seldom sees parked cars due to its narrowness. This assertion was not backed by the actual conditions of Sagamore Road because it is hardly to see any car park on the narrow street at any given time.

due to the construction of the new driveway and the associated disturbances, which mark a change from the areas' established historical aesthetic.

Evidently, the deviation would sustainably impair the intents and purposes of the Master Plan. When Mr. Keller and the Board concluded that the proposed plan preserve the character of the established neighborhood, they failed to specify what aspects of the "character of the surrounding area" that they intended to protect or preserve. The Board's conclusion - "the deviation is relatively modest, …. can be accomplished without undermining the intent and purpose of the township zoning ordinance or master plan" (Pa Pa58, paragraph 23) - lacks support from the record.

Detriments to The Public Good The record reveals that the Plaintiffs testified the substantial detriments to the neighborhood from the proposed excessive disturbance variance. (1T133:11-135:4), (1T138:22-139:5). These concerns were not fairly and properly addressed during the hearing. These adverse detriments were unjustly minimized as "negligible" by the Board in the Resolution (Pa59, paragraph 24). The Board did not explain its conclusion that specific detriments and why they were deemed as "negligible" to the public good. The trial court's reasoning for negative criteria simply provided one single finding statement below:

> "Substantial testimony was presented by professional experts on behalf of the Hegdes regarding the benefits of the reconstruction to the Property as well as the potential benefits to the public which included testimony from a resident of a nearby property who supported the Application and the construction of the new driveway, stating that it was a benefit to the neighborhood." (Pa8),

It mischaracterized the testimony of a resident, suggesting the proposed construction would benefit the neighborhood. However, the transcript (1T136:23-137:8) reveals the

resident's statement was more nuanced, emphasizing the general benefit of developing a safe driveway due to common steep slopes, rather than endorsing the specific construction would benefit the neighborhood. The trial court failed to review the record and consider relevant facts, misinterpreted and misapplied the negative criteria and did not evaluate whether the Board's decision was found on adequate record.

V. The Board failed to exercise due care and due diligence in assessing the application, making numerous material errors in its decision-making process. Its decisions are not grounded on credible and reliable findings. (Raised Below Pa 1-10)

The wide latitude afforded to municipal boards in the exercise of their delegated discretion is due to their peculiar knowledge of local conditions. Jock.; Pierce Estates Corp. v. Bridgewater Twp. Zoning Bd. of Adjustment, 303 N.J. Super. 507, 514 (App. Div. 1997). "We defer to the Board's factual determinations, which were based on its assessment of the witness testimony and documentary evidence, and its "'peculiar knowledge of local conditions[.]'" Burbridge v. Governing Body, 117 N.J. 376 (N.J. 1990). at 385 (quoting Medici, 107 N.J. at 23; Kramer, 45 N.J. at 296)). "A board may and indeed is expected to bring to bear in its deliberations the general knowledge of the local conditions and experiences of its individual members". Baghdikian. The Board's factual findings should be based on its reasonable assessment of the witness testimony and documentary evidence, and its "peculiar knowledge of local conditions". A decision can be deemed arbitrary, capricious, and unreasonable if it is not grounded in solid law, or fact, neglects relevant factors, or reflects a manifest error in judgement.

A review of the Board's Resolution reveals inadequacies in both the factual findings and the application of law, casting doubt on the legitimacy of the variances granted.

Discrepancies In Variance Applied and Approved The applicants applied for three (3) variances related to steep slope disturbance (§608.5), wall separation in steep slope area (§608.71), and front yard wall height not exceeding 2 feet (§609.6), as documented in the Minutes of the Zoning Board on January 22, 2024 hearing (See Pa a1??). (1T5:1-4). This Minutes was submitted to the court as part of the Amended Complaint filed. (See Pa88-89). However, the Board's Resolution listed and approved four (4) variances, including one for alteration of elevations within 5 feet of a property line in steep slope areas (608.7k). (Pa51, paragraph 3).

Failure to Address Noncompliance Front Yard Impervious Area Ratio Error The Board failed to identify the applicants' front yard impervious area ratio calculation error on the Hegde's submitted "Zoning Calculation Form" item 5 (Pa220), which falsely showed compliance, while the correct calculation indicates a violation of Millburn Zoning Ordinance (§DRZ607.3e.) (Pb29, footnote 10) This oversight is concerning, given the Board's previous rigorous review of the similar coverage ratio calculation in other application with identified errors, right prior to Hegdes' variance application, as evidenced by the Minutes of the Zoning Board on January 22, 2024 (See Pa88). This inconsistency raises serious questions about the Board's adherence and commitment to maintaining reasonable standards of care and ensuring fairness and consistency in its decision-making process, which further underscores the arbitrary nature of its decision.

Alteration of Board Meeting Minutes Coincidently, the Minutes of the Zoning Board meeting on January 22, 2024, submitted to the court by the Board on October 24, 2024, (See Pa 272- 289, a total of 18 pages) were allegedly altered. The Minutes' pages

17 to 20 (Pa88-Pa91) from the Plaintiffs' attachment as part of the filed complaint (Pa72-91, a 20-page document), pertinent to the Hegdes' case and the above floor coverage ratio calculation review for a different case, were replaced with content from the January 8, 2024, Board's Minutes for a different variance application (Pa288-289). This intentional substitution appears to conceal the discrepancies in the number of variances applied for and approved, as well as inconsistencies in the review of coverage ratio. The Minute also indicated that the driveway relocation necessitated variance relief - "It is the relocation of the driveway that is triggering the need for some variance relief." (Pa 89, above "Entered as Exhibit …"). In other words, this variance is a result of self-initiated actions. The record alteration actions violate statutory requirements for transparency and accuracy, compromising the integrity and legal validity of the Board's decision.

Failure to Address Critical Errors on the Variance Application: In the submitted "HEGDE RESIDENCE: VARIANCE APPLICATION," (Pa 252, Pa 254), there are two critical technical errors in the upper right comment table section:

(a) ENC Variance Omitted: Despite the clear indication that a variance is required for the ENC structure the Board failed to review, identify and address accordingly.

(b) Lot Depth Calculation Error: Despite the larger side of the property line being only 232.42 feet, the lot depth is erroneously calculated as 304. 05 feet. This error reflects not only a lack of accuracy and reliability in the engineering assessment but also a failure by the Board to adequately review and catch such discrepancies during their evaluation process and understanding the layout changes of the proposed construction for adequate assessment.

Erroneous Basis for Board's Decision on Structure Impact The Board's assessment of the new structure as modest, tasteful, and preserving the property's character was based on the incorrect understanding that the proposed structure would be set further back from Sagamore Road than it currently is, as noted in the Resolution. (Pa55, paragraph 12). Contrary to this, the proposed plan includes a new basement-level garage extending nearly 20 feet forward from the existing structure, with a new living room atop. This significant discrepancy indicates that the Board's decision was influenced by erroneous information regarding the project's spatial impact in preserving the property's character.

Obscure in The New Driveway Location The Board erroneously stated that the Plaintiffs believed the new driveway would be 30 feet away from the closest property. (Pa55, paragraph 11). During the hearing, the Plaintiffs expressed significant concern about the proximity of the new driveway to their own and their neighbor's driveway entrances, objecting to the proposed 5-8 feet distance as unreasonably close. (1T80:16-19). It was Mr. Keller's testimony that the new driveway is 30 feet away from the property line at the closest point, but only 11 feet from the gutter line (public right-of-way). This misunderstanding by the Board regarding the driveway entrance distance was pivotal in evaluating whether the impact on adjacent neighbors was negligible or significant.

Disturbance Area on Subject property are Natural, Not Man-made The Board accepted Mr. Keller's testimonies that the disturbance area "contains a significant amount of man-made steep slopes (likely created during the construction of the existing dwelling)" (See Pa56, paragraph 14). (1T115:7-22;119:7-10). This assertion seems to give the applicants a "legitimate" reason to justify the disturbance, yet the ordinance does not

support such differentiation. All uphill side houses on Sagamore Road, immediately backed by the South Mountain reservation, are built along the natural contour of the South Mountain topography, and the backyard was not disturbed and still preserve the natural slope when the house was built. However, 8,546 square feet backyard disturbance was proposed in this variance application. The Sagamore Road is the last street right in front of the mountain in Wyoming District that was charactered by its sloping terrain, many uphill side houses have to have many sub-stairs on the first floor to accommodate the natural slope, which further undermines the claim of man-made slopes. The Board, which is expected to possess 'peculiar knowledge of local conditions', failed to exercise adequate discretion by accepting these statements and basing its decision on unsubstantiated findings. This oversight calls into question the Board's commitment to maintaining reasonable standards and ensuring decisions are grounded in credible evidence.

Unreasonable Tree Removal Proposed Accepted The Hegdes' team testified that six (6) trees would be removed (1T133:11-16) (Pa55, paragraph 13) for the front yard disturbance to build the new house and the driveway. However, the proposed plans indicated that this was impossible given the marked disturbance areas (Pa48) and tree location (Pa213). The Plaintiffs urged the Board to require a detailed tree removal plan to show which trees will be removed before approving the variance. (1T135:25-136:4). Ultimately, 15 trees were removed in the front yard, not the six proposed. Despite objections, the Board failed to critically assess the proposed tree removal, accepting testimony that was clearly inaccurate and not credible, and appraising them as a control to prevent erosion from stormwater by the removal of fewer trees (See Pa56, paragraph 14). Any reasonable assessment would have shown that removing only six trees was

insufficient for the planned construction. These unreliable findings formed the basis of the Board's decision, indicating it was not grounded on credible and adequate evidence.

Assessment of Driveway Impact Based on Inaccurate Evidence The Board's assessment of the negative impact of the new driveway location lacked factual support. Mr. Keller claimed that a wider driveway would need more disturbance. (1T97:24-98:4). Similarly, a longer driveway or one closer to the adjacent neighbor's driveway entrance would also necessitate more disturbance. When the Plaintiffs questioned the proximity of the new driveway to theirs, given their lot's width of 173 feet, the Board chairman intervened, stating that Mr. Keller was entitled to this by right and was not obligated to respond since no driveway variance was sought. The Board chairman advised Mr. Keller to ignore the Plaintiffs' question, asserting the driveway entry was irrelevant to the variance. (1T79:13-24). However, the Board's Minutes of the same public hearing documented that "It is the relocation of the driveway that is triggering the need for some variance relief." Per the Hegdes' council. (Pa 89, above "Entered as Exhibit …").

Additionally, Mr. Keller inaccurately claimed that moving the driveway entrance so close to adjacent neighbors on one side would provide street parking benefits. He testified that parking on Sagamore Road is problematic, (1T80:21-24), as parked cars are on both side make it difficult for drivers to see the road conditions. (1T81:2-10). However, Sagamore Road, with its 20-foot paved surface, barely accommodates two cars and rarely has parked cars. Despite this, the Board Chairman supported Mr. Keller's assertions based on his own neighborhood experience. (1T143:4-15). Another Board member suggested using the "beeps" method to avoid collisions when both drive out the driveway at the meet

up point per her own experience. She advised that "careful driving will mitigate it". (1T147:4-9). Acknowledging the Hegdes' unsafe driveway concerns, she could have extended this advice of "careful driving" as a solution to avoid the need for a variance. (1T146: 18-147:3). Her "careful driving" advice overlooked the steep slope of the driveways, when we drive down, the descending views are obstructed, and icy condition can lead to accidents. While the Hegdes improves their living conditions, these changes will negatively impact the adjacent neighbors. Additionally, Mr. Keller's stance that they can put the driveway entrance anywhere was echoed by another Board member, who argued that the Plaintiffs that you are the people who are confused to think they own the driveway when they get to the edge beyond their property boundary and they're in the public right-of-way. (1T142:20-143:2). If these Board members had and adequately exercised the "peculiar knowledge of local conditions", their assessment would have yielded a different result.

Acceptance of The Illogical Justification for Retaining Walls Variance Benefits

Mr. Keller testified that retaining wall height & separation variance will "reduce disturbance and provide landscape opportunities". Although this is an illogical claim that doesn't make any sense in this disturbance variance application, the Board accepted it as a credible finding in its Resolution (See Pa56, paragraph 14 (c)). Mr. Keller's testimonies at the public hearing included the following statements that were either misrepresentations or lacked supporting evidence.

a). The property is in the steepest part, and near the summit of Sagamore, one of the steeper properties on the uphill side, (1T115:13-17) yet this assertion lacks factual backing.

b). One adjacent neighbor's driveway is not nearly as steep as the 27 percent that Hegdes have, (1T24:17-25) but this comparison was not substantiated with evidence.

c). The subject property is the only house Sagamore Road where the garage level is completely disassociated from any primary habitable space, (1T20:6-8) despite proof showing the elevator and connection structure was added in 2006.

d). Using/widening the existing driveway would have to slide the house back 15, 20 feet into the steepest part of the house, (1T20:22-25) a claim not supported by any plans.

e). Residents living on the hillside park their cars down on Sagamore street when it snows, (1T16:23-25) yet this was not corroborated by the actual parking patterns, i.e. they parked on driveway by the curb.

f). Sagamore street parking is problematic, (1T80:21-24) and moving the new driveway in close proximity to 3 adjacent neighbors creates street parking benefits, (1T80:24-25) (1T81:1-17) despite Sagamore Road's narrowness of 20-foot and rare instances of parked cars, which contradicts his statement.

g). We tried to limit the foundation to the existing wall, we did come a couple feet forward, (1T21:9-10) whereas the reality was a 20-foot forward extension, enlarging the structure in every dimension.

h). The previous owner of the subject property made illegal construction to install the garage elevator and attach the garage to the main house, (1T19:25-20:3) a claim that was not supported with any evidence.

i). Most of the area we're disturbing is existing manmade topography that is steeper than 20 percent (1T115:18-20), yet this was not supported by the natural geographic environment of the surrounding neighborhood.

j). Brian Hirsch, Landscape Architect, knows every tree on that site because he's lived and breathed this property and came up with all of the geometries that avoided and gave those trees chances of living. (1T120:15-19). They presented to removal fewer trees, i.e. six (6) trees (1T106:9-14), instead, 15 trees were removed in the front yard alone. The reconstruction execution does not align with or follow the variance application plan presented to the Board by these experts in the public hearing.

In conclusion, the Board's findings were not grounded in solid fact, reflecting a manifest error in judgment. These oversights and inconsistencies, individually and cumulatively, undermine the legitimacy of the variances granted, rendering the Board's decision arbitrary, capricious, and unreasonable. The Board's actions not only compromised the integrity of the process but also failed to uphold the standards of care and fairness expected in such deliberations.

VI. The trial court's decision should be reversed due to procedural irregularities, appearance of impropriety, substantive deficiencies, and lack of neutrality that compromised fairness. (Not Raised Below)

The integrity of the judicial process is paramount to ensuring fair and impartial adjudication. The trial court's procedural irregularities, appearance of impropriety, and

lack of neutrality, along with substantive deficiencies in the February 7, 2025 Order, compromised judicial integrity and affected the trial's fairness and outcome.

Procedural Irregularities On September 18, 2024, a CMC was set for September 30, 2024 with the new assigned Judge Spencer. On September 25, 2024, the Plaintiffs submitted the required statements of facts, legal arguments, and a proposed brief schedule, i.e. "September 25 CMC Submission" (Pa122-168) in compliance with the CMC order (Pa92) issued by the previous Judge Santomauro. During the CMC on September 30, 2025, Judge Spencer imposed an aggressive briefing schedule for the Plaintiffs to submit a brief within 14 days, required the Plaintiffs to submit a brief that contains only supplemental information to the "September 25 CMC Submission", and prohibited a reply brief, stating that filing reply brief would forfeit their right to oral argument at the trial scheduled for November 14, 2024. This schedule and restrictions were inconsistent with fairness and due process principles, severely limiting the Plaintiffs' ability to adequately prepare their case, contrary to the general spirit of the principle of New Jersey Court Rule 4:46-2(c), which mandates that parties must be given a reasonable opportunity to respond to motions and present their arguments. Additionally, after Plaintiffs' brief submission on Oct 14, 2024, the Court upheld the CMC order proposed by the Defendants' counsel of Hegdes on October 23, 2024. As a result, the Zoning Board, submitted the application materials, for the very first time, via eCourt on October 24, 2024. The delayed submission disrupted the established and expected court procedural timeline and protocols and hindered the Plaintiffs' ability to address and respond to the evidence, which significantly prejudiced the Plaintiffs and compromised the trial's fairness.

Appearance of Impropriety Following the trial on November 14, 2024, Judge Spencer requested to speak to the defendants' attorneys privately, and further instructed the on-duty court officer to "make sure one of them (defendants' attorneys) will come to see me" as she was leaving her bench to exit the courtroom. This communication occurred outside the presence of the Plaintiffs, raising serious concerns about the impartiality. The **Code of Conduct for U.S. Judges, Canon 2**, mandates that judges must avoid not only impropriety but also the appearance of impropriety. Judge Spencer's initiation of a private meeting with the defendants' attorneys constitutes a clear violation of this ethical standard, ccompromising the fairness of the trial and its outcome.

Unwarranted Record Supplementation & New Issues Exaggerate Non-Material Significance The trial court's criticism of the Plaintiffs for allegedly supplementing the record with exhibits attached to the "CMC Sept 25" submission (Pa163-168), is both exaggerated and unfounded. This criticism overlooks the non-material nature of the exhibits and their intended purpose, which was to aid the court's understanding without affecting the core facts of the case. First, exhibits 1, 3, and 5, relevant Millburn Zoning requirements, were included for the court's convenience. Second, exhibits 2 and 4, interpretations of NJ nonconforming structure statutes by NJ Administrative for another township, are similar to Millburn ordinance in Exhibit 3, making these exhibits ancillary and duplicative rather than supplemental. Third, exhibit 6 included 7 photos, 5 were added based on Judge Santomauro's advice at the OTSC hearing to counter one of Mr. Keller's misrepresentations, such as the subject property was the only house having a garage level separate from habitable space. (1T20: 6-9). The photos show five other houses on Sagamore with similar garage arrangements. Two additional photos illustrate the negative

aesthetic impact of the nonconforming garage, (See Pa166), in a hypothetical scenario that a ENC variance was applied, thus not supplementing the record. Lastly, the court's generalized assertion that the Plaintiffs attempted to raise new issues lacks the necessary specificity and failed to substantiate which issues were allegedly new. Additionally, the court did not apply NJ Court Rule 2:10-2, which requires testing of both plain and harmful errors to determine if these issues could be "clearly capable of producing an unjust result." This lack of clarity undermines the fairness and transparency of the judicial process.

Lack of Neutrality Led to Unjust Result The court's statement of reasoning in the February 7, 2025 Order, (Pa1-10), dismiss and attack the Plaintiffs' arguments rather than objectively evaluating evidence from both sides. This lack of balanced consideration led to a decision that supports the defendants disproportionately, suggesting a predetermined inclination towards the defendants, resulting in an unjust outcome.

CONCLUSION

For the foregoing reasons, the trial court's February 7, 2025 Order affirming the Defendant Board's decision to approve the application of Defendant Hegdes for the bulk variance and the continued use of the nonconforming structure should reversed and declared null and void, and the Board's decision should also be reversed.

Respectfully submitted,

Dorothy Guo & Henry Zheng

/s/ Dorothy Guo

Dated: May 26, 2025 /s/ Henry Zheng

DOROTHY GUO & HENRY ZHENG, Plaintiffs-Appellants vs. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MILLBURN AND NARAYAN & AYRA HEDGE, Defendants-Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001930-24 ON APPEAL FROM SUPERIOR COURT, LAW DIVISION ESSEX COUNTY DOCKET NO. ESX-L-002897-24 Sat Below: Honorable L. Grace Spencer, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MILLBURN

HEROLD LAW, P.A.
25 Independence Boulevard
Warren, New Jersey 07059-6747
(908) 647-1022
Attorneys for Defendant-Respondent,
Zoning Board of Adjustment of the
Township of Millburn

Of Counsel:
Robert F. Simon, Esq. (ID# 009461992)

On the Brief:
Christine M. Faustini, Esq. (ID# 023361993)

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

PRELIMINARY STATEMENT

The underlying Prerogative Writs action was brought by Plaintiffs/Appellants, Dorothy Guo and Henry Zheng ("Ms. Guo," "Mr. Zheng," or collectively, "Plaintiffs") challenging the decision of Defendant/Respondent, Zoning Board of Adjustment of the Township of Millburn ("Board"), which approved a development application with variances ("Application") filed by Defendants/Respondents, Narayan and Ayra Hegde ("Mr. Hegde", "Mrs. Hegde", or collectively, "Hegdes") concerning their single family home located at 99 Sagamore Road, Millburn, New Jersey, otherwise designated as Block 101, Lot 11 on the Official Tax Map of the Township of Millburn ("Property").

Sagamore Road is located along a mountain scape, and the rear of the Property abuts South Mountain Reservation. While many properties along Sagamore Road are encumbered by steep slopes, the Property is located near the peak of Sagamore Road, with 65% of the Property encumbered by steep slopes.

In 2023, the Hegdes filed the Application with the Board, seeking to raze their existing house (in need of extensive mold remediation) to its foundation and construct a new house. As part of their proposed reconstruction plan, they also intended to replace their existing steep, narrow and winding driveway with a safer and more functional driveway, which would reach the front door of their

new house and allow an ambulance to reach their home. In addition, the Hegdes' reconstruction plan incorporated a stormwater management system, designed to protect the house and surrounding properties from excessive stormwater runoff. Finally, because constructing a basement required the blasting of underground rock, the Hegdes sought to maintain the existing, detached two-car stone garage for use as passive storage. The stone garage had been constructed many years ago, prior to the existing house, and did not comply with current side yard setback requirements.

The Board heard the Application during its January 22, 2024 meeting. The Application required two (2) variances from the Township's steep slope ordinance, and one (1) variance from the Township's restriction on the height of retaining walls located in the front yard. The Hegdes provided extensive testimony from three (3) professional experts in support of the Application, including Richard Keller, who had personally resided on Sagamore Road, and is a licensed engineer and planner. Mr. Keller provided thoroughly described reasons, and justification, for the requested variance relief.

Plaintiffs are the owners of property, located at 101 Sagamore Road, adjacent to the Property. Plaintiffs appeared at the Board's January 22, 2024 hearing to object to the application, focusing on the proposed steep slope disturbance as well as the location of the entrance to the new driveway. The

proposed location of the driveway complies with the Township's ordinance requirements.

At the conclusion of the hearing, the Board voted unanimously to approve the Application. On March 4, 2024, the Board adopted a Resolution which memorialized its decision to approve the Application.

On April 26, 2024, Plaintiffs, appearing pro se, filed their Complaint in Lieu of Prerogative Writ. On November 14, 2024, the Honorable L. Grace Spencer, J.S.C. conducted a bench trial. On February 7, 2025, Judge Spencer issued an Order, with an attached Statement of Reasons, affirming the Board's decision and denying Plaintiffs' appeal. This appeal challenges Judge Spencer's February 7, 2025 Order and decision, as well as the Board's decision.

PROCEDURAL HISTORY

On or about August 31, 2023, the Hegdes filed a development application with the Board concerning their real property located at 99 Sagamore Road, in the Township of Millburn, Essex County, New Jersey, otherwise designated as Block 101, Lot 11 on the Official Tax Map of the Township of Millburn ("Property"). Pa229-Pa255. The Hegdes' application sought to raze the existing house to its foundation, and construct a new single-family house, with a redesign of the existing driveway, new retaining walls and a stormwater management plan ("Application"). Pa232-Pa233. The initial Application included a request for four (4) bulk variances. Pa238.

The Board is the duly constituted zoning board of adjustment of the Township of Millburn. On January 22, 2024[1], the Board conducted a public hearing on the Application and voted to approve it. Pa50. On March 4, 2024, the Board adopted a Resolution to memorialize its January 22, 2024 decision to approve the Application ("Resolution"). Pa50-Pa60.

Plaintiffs are the owners of real property located at 101 Sagamore Road, in the Township of Millburn, New Jersey. Pa11. Plaintiffs' property is adjacent to the Property. Pa11. Plaintiffs appeared at the January 22, 2024 public

[1] 1T = Transcript of January 22, 2024 Board hearing; 2T = Transcript of November 14, 2024 trial

hearing, cross-examined the Hegdes' witnesses, and presented factual testimony and exhibits as objectors to the Application. Pa55-Pa56.

On April 26, 2024, pro se Plaintiffs filed a Complaint in Lieu of Prerogative Writ, challenging the Board's approval of the Application, and commencing the litigation which is the subject of this appeal. BoardDa1-BoardDa67. On May 9, 2024, Plaintiffs filed an Amended Complaint in Lieu of Prerogative Writ. Pa11-Pa91. On June 5, 2024, the Board filed an Answer to the Complaint. BoardDa68 – BoardDa79. On June 14, 2024, Plaintiffs filed an Order to Show Cause with Temporary Restraints to stop construction on the Property. BoardDa80-BoardDa94. On June 19, 2024, the Honorable Damian Santomauro, J.S.C. entered an Order denying Plaintiffs' application for temporary restraints and scheduling a case management conference. Pa92-Pa93. On June 25, 2024, the Board filed an Answer to the Amended Complaint. Pa94-Pa109. On June 27, 2024, the Hegdes filed an Answer to the Amended Complaint. Pa110-Pa121.

On September 30, 2024, the Honorable L. Grace Spencer, J.S.C. held a Case Management Conference and thereafter entered a Case Management Order on October 23, 2024. Pa221-Pa222. On November 14, 2024, Judge Spencer conducted a bench trial. Pa1. On February 7, 2025, Judge Spencer issued an

Order, with an attached Statement of Reasons, affirming the Board's decision and denying Plaintiffs' appeal. Pa1-Pa10.

On February 28, 2025, Plaintiffs filed a Notice of Appeal with the Superior Court, Appellate Division, challenging Judge Spencer's February 7, 2025 Order and decision. Pa314-Pa335.

STATEMENT OF FACTS

This matter concerns a development application with variances ("Application") filed by the Hedges concerning their real property located at 99 Sagamore Road, in the Township of Millburn, Essex County, New Jersey, otherwise designated as Block 101, Lot 11 on the Official Tax Map of the Township of Millburn ("Property"). The Property, containing approximately 0.874 acres, is currently developed with a single-family house and is located in the Township's R-4 (Residential) Zoning District. Due to the Hegdes' inability to effectively remediate extensive mold in the house, the Application sought to raze the existing house to its foundation and construct a new single-family house. The proposed reconstruction project included a redesign of the existing driveway, new retaining walls and a stormwater management plan. Pa229-Pa255.

The Property is affected by steep slopes. As stated in the Application, the Property experiences a 78-foot change in elevation from its frontage on Sagamore Road to the rear of the Property, with sixty-five percent (65%) of the Property containing slopes in excess of twenty percent (20%). Pa232. The initial Application requested relief from three sections of the Township's steep slope ordinance, located at Section 608 of The Millburn Development Regulations and Zoning Ordinance

("DRZ[2]"): (1) §608.5, which prohibits disturbance of steep slopes in excess of 1,000 square feet[3] "except for redevelopment[4]", and 16,101 square feet was proposed; (2) §608.7(k), which prohibits alteration of site elevations in excess of one (1) foot within five (5) feet of an adjacent property, where the reconstruction project proposed an alteration within two (2) feet of an adjacent property; and (3) §608.7(l), which regulates retaining walls on a residential site and requires a minimum distance between stepped retaining walls equal to the height of the highest wall, and the proposed retaining walls did not provide the required minimum distance. Pa232. In addition, the Application sought relief from §609.6, which regulates fences and walls within the Township and restricts walls located in front yards to a height of two (2) feet, whereas the proposed front yard retaining wall would be between three (3) and four and one-half (4½) feet high. Pa232.

On January 22, 2024, the Board conducted a properly noticed public hearing on the Application. The Hegdes appeared with counsel, Richard Schkolnick, Esq., and three (3) expert witnesses: Richard Keller, a licensed civil engineer and

[2] The Township's DRZ is available on the internet at: https://ecode360.com/35142518
[3] "Disturbance" is defined in §608.3 of the DRZ as "The placement of impervious surface, the exposure or movement of soil or bedrock, or the clearing cutting or removal of vegetation over an aggregate areas of more than 1,000 square feet."
[4] "Redevelopment" is defined in §608.3 of the DRZ as "The construction of structures or improvements on areas which previously contained structures or other improvements."

professional planner, Marvin Clawson, a licensed architect, and Brian Hirsch, a licensed landscape architect. Pa50.

At the outset, Mr. Schkolnick advised the Board that the Hedges had eliminated their need for one of the variances: the variance from §608.7(k) regarding alterations of site elevations within five (5) feet of Plaintiffs' property. 1T5:1-4. Regarding the steep slope disturbance variance, he explained that at least two-thirds (2/3) of the requested disturbance will occur within the front and side of the existing home – areas that had previously been disturbed. He noted that the DRZ creates an exception for redevelopment. 1T5:10-22. He summarized the application as providing a new building with safe driveway access as compared to the existing driveway with up to a 23 percent (23%) slope. 1T6:4-8.

Mr. Hegde testified that he and his family had moved out of their home due to their mold exposure. They unsuccessfully attempted to remediate the mold, and realized that they would have to rebuild. Mr. Hegde explained that his experts have spent more than one and one-half years developing the proposed reconstruction plan. 1T7:6-9:6.

Mr. Keller, the Hegdes' professional engineer and planner, provided extensive testimony in support of the Application. Mr. Keller had personally resided on Sagamore Road for twenty-five (25) years. 1T10:8-13. Mr. Keller described Sagamore Road as being "tucked into the mountain." 1T12:12-19. South Mountain

Reservation is at the rear of the Property. 1T13:1-3. The Property contains 38,501 square feet, where a minimum of 29,000 square feet is required in the R-4 zone. Sagamore Road is located in the R-4 zone, and described by Mr. Keller as a "unique street within the community." 1T13:19-22.

Based on his observations and knowledge, Mr. Keller testified that the area from the front lawn path to the street were areas of prior steep slope disturbance. Regarding the driveway, Mr. Keller stated: "we shouldn't encourage people to drive up it." 1T16:12-15. The existing driveway is approximately ten (10) feet wide and lies between a four (4) foot and six (6) foot retaining wall "as it curves up the property at 23 percent." 1T16:15-19. Mr. Keller added:

> It is by far the least safe and most daunting driveway I've ever driven on and certainly I think the fact that Narayan has had to replace the mirrors on his vehicle because he slid into the wall coming down it, even in rain let alone snow.

1T16:19-23. Most cars are approximately 7.5 feet wide, leaving only one (1) foot and three (3) inches of space on either side of the car to travel the existing driveway. 1T19:2-6. The goal in redesigning the driveway was to create a driveway that would service the house by getting to at least ten feet below the house. 1T20:14-21. The proposed driveway would also allow an ambulance to safely get near the house. 1T41:14-19.

A two-car stone garage, probably constructed in the 1800s and predating the 1962 construction of the existing house, exists on the Property. 1T15:1-6. The

garage is at roughly an elevation of 410, and the primary entrance to the existing house is at an elevation of 426. 1T19:21-23. An elevator installed by a prior owner created access from the floor of the garage to the elevation of the home. 1T19:25-20:2. Mr. Keller stated: "It's the only house I know of where the garage level is completely disassociated from any primary habitable space." 1T20:6-9. The stone garage provides an existing side yard setback of 4.45 feet, whereas §606.2e.3(a) of the DRZ requires a 12 foot side yard setback for accessory structures. The Application sought to remove the pergola on top of the existing stone garage, replace it with a living hedge, and use the garage for passive storage. 1T26:14-26.

Mr. Keller relied on current photographs of the Property during his testimony. He showed the Board how the existing slope comes down into the back of the house "and water pitches right against the house. So water was coming down along the foundation and penetrating and filling up that crawl space and that's what created the mold problem in addition to the connection on the front." 1T24:11-16.

In response to the revised project, Mr. Keller recalculated the extent of the steep slope disturbance variance request to be 14,052 square feet. 1T35:2-24. Although the Property is almost double the required lot size, the Township's ordinance imposes a 1,000 square foot cap on steep slope disturbance, regardless of the size of the lot, and the Property is almost double the required lot size. 1T56:2-7. He emphasized that, "under the current ordinance you wouldn't have developed

any properties on the uphill side of Sagamore Road. You wouldn't have any of them. And I think Sagamore Road and the Township is better for it." 1T66:20-24. Mr. Keller provided a detailed review of the proposed areas of disturbance on the site, referencing the color-coding shown on the Hegdes' Exhibit A4, which depicted areas of prior disturbance in orange and green, and areas of new disturbance in blue and yellow. The colors also indicated the nature and extent of development on the areas to be disturbed. Orange indicated the area of disturbance needed for driveway safety and construction access, calculated as 6,506 square feet, all of which was located in an area of prior disturbance. The colors green, blue and yellow indicated areas of disturbance required for the proposed stormwater management system, with green also indicating an area of prior disturbance. The proposed disturbance created by the combined green, blue and yellow areas equaled 8,546 square feet, with only 4,577 square feet representing new disturbance. Options to lessen the amount of disturbance did not exist. 1T67:11-73:8.

Ms. Guo attended the January 22, 2024 Application hearing, and questioned Mr. Keller. Ms. Guo asked Mr. Keller why the location of the new driveway entrance was placed "so close" to her driveway. 1T79:13-15. The Board Chairman advised Ms. Guo that the new driveway entrance did not violate any of the Township's ordinances, that it could "lawfully exist" and was permitted "as of right." 1T79:17-24. Mr. Keller explained how the proposed driveway entrance

would provide longer uninterrupted sections of curbline for street parking and how the proposed redevelopment is "much more respective of your view shed and your property and safety of the driveway and viability of visitors to park on Sagamore Road." 1T80:20-82:13.

In response to Ms. Guo's questions regarding the existing stone garage, Mr. Keller stated that the existing driveway pavement to the garage would be removed, and the patio on top of the garage would not be used. 1T83:7-17. When Ms. Guo focused on the existing side yard encroachment, Mr. Keller stated: "It's an existing nonconforming condition…[which] predates zoning from the 50's. We are keeping it, lessening the intensity of the use because we are no longer using it to park cars. We're not using the top of it anymore." 1T84:11-17. The Hedges sought to keep the garage because they did not want to blast rock to get basement storage. 1T84:20-25. The garage will be helpful to store lawn maintenance equipment, bikes, and "things like that." 1T84:25-85:2.

Ms. Guo then asked Mr. Keller to explain the need for the rear end slope disturbance, and Mr. Keller first emphasized that they were no longer going to disturb an area within five (5) feet of her property line, and that the rear end slope disturbance was necessary for the proposed stormwater management. 1T85:10-86:4. Ms. Guo inquired if the existing driveway could be altered and the slope disturbance could be minimized, and Mr. Keller testified that the Application had to incorporate

the need for construction vehicle access to rebuild the house, which had been severely damaged by mold, and the desire to create a safe driveway that would allow reasonable access to the first floor level of the new house as compared to the existing driveway which is sixteen (16) feet below the home's first floor level. 1T86:5-88:10. He stated: "…if you look at every other house on Sagamore Road there isn't a single one that I know of and I think it's 100 percent where you get to the driveway you get to the basement level or you get to the first floor level. We're not – you're not 16-feet below the house." 1T87:10-15.

Marvin Clawson testified as the Hegdes' licensed architect. Mr. Clawson stated that the Application uses 80 percent of the existing house foundation. 1T90:19-20. The new house will be the same style genre as the existing house. 1T93:2-7. In designing the new house, they tried "to nestle it into the hill and create a massing that would be complimentary to the landscape and to Sagamore Road." 1T94:23-95:2.

Brian Hirsch then testified as the Hegdes' licensed landscape architect. The Board Chairman questioned Mr. Hirsch regarding the backyard disturbance and whether the proposed paths could be changed to diminish the amount of disturbance. Mr. Hirsch replied "…we designed them as optimally to mitigate as much water as possible and to provide egress." 1T102:11-20. Mr. Hirsch stated:

> So, just so we understand, and again, you know, when we were tasked with creating a safe – this is all about safety, getting up and down

> the driveway. This area here is about mitigating water before it comes to the house. And so I, just to repeat what we're talking about, is that when you have, I think it's, you know, hundreds of feet of water starting to sheet, when it starts to really move, when it has, you know, no chance where it's being slowed down, that's when you get washouts and that's when you're getting into the foundation area. So all these are trying to do is trying to intercept water, slow it down and move it towards where it can easily collect. Again, here, slow it down, mitigate it where it can easily be intercepted before it ever has a chance to adversely effect the property which is currently happening.

1T103:5-20. The eight-foot wide path is needed for construction vehicle access. 1T104:13-105:12. The Application proposed removal of six (6) trees to construct the new driveway. 1T106:15-17. Additional trees would be lost in the rear of the property, in the purple and yellow areas shown on Exhibit A4, but "nothing larger than 8 inches." 1T107:6-14. Potentially two 8-inch diameter trees would be lost in the rear area. 1T107:15-19. Mr. Hirsch did not anticipate that any trees would be removed or adversely impacted along the adjacent property lines because the reconstruction would not disturb the Property within five (5) feet of the property line. 1T107:24-108:7. Mr. Hirsch advised that the proposed landscape plan would plant replacement trees on the Property, with the long-term goal of creating a succession forest. 1T108:16-109:9.

The Board Chairman asked Mr. Hirsch whether the new disturbance area, the purple and yellow areas on Exhibit A4, could be cut in half. Mr. Hirsch replied:

> …I would definitely recommend not doing that. Because if, I think you have to understand, all the water that's running off the Reservation is running directly to the backs of these homes. So unless you do

> something to slow it down it's going to be much harder the sooner it gets towards the foundation. So if you're able to intercept it at least one place, if not two, that's beneficial.
>
> I think something that hasn't been talked about, which I think is important, is this helps everybody that's downhill of this property. So the road that's coming across this way, it has a swale on one side and a swale on the other side, which, again, helps everyone downhill, if this functions properly in a storm this basically serving the exact same purpose through a street, through hardscape, that this will be doing with just grading and vegetation. So this really is supposed to be light touch because they love the existing back of the property. We're not trying to, you know, degrade this area back here. If anything it's more about, you know, slowing water down and getting access.

1T110:1-22. Mr. Hirsch explained that many of the other houses in the neighborhood have systems in place to help mitigate the stormwater, and some may have constructed walls that divert water from their property. The Hedges' proposed stormwater management plan would retain the water on the Property. 1T111:1-24.

Mr. Keller was recalled to provide testimony as a professional planner. The Property is located at the steepest part of Sagamore Road, and most of the area that will be disturbed is existing manmade topography, which is steeper than twenty percent (20%). 1T115:15-22. He testified that these circumstances create a hardship to justify a C(1) variance pursuant to N.J.S.A. 40:55D-70(c)(1). He testified that the Application also satisfied the criteria for a variance pursuant to N.J.S.A. 40:55D-70(c)(2) because the proposed plan represents a better planning alternative than one which would comply with the DRZ, where the benefits outweigh the detriments, and advances the purposes of the Municipal Land Use Law ("MLUL"). Regarding the

negative criteria, Mr. Keller focused on the purpose of the steep slope ordinance, and testified that the Application will not accelerate erosion prosthesis, and they are limiting flooding potential. 1T118:2-120:12. Mr. Keller further testified that the Master Plan promotes preservation of the character of neighborhoods and reinforcement of the Township's residential community, and this Application supports that goal. Accordingly, the Application does not have a negative impact on the Master Plan. 1T122:4-12.

After Mr. Keller testified, the Board opened the meeting to public comment. Ms. Guo introduced a five (5) page document with photographs to the Board Secretary, which was marked as Exhibit O-1. Ms. Guo objected to the characterization of the Hegdes' existing driveway as a hardship because she and other homeowners in the neighborhood also have steep slope driveways. 1T125:18-126:4. She stated that she used a "bubble level app" on her iPhone to measure the slopes of five (5) nearby driveways. She did not provide the Board with any written information regarding the data she had collected or its methodology, and once the Board discovered that she had trespassed to get the data, the Board disregarded her testimony and asked her to move on to other comments. 1T126:15-128:7.

Ms. Guo objected to the continued use of the stone garage because the side yard setback does not comply with the current ordinance for an accessory use. Relying on pages 1 and 2 of her Exhibit, she alleged that the stone garage causes

some water runoff onto her property. She objected to the proposed entrance location of the new driveway, asserting that the proposed entrance is not consistent with other driveways in the neighborhood and fearing that it will impair the value of her property. 1T130:23-131-21. She asserted that the reconstruction will result in the destruction of a historical retaining wall owned by the Township. 1T132:25-133:2. By Ms. Guo's personal calculation, the reconstruction will remove 70 healthy trees, disturbing the aesthetics and potentially the foundation of the land. 1T134:11-15. She expressed concerns regarding how the construction will impact the public electricity utility poles and the shared underground water, gas and electric utility sources. 1T135:5-16.

Leanne Rokowitz, who resides at 93 Sagamore Road, commented that while steep slopes are common in the area, "I think anyone living at one of these properties would want to be able to develop a driveway so that they could safely access their house and there's been a benefit to the neighborhood for doing that as well." 1T136:21-137:6.

Mr. Zheng then spoke. Mr. Zheng expressed concern that destruction of the existing driveway would destroy the integrity of the existing slope and impact other properties. 1T138:20-139:3. Mr. Zheng also objected to the extent of the requested variance for disturbance of steep slopes. T139:18-140:6.

Plaintiffs did not present any expert testimony to the Board.

Thereafter, the Board closed the public comment portion of the meeting. The Board members discussed the Application, with six (6) members speaking in support of the Application. 1T140:19-147:12. The Board found that the Hegdes had satisfied the statutory criteria for variances pursuant to N.J.S.A. 40:55D-70(c)(1) and N.J.S.A. 40:55D-70(c)(2), and voted unanimously to approve the Application. 1T147:17-148:9.

On March 4, 2024, the Board adopted a Resolution to memorialize its January 22, 2024 decision to approve the Application ("Resolution"). Pa50-Pa60.

On April 26, 2024, Plaintiffs, representing themselves pro se, filed a Complaint in Lieu of Prerogative Writ, challenging the Board's approval of the Application, and commencing the litigation, which is the subject of this appeal.

STANDARD OF REVIEW

This appeal arises from a Prerogative Writ Complaint, filed pursuant to New Jersey Court Rule 4:69-1. Rule 4:69-1 provides aggrieved parties with a mechanism to challenge a zoning board of adjustment's decision in the Superior Court, Law Division. Wyzkowski v. Rizas, 132 N.J. 509, 522 (1993); Wallace v. City of Bridgeton, 121 N.J. 559, 563 (1972). The courts recognize that local board members are more "familiar with their communities' characteristics and interests," so that a municipal zoning board's decision is presumed to be valid. Pullen v. Township of South Plainfield Planning Board, 291 N.J. Super. 1, 6 (App. Div. 1996). When reviewing a land use board's decision, the court may not apply a de novo review to the factual issues decided by the board "nor substitute its judgment for that of the board." Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 54 (1998). A court may set aside a municipal board decision only if it is shown to be arbitrary, capricious or unreasonable, not supported by the evidence, or otherwise contrary to law. Rivkin v. Dover Twp. Rent Leveling Board, 143 N.J. 352, 378 (1996). Parties challenging a municipal board's decision face a heavy burden. Witt v. Borough of Maywood, 328 N.J. Super. 432, 442 (Law Div. 1998). As affirmed by the trial court, the Board's decision in this matter was properly supported by the evidence in the record and demonstrates a correct application of the relevant principles of land use law.

See Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58-59 (1999). Accordingly, Plaintiffs cannot overcome the presumption of validity attached to the Board's decision.

New Jersey Court Rule 2:10-2, entitled "Notice of Trial Errors," allows the appellate court to disregard any error committed by the trial court unless that error "is of such magnitude as to have been clearly capable of producing an unjust result." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 2:10-2 (2025). Plaintiffs' explanations for why the Court should apply Rule 2:10-2 to invalidate the trial court's decision solely amount to Plaintiffs' disapproval of the Board and the trial court's decisions. See Pb13-Pb20. Rule 2:10-2 does not apply to this matter.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DETERMINED THAT THE CONTINUED USE OF THE EXISTING DETACHED STONE GARAGE DID NOT REQUIRE A VARIANCE.

The Hegdes' property contains a two-car "partially buried stone structure located along a steep slope," which is also located 4.45 feet away from Plaintiffs' property. Pb15. The Hegdes' expert, Mr. Keller, testified that the stone garage was constructed prior to 1962, and predates the construction of the existing house. 1T15:1-6. The stone garage violates the current side yard set

back requirement of twelve (12) feet. Based on a review of the record, and a rejection of the case law relied on by the Plaintiffs, the trial court agreed with the Board: the Hegdes do not need a variance in order to use the nonconforming garage as storage. Pa10.

N.J.S.A. 40:55D-68 permits the continuation of any nonconforming use or structure. Consistent with this statute, §609.8 of the DRZ, entitled "Nonconforming Lots and Structures," provides:

> a. Any existing structure on a nonconforming lot, or any existing structure on a conforming lot which violates any yard requirements, may have additions to the principal building or construct an accessory building without an appeal for a variance, provided the accessory building or the addition to the principal building does not violate any requirements of this ordinance and does not extend or increase any existing nonconformity.

The Hegdes' expert engineer/planner, Mr. Keller, testified that the stone garage was probably constructed in the 1800s and predated the 1962 construction of the existing house. 1T15:1-6. The garage is at an approximate elevation of 410, and the primary entrance to the existing house is at an elevation of 462. Mr. Keller stated: "It's the only house I know of where the garage level is completely disassociated from any primary habitable space." 1T20:6-9. Mr. Keller testified that the garage is an existing nonconforming condition that does not meet the ordinance's side yard requirements. 1T84:5-85:7.

Mr. Keller's testimony was not refuted. The stone garage is a nonconforming structure, according to N.J.S.A. 40:55D-68 and DRZ §609.8(a).

§301.23 of the DRZ defines "garage" as "a structure used to store vehicles, and other items associated with residential structures. A garage shall not include a kitchen, sleeping, or private bath facilities." Because underground rock would make constructing basement storage difficult, the Hegdes intended to use the stone garage for passive storage. 1T84:11-25. Mr. Keller specifically mentioned "storage for lawn maintenance, for kids bikes, things like that." 1T85:1-2. The DRZ clearly allows a residential property owner to use a garage for the type of storage that the Hegdes proposed and the Board approved. The approved Application will not make any additions to the size of the structure. In fact, the changes to the stone garage will decrease the intensity of its use. T84:11-17.

Based on Mr. Keller's testimony, the Board reasonably concluded that no variance was required for the stone garage, and its use for storage constitutes "a use customarily incidental to the use of a single family home." Pa59.

Plaintiffs have argued before the Board, the trial court, and before this Court, that the continued use of the stone garage required a variance due to the setback encroachment. Plaintiffs do not refute the age of the garage. Rather, Plaintiffs have consistently presented a convoluted argument that because, at

one point, an elevator was installed to create easier access from the garage to the existing house, the garage merged with the principal structure, causing the garage to lose its preexisting structure status. To support their premise, Plaintiffs extensively rely on Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132 (App. Div. 2013). The Board agrees with the trial court, that this matter is significantly different from Motley, making Motley inapplicable. See Pa10.

Motley involved two single-family houses located on one lot in a residential zone in Seaside Park. The Borough's 1972 zone restrictions converted the houses into nonconforming uses. The Motley plaintiff occupied the front building and, after its pipes burst in 2006, sought to renovate the house. Id., at 136-137. After the board denied plaintiff's variance application for an expansion of a nonconforming use, along with other bulk variances, plaintiff obtained a permit from the zoning officer which permitted certain renovations but prohibited an expansion of the structure's dimensions. Id., at 137-138. When plaintiff removed the roof, plaintiff discovered extensive damage. Thereafter, plaintiff embarked on a renovation project so severe that the house had become almost entirely new construction. Id., 138-139. The court focused on whether the plaintiff had the right to rebuild the house, having caused more

than a partial destruction to his nonconforming use and defying the terms of the zoning permit. Id., at 136.

Motley is significantly different from the case at bar and inapplicable. Motley involved a nonconforming use. The stone garage is a nonconforming structure. Its storage use is customary for any residential garage. Whereas the Motley plaintiff sought to expand his nonconforming use, the Hegdes intend to use the stone garage less intensely than its historical use – they will not store cars in the garage, will remove the driveway access, will replace the rooftop pergola and eliminate rooftop use. 1T26:14-26; 1T83:7-17. Further, as discussed by the trial court, the Motley plaintiff had deliberately destroyed his property, in contravention of his zoning permit, and had sought to expand his nonconforming use, whereas the Hedges have not acted maliciously and intend to decrease the intensity of the garage's historical use. Pa10.

Based on the evidence presented to the Board, N.J.S.A. 40:55D-68 and the Township's ordinances support the Board's decision to allow the Hegdes to continue to use their historical stone garage for passive storage. Accordingly, the trial court determined that this decision was not arbitrary, capricious or unreasonable. Pa10.

POINT II

AS AFFIRMED BY THE TRIAL COURT, THE BOARD PROPERLY FOUND THAT A HARDSHIP EXISTED, PURSUANT TO N.J.S.A. 40:55D-70(C)(1).

A property owner may obtain a variance pursuant to N.J.S.A. 40:55D-70(c)(1), often referred to as a "hardship" variance, if the owner can demonstrate a special condition of the property which creates "exceptional practical difficulties" or an "exceptional and undue hardship." The Hedges appeared before the Board, requesting two (2) steep slope variances and one (1) variance for the height of their proposed front yard retaining walls. They provided ample expert testimony, which highlighted development difficulties associated with the significant amount of steep slopes located on the Property. The Board thereafter reasonably concluded, based on the evidence, that the Hedges established the positive criteria for a hardship variance according to the statute.

As quoted in the Resolution, N.J.S.A. 40:55D-70(c)(1) provides:

> Where: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional 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 regulation pursuant to article 8 [C.40:55D-62 et seq.] of this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such application of such regulation so as to relieve such difficulties or hardship [.]

Pa57. Undue hardship refers solely to the physical condition of the applicant's property. Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 590 (2005).

Sixty-five percent (65%) of the Hedges' property is encumbered by slopes in excess of twenty percent (20%). Pa232. The Property experiences a 78-foot change in elevation from Sagamore Road to the rear of the Property. Pa232. South Mountain Reservation is located at the rear of the Property. 1T13:1-3. The Property is located at the steepest part of Sagamore Road. 1T115:13-17. The existing driveway is on a twenty-three percent (23%) slope. 1T16:15-19. Mr. Keller, the Hegdes' licensed engineer and planner, has also been a resident of Millburn for twenty-five (25) years. 1T10:8-13. Mr. Keller testified that, under the Township's current steep slope ordinance, the houses on Sagamore Road could not be constructed today, and yet the Hegdes need to rebuild. 1T66:20-24. Mr. Keller described the existing driveway as "the least safe and most daunting driveway I've ever driven on." T16:19-23.

As the MLUL respects the wealth of knowledge possessed by board members regarding local conditions, board members are entitled to conduct site visits. Baghdikian v. Board of Adjustment, 247 N.J. Super. 45 (App. Div. 1991). Board member Truitt visited the site, walked up the driveway in her "little heels" and regretted it. 1T146:19-21. She noted that while many other driveways are sloped,

the Hegdes' driveway is "uniquely challenging because of the walls which was really scary. It was like a luge [track]…" 1T146:22-147:1.

The entire reconstruction project was necessary due to extensive mold which had developed in the existing house. Mr. Hegde described their discovery of mold after members of his family experienced health problems, and the steps they took to attempt to remediate the mold and restore the existing house to a safe, habitable condition. 1T7:6-9:6. Mr. Keller testified and showed the Board how, due to the topography, stormwater pitches up against the existing house, and how water penetrated the foundation and pooled in the crawl space of the home, allowing the mold to grow. 1T24:11-16.

Two of the Hegdes' experts, Mr. Keller and Mr. Hirsch, provided an extensive review of the existing steep slopes on the Property, relying on color-coding depicted in the Applicant's Exhibit A4. Prior to the January 22, 2024 hearing, the Hegdes revised their application to eliminate disturbance within five (5) feet of the Plaintiffs' property, thereby reducing the steep slope disturbance. Each expert responded to questions from the Board on whether the amount of steep slope disturbance could be further reduced, and were told that additional reductions would jeopardize safety or stormwater management. 1T85:10-86:4; 1T86:5-88:10; 1T110:1-22. A portion of the steep slope disturbance was needed to allow construction vehicle access to the

site. 1T104:13-105:12. Although the variance requested 14,052 square feet of steep slope disturbance, most of the steep slopes were manmade. 1T115:10-22.

The record before the Board clearly demonstrated exceptional existing topographical difficulties uniquely affecting the Property, meeting the positive criteria for variance relief described by N.J.S.A. 40:55D-70(c)(1). The Board properly found that N.J.S.A. 40:55D-70(c)(1) warranted the requested variances due to "the subject property's…existing conditions, including the location of the existing dwelling on the downslope of the extreme upgrade in the rear of the subject property, the unsafe driveway condition, and the extensive steep slopes on the subject property, are all hardships specific to same." Pa57-Pa58. The trial court found that the Board's decision, as memorialized in the Resolution, was appropriately supported by the record and, specifically, the uncontradicted testimony provided by the Hegdes' experts. Pa7.

POINT III

AS AFFIRMED BY THE TRIAL COURT, THE BOARD PROPERLY FOUND THAT THE APPLICANTS SATISFIED THE POSITIVE CRITERIA FOR VARIANCES PURSUANT TO N.J.S.A. 40:55D-70(C)(2).

Although N.J.S.A. 40:55D-70(c)(1) of the Municipal Land Use Law is similar to provisions contained in N.J.S.A. 40:55D-70 of the Municipal Planning Act of 1953 and the 1928 Zoning Act, in 1984, the Legislature created the "flexible c" variance, N.J.S.A. 40:55D-70(c)(2). The C(2) variance allows a zoning board to grant a variance when (1) the purposes of the MLUL would be advanced and (2) the benefits of granting the variance substantially outweigh any detriment. The evidence presented to the Board satisfied the positive criteria for C(2) variances as well as the positive criteria for C(1) variances.

The Court evaluated the relatively new "flexible c" statutory provisions for the first time in Kaufmann v. Planning Bd. of Warren, 110 N.J. 551 (1998). Reviewing the Legislative history of the MLUL's variance criteria, contained in sections c and d of N.J.S.A. 40:55D-70, the Court reasoned that the Legislature had added subsection c(2) to the statute to provide a new standard for a narrow band of cases which fell between the traditional standards of "hardship, now located in subsection c(1), and "special reasons," found in section d. Id., at 560-561. The Legislature made clear that "the grant of a c(2) variance must be rooted in the purposes of zoning and planning itself and must advance the purposes of the

MLUL." Id., at 562. The Court determined that the focus of a C(2) variance request will be "on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community." Id., at 563. Under a C(2) analysis, the approval will represent a better zoning alternative for the property. Lang v. Zoning Board of Adjustment, 160 N.J. 41 (1999).

The Application, necessitated by the extreme mold infesting the existing house, sought to create a new home for the Hegdes, with a safer driveway and better stormwater management. The new house is designed to be of a similar genre to the existing house and complimentary to the landscape and to Sagamore Road. 1T94:23-95:2. Mr. Keller testified that the current driveway is so unsafe that "we shouldn't encourage people to drive up it." 1T16:12-15. Board member Truitt described the existing driveway as being "like a luge [track]…" 1T146:22-147:1. The current driveway also ends sixteen (16) feet away from the entry level of the existing house. 1T86:5-88:10. In comparison, the new driveway will be closer to the front door of the house and will permit an ambulance to reach the house. 1T41:14-19. Mr. Hirsch explained that the new stormwater management system is designed to slow the water down and to keep the water on the Property, rather than push it onto adjacent property. He testified that this new system will help everyone downhill of the property. 1T110:1-22. Mr. Keller testified that based on the detailed testimony provided by the various witnesses in support of the Application, the

proposed development represents a better planning alternative than one which would comply with the DRZ, where the benefits substantially outweigh the detriments, and advances the purposes of the MLUL. 1T115:25-116:4. His testimony was unrefuted.

N.J.S.A. 40:55D-2 identifies the purposes of the MLUL. The Board aptly found that the Application fulfilled several purposes of the MLUL: (a) promoting the general welfare and safety of the subject property and the surrounding neighborhood; (b) securing safety from flood; (c) providing adequate light, air and open space; and (i) promoting a desirable visual environment. The Board recognized that the proposed development was consistent with the neighborhood, while improving the functionality and safety of the Property. Pa58. The Board also found that any negative impact from the proposed reconstruction "is negligible and not a substantial detriment." Pa59.

As the unrefuted expert testimony before the Board provided ample evidence to support granting the requested variances pursuant to N.J.S.A. 40:55D-70(c)(2), the Board's decision was not arbitrary, capricious or unreasonable.

POINT IV

THE TRIAL COURT CORRECTLY DETERMINED THAT THE VARIANCES COULD BE GRANTED WITHOUT VIOLATING THE NEGATIVE CRITERIA OF N.J.S.A. 40:55D-70(C).

Along with demonstrating the positive criteria for a variance pursuant to either N.J.S.A. 40:55D-70(c)(1) or (c)(2), an applicant must also prove that the requested variance can be granted without causing substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance. This statutory requirement is often referred to as the "negative criteria." The record before the Board demonstrated that the variances could be granted without the negative consequences prohibited by the statute, and the Board appropriately granted the variances pursuant to N.J.S.A. 40:55D-70(c)(1) and (c)(2).

The steep slope variances presented the biggest discrepancy between what the ordinance permits and the relief requested. Regarding the Township's steep slope ordinances, DRZ §608.2, entitled "Background," provides:

> Disturbance of steep slopes results in accelerated erosion processes from stormwater runoff and the subsequent sedimentation of water bodies with the associated degradation of water quality and loss of aquatic life support. Related effects include soil loss, changes in natural topography and drainage patters, increased flooding potential, further fragmentation of forest and habitat areas, and compromised aesthetic values. It has become widely recognized that disturbance of steep slopes should be restricted or prevented based on the impact disturbance of steep slopes can have on water quality and quantity, and the environmental integrity of the landscapes.

The Hedges' professional expert testimony described the potential benefits of the proposed reconstruction project to the public. The Project was fully compliant with the DRZ, except for the steep slope and front yard wall deviations, which were required for safety and stormwater management. Some portion of the steep slope disturbance was required to provide construction access to the site because those vehicles could not "come through the neighbors property." 1T86:11-87:1. The Township's current steep slope ordinances would prevent construction of any of the existing houses on Sagamore Road. 1T66:20-24. Familiar with the purpose of the Township's steep slope ordinance, Mr. Keller testified that the reconstruction will limit the likelihood of flooding without accelerating soil erosion. 1T118:2-120:12.

Reconciliation of a C variance with the Master Plan and ordinance depends upon whether the grounds offered to support the variance adequately justify the board's actions in granting the variance. Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58 (1999). Mr. Keller testified that the Application supports the Master Plan's goal of preserving the character of residential neighborhoods and reinforces the Township's residential community. 1T122:4-12. Plaintiffs did not put forth any expert testimony to refute Mr. Keller's statements. The Application seeks to raze an existing uninhabitable house, riddled with mold, and replace it with a new house, which is aesthetically similar to other houses in the neighborhood, a safer driveway, which will allow an ambulance to reach the front door of the home, and a stormwater

management system, fulfilling four (4) purposes of the MLUL. The Board appropriately found that the variances could be granted without detriment to the public good and without undermining the intent and purpose of the Township Zoning Ordinance or the Master Plan. Pa58.

The record provides absolutely no support for Plaintiffs' claim that the grant of these variances will harm the public good. Pb38. Similarly, Plaintiffs' attack on Mr. Keller's credibility has no basis. The Board has the authority to accept or reject witness testimony, and where reasonably made, the Board's decision will be conclusive on appeal. Kramer v. Board of Adjustment, 45 N.J. 268, 288 (1965). The Board was well within its right to find the Hegdes' expert witnesses credible, especially given that no contrary expert testimony or evidence was provided by Plaintiffs.

Plaintiffs repeatedly rely on Briar Rose Grp. Inc. v. Planning Bd. of Denville, 2011 N.J. Super. Lexis 2855 (App. Div. 2011), presumably because this case arises out of the denial of an application for a variance from the municipality's steep slope ordinance. This decision is an unpublished opinion and, pursuant to Rule 1:36-3, does not constitute precedent and is not binding upon this Court. Plaintiffs' substantive reliance on this case is also misplaced. Briar Rose involved a subdivision application and construction of two (2) houses on the respective proposed lots. The requested variance from the steep slope ordinance was

significant, and the planning board found that the applicant did not meet its burden of proof. What is relevant to the case at bar are some of the planning board's reasons to deny the variance. The applicant in Briar Rose did not adequately provide for "'appropriate storm drainage facilities'" or "'adequate protective measures…for downstream properties.'" Briar Rose, at 4. In comparison, and as noted by the trial court, much of the requested steep slope disturbance requested by the Hegdes is designed to create a stormwater management system which will keep the water on the site and benefit downhill properties. Pa9. However, the court's reasoning in Briar Rose is helpful. The court stated: "The law presumes that local planning boards 'act fairly and with the proper motives and for valid reasons.'" Briar Rose, at 5, quoting Kramer v. Board of Adjustment, 45 N.J. 268, 296 (1965). Despite Plaintiffs' fevered claims, the Board acted fairly when it reviewed the evidence presented and chose to approve the Application.

Based on the foregoing, the Board reasonably determined that the Hegdes satisfied the negative criteria for either a C(1) or C(2) variance pursuant to N.J.S.A. 40:55D-70(c).

POINT V

THE BOARD'S DECISION TO GRANT THE APPLICATION WAS WELL REASONED AND GROUNDED IN THE EVIDENCE PRESENTED.

The actions of a municipal zoning board are presumed valid, and the courts will not interfere with those decisions absent a clear showing that the board's action was arbitrary or unreasonable. Pullen v. Township of South Plainfield Planning Bd., 291 N.J. Super. 1 (App. Div. 1996). A reviewing court will not suggest a decision that may be better than the one made by the board, but will merely determine whether the board could have reasonably reached its decision. Davis Enterprises v. Karpf, 105 N.J. 476, 485 (1987). In this matter, the Hegdes provided substantial expert testimony to justify the requested variances, and the Board consequently approved the Application and adopted a Resolution, setting forth the Board's findings of fact and conclusions, as required by N.J.S.A. 40:55D-10(g)(2).

The Board approved three (3) variances. Paragraph 3 of the Resolution describes the variances, which were identified on the filed Application. Pa51. Applicants often modify their requested relief prior to Board hearings or during the course of multiple hearings prior to the time when the Board members vote on the pending application. Paragraph 8 of the Resolution recites that Mr. Keller testified during the hearing that the Hegdes had eliminated the "originally proposed steep slope disturbance within five (5) feet of the property line." Pa54. Condition 1 of the

Resolution binds the Hegdes to the representations made by themselves and their professionals during the public hearing "including as set forth in the Board's findings of fact contained in this resolution." Pa59. Plaintiffs' claims that the Resolution approved four (4) variances is nonsensical. See Pb40.

The Board respectfully submits that an additional variance was not required for a front yard impervious area ratio calculation. See Pb40. The Board has not altered the January 8, 2024 Meeting Minutes. See Pb40. The Board did not fail to address critical errors on the Application. See Pb41. These issues were not raised below and should be disregarded by the Court.

Plaintiffs have consistently objected to the proposed placement of the new driveway entrance. As the Board Chairman told Ms. Guo during the meeting, the location of the driveway entrance was legal and "as of right." T79:17-24. The location of the driveway entrance is, therefore, an improper issue in this action. Similarly, Plaintiffs assert that the Hegdes have removed more trees than were represented during the January 22, 2024 hearing. Specifically, Plaintiffs state that the Board approved the removal of six (6) trees, but the Hegdes have since removed fifteen (15) trees. Pb43. The Application sought to remove six (6) trees to construct the driveway. T106:15-17. Mr. Hirsch expected that other trees would be removed in other areas of the Property, and anticipates replacing trees, accordingly. Plaintiffs do not provide any additional information regarding what type of trees were removed

or their location. Assuming arguendo that Plaintiffs are correct, the improper removal of trees after the Board's approval is beyond the scope of what the Court should consider in this action. The Board must base its decision on the record presented at the time it makes a decision on a development application, and this action is limited to an appeal of the Board's approval of the Application. Other municipal entities exist to enforce ordinances and conditions of approval.

Ample evidence was presented to the Board to justify its approval of the Application. The Board's decision should be upheld.

POINT VI

THE TRIAL COURT DID NOT ENGAGE IN ANY INAPPROPRIATE CONDUCT TO WARRANT A REVERSAL OF ITS DECISION.

Contrary to Plaintiffs' assertions, the trial court did not engage in any procedural irregularities or lack of neutrality. Rather, Plaintiffs' complaints stem from their inability to conform to the requirements of the New Jersey Court Rules governing actions in lieu of prerogative writs, Rule 4:69-1, et seq. Moreover, Judge Spencer did not engage in violations of Canon 2 of the Code of Judicial Conduct. Plaintiffs should be admonished for these unsubstantiated claims.

New Jersey Court Rule 4:69-4 creates a special case management procedure for actions in lieu of prerogative writs, designed to expedite their final disposition. Pressler & Vernier, Current N.J. Court Rules, cmt. 5.1 on R. 4:69-4 (2025). This

Rule vests the managing judge with the authority to "conduct a conference…with all parties to determine the factual and legal disputes, to mark exhibits and to establish a briefing schedule." The Rule requires each party to submit a statement of factual and legal issues and an exhibit list to the Court at least five (5) days prior to the conference. R. 4:69-4.

An in-person case management conference was initially scheduled for July 26, 2024. Pa93. Defendants submitted the required statement of facts and legal issues prior to July 26, 2024. Plaintiffs did not. Instead, this July conference was thereafter adjourned in response to Ms. Guo's request. Eventually, the Case Management Conference was held on September 30, 2024 before the Honorable L. Grace Spencer, J.S.C.

On September 25, 2024, Plaintiffs submitted a forty-seven (47) page document, containing substantial legal arguments, references to New Jersey Administrative Code regulations and a series of photographs which were not presented by the Plaintiffs to the Board during the January 22, 2024 hearing. Plaintiffs' forty-eight (48) page Trial Brief cross-referenced their September 25, 2024 submission. In prerogative writs actions, the trial court's review of a zoning board's decision is generally limited to the record presented to the board. See Willoughby v. Planning Bd. of Tp. of Deptford, 306 N.J. Super. 296 (App. Div. 1987). Accordingly, Judge Spencer correctly decided to exclude these extraneous

documents and issues raised by the Plaintiffs which were not raised during the January 22, 2024 hearing. Pa4-Pa5.

Plaintiffs also allege that Judge Spencer violated the Code of Conduct for U.S. Judges, Canon 2 by engaging in an ex parte meeting with Defendants' counsel. The Code of Conduct for U.S. Judges governs federal court judges, and is inapplicable here. Nevertheless, Canon 2 of the Code of Judicial Conduct for New Jersey State Court judges contains similar provisions. Plaintiffs' claims are baseless and unsubstantiated. No such meeting occurred. The transcript of the hearing shows that Judge Spencer directed members of the Court to advise her which matter was next on her docket prior to leaving the bench. 2T81:19-21.

Although Plaintiffs are appearing, pro se, New Jersey courts have held that pro se litigants are presumed to know and must follow the same laws and procedural rules as attorneys. Tuckey v. Harleysville Ins. Co., 236 N.J. Super. 221, 224 (App. Div. 1989). Therefore, Plaintiffs must abide by the Rules of Court and cannot make spurious accusations against the judiciary without substantive proof. This Court should disregard the claims contained in Point VI of Plaintiffs' Brief. See Pb47-Pb50.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court affirm the Trial Court's February 7, 2025 Order and the opinion attached thereto.

Respectfully submitted,

/s/Robert F. Simon
Robert F. Simon

Dated: June 25, 2025

INGLESINO TAYLOR
600 Parsippany Road, Suite 204
Parsippany, New Jersey 07054
Tel: (973) 947-7111
Fax: (973) 887-2700
Attorneys for Narayan and Arya Hegde

DOROTHY GUO & HENRY ZHENG, **Plaintiffs/Appellants** v. **ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MILLBURN, AND NARAYAN & ARYA HEGDE** **Defendants/Respondents**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Civil Action DOCKET NO. A-1930-24 Sat Below: HON. LOUISE GRACE SPENCER, J.S.C.

BRIEF OF DEFENDANTS/RESPONDENTS NARAYAN & ARYA HEGDE

Of Counsel and on the Brief:
Derek W. Orth, Esq. (001152013)

On the Brief:
John T. Eder, Esq. (433432023)

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Dorothy Guo and Henry Zheng ("Appellants") now come before this Court, attempting for the third time, to stop their neighbors Narayan and Arya Hegde (the "Hegdes" or "Respondents") from rebuilding their home at 99 Sagamore Road in the Township of Millburn ("Millburn"), otherwise designated as Lot 11, Block 101 on Millburn's official Tax Map.

As further detailed herein, Appellants' misguided challenge to the unanimous approval granted by the Millburn Zoning Board of Adjustment (the "Board") to the Hegdes lacks any foundation; it is supported only by inaccurate and conclusory claims which were rejected by the Board and the Trial Court, lacking any expert testimony. Appellants would have this Court overlook the ample proofs and the uncontroverted testimony of several experts, all of which were carefully examined by the Board during an exhaustive hearing process, and substitute the Appellants' personal preferences for the reasoned evaluation of a body of local experts.

The Board's approval of the application, which again was unanimous, is entitled to deference from the Court, is well supported by the credible record evidence, and Appellants' unsubstantiated claims should be rejected in their entirety. Furthermore, the new desperate claims raised by the Appellants on this appeal, i.e., that the Trial Court somehow acted inappropriately, is completely

meritless, factually incorrect, and should be wholly rejected by this Court on appeal.

COUNTER-STATEMENT OF FACTS

The Hegdes' Application

In 2022, the Hegdes commenced an extensive planning process for the demolition and rebuild of their home, due to extensive and irredeemable mold caused by water penetration, which had rendered the home uninhabitable for the Hegdes. T1 at 7:11-9.6. Upon proper notice and after significant time preparing their application and purposefully delaying the application at the request of a neighbor, the Board heard the Hegdes' application on January 22, 2024. T1 at 1:1-6.

The January 22, 2024 Hearing

During the January 22, 2024 hearing, Richard Keller, the Applicant's professional civil engineer and planner, provided sworn testimony in support of the Hegdes' application and was accepted by the Board as an expert in the fields of engineering and planning. T1 at 10:14-18. Mr. Keller is a prominent engineer and planner with decades of experience.

Mr. Keller introduced the Hegdes' application package, including the variance application, plot plan and zoning analysis, and a survey of the Hegdes' property, and provided an overview of the site plan. T1 at 11:20-12:5. Mr. Keller testified that the property is currently improved with an existing two-car stone garage, that is believed

to have been built in the 1800s, whereas the exiting dwelling was built in 1962. T1 at 15:1-5. Mr. Keller testified that the prior owner installed an elevator in the existing garage and a "link" to the main home from the top of the garage. T1 at 19:25-20:6. Mr. Keller explained that due to the excavation required to remove the historic garage structure, and the Hegdes' need for storage, the existing stone garage will remain intact, while the elevator and hallway connecting the garage to the existing dwelling will be removed. T1 at 26:16-20.

Mr. Keller extensively testified regarding the prevalent steep slopes existing throughout the property, both natural and artificial from the construction of the existing dwelling. See T1 at 18:7-10; 19:8-13; 23:6-18; 24:9-16; 30:10-11; 62:3-9; see also T1 at 54:21-22 ("We've gone pretty exhaustively through the steep slope inventory"). Significantly, at the rear of the existing dwelling, the steep slopes direct stormwater runoff toward the foundation of the home and led to mold forming in the existing crawl space. T1 at 24:9-16. Mr. Keller then described the efforts to create a safe driveway to access the rebuilt home, which required both lengthening and widening and could not be accomplished while using the existing driveway placement and existing dwelling foundation. T1 at 20:14-25. Mr. Keller introduced a diagram depicting the steep slope disturbance by area. T1 at 30:10-11. He then explained that the proposed disturbances within five (5) feet of the property line were removed. T1 at 30:18-31:9. Mr. Keller testified that the area of proposed

disturbances in the front of the property was specifically designed to create a safe driveway and terracing to slow down rainwater. T1 at 31:17-23. He explained that the terracing also required a variance for the retaining walls, which exceed two feet in some areas. T1 at 31:23-32:3. Mr. Keller testified that the sleep slope disturbances were the result of grading against existing steep slopes to create flatter plateaus in both the front and back of the property to slow down stormwater runoff, while also allowing for a safer driveway and vehicle access. T1 at 28:13-23; 31:18-23; 47:1-15.

Mr. Keller further testified that the proposed plans include inlets placed around the sides of the house, which would direct water away from the main dwelling's foundation (T1 at 27:24-28:3), and stormwater intercepts and access point (T1 at 28:3-7). Mr. Keller likened the stormwater management design to third-century agricultural terracing, which the Soil Conservation District acknowledged as manageable. T1 at 48:14-49:2. Ultimately, the proposed plan creates stormwater detention to protect both the home and prevent excess runoff from intruding into neighboring properties or the roadway. See T1 at 28:2-3; 28:20-23; 42:17-24; see also T1 at 44:18-45:1 ("this is really about getting a house that manages the water that comes off that road . . . we're looking at using this to basically bifurcate the water down around and out into the storm sewer system that sits in the front left corner of our property, an existing inlet right there. There's detention available.")

Mr. Keller also discussed the variances requested relating to retaining wall height and separation, describing the proposed deviations as being necessary to effectuate the terracing and driveway plan, and consistent with other properties in the area. T1 at 56:8-59:6. As noted subsequently, these variances (to which Appellants object) have been specifically designed to improve runoff conditions from the site.

Appellant Guo questioned whether the driveway needed to be moved closer to her driveway (T1 at 79:13-16), whether a variance was required for the garage (T1 at 84:1-10), and whether the house could be rebuilt with a temporary driveway to minimize the disturbance (T1 at 87:2-5).

Mr. Keller explained that moving the driveway was necessary to create a shallower driveway slope. T1 at 81:20-82:4. Chairman Ploetner advised Ms. Guo that the proposed driveway location did not require a variance. T1 at 79:21-24. With respect to the pre-existing garage structure, Mr. Keller explained that it is an existing, nonconforming condition that predates the current zoning ordinance. T1 at 84:11-12. Mr. Keller further explained that the intensity of the pre-existing nonconformity was being decreased by the proposed changes to the driveway and use, as cars would no longer be parked there, the elevator would be removed, and the existing patio area above the garage would no longer be used. T1 at 84:14-24. With regard to Appellant Guo's inquiry regarding temporary access drive in lieu of a new driveway, Mr. Keller testified that it would be very difficult to get the current driveway layout to a

slope below 15% without moving the house back significantly, and that the numerous design ideas considered demonstrated that the proposed steep slope disturbance was necessary to build an access road for construction of the rebuilt dwelling. T1 at 87: 6-88:7.

Next, the Hegdes' licensed Architect, Marvin Clawson, was duly sworn and accepted as an expert in the field of architecture by the Board. T1 at 89:5-24. Mr. Clawson described the project and introduced an exhibit demonstrating that the proposed rebuild utilizes 80% of the existing foundation. T1 at 90:13-25. Mr. Clawson explained the design of the proposed rebuild includes an enlarged utility room and basement level garage, to provide for upgraded utilities and upgraded mechanical equipment to meet new energy code requirements. T1 at 91:2-15. Mr. Clawson described the layout of the rebuild, and the effort to preserve as much of the existing natural environment while preventing water migration into the home. T1 at 94:20-23. Mr. Clawson concluded his testimony stating, "the whole design was predicated on the fact that we should have a symbiotic relationship with the landscape [and] try to nestle [the home] into the hill and create a massing that would be complimentary to the landscape and to Sagamore Road." T1 at 94:23-95:2.

Next, Brian Hirsch, the Hegdes' Landscape Architect, was duly sworn and accepted by the Board as an expert in the field of landscape architecture. T1 at 98:16-25; 99:1-13. Mr. Hirsch provided an overview of the proposed landscaping in the

context of stormwater runoff mitigation, noting that it was designed to mimic the natural vegetation of the surrounding areas and utilize existing site topography. T1 at 99:14-101:16. When asked by Chairman Ploetner about the design of proposed walking paths on either side of the property, Mr. Hirsch explained that the landscaping was designed to optimally mitigate water runoff and provide egress (T1 at 102:7-23); he further explained that paths were designed with reference to the existing trails on the South Mountain Reservation, which borders the rear of the Property. T1 at 103:21-104:5. Mr. Hirsch also answered a previous question of the Board regarding the vegetation being planted to mitigate soil erosion, explaining that sedges, woodland grasses and ferns, which grow in beneath the tree canopy and are not eaten by deer, will provide soil stabilization with a natural aesthetic. T1 at 104:6-12. Mr. Hirsch advised that the amount of slope disturbance could be reduced to some degree, but the width of the proposed sections of disturbance correspond with the size of safe access paths and provide more area of rainwater retention and stormwater runoff mitigation, which benefits all downhill properties. T1 at 105:5-12; 109:17-111:24.

When asked about the trees to be removed by the proposed plans, Mr. Hirsch testified that the trees around the perimeter of the property would be preserved, as well as hardwood trees that hold up well to storms. T1 at 105:13-23. He further testified that trees will be planted on the property to account for trees being removed,

to maintain the upper canopy and understory of the forest in the long term. See T1 at 108:16-109:9.

Mr. Keller returned to provide expert planning testimony. Mr. Keller opined that the manmade and natural steep slopes of the property create a hardship justifying variance relief relating to steep slope disturbance and retaining wall height. T1 at 115:10-24. Mr. Keller further testified that the proposed plan represents a better planning alternative than one that meets the ordinance requirements because the general welfare is advanced by the proposed stormwater management design and also creates safer access to the home for the owners, construction workers, visitors, and emergency services. T1 at 115:25-116:25.

With respect to the statutory "negative criteria," Mr. Keller testified that the proposal poses no detriment to the intent and purpose of the zoning plan and zoning ordinances because the design reduces the steepness of the slopes, reduces erosion potential, mitigates stormwater runoff, and reduces flooding potential while maintaining the aesthetic appeal of the surrounding area. T1 at 118:2-120:23. Mr. Keller added that the proposed plan is the best balance of competing interests considered when developing the project design, and that even though a steep slope variance is required, it was a necessary part of a comprehensive plan that strikes a balance between the Hegdes' goals and zoning requirements, while remaining faithful to the intent of the master plan. T1 at 122:4-123:9.

Public Comment and Objection

Appellant Guo then attempted to offer evidence regarding steep slopes with apparent measurements of the Hegdes' property. T1 at 126:4-127:19. However, when questioned about how she obtained the data she intended to present into evidence, Ms. Guo admitted that she trespassed to obtain the data. T1 at 127:20-128:4. Ms. Guo was then advised that the Board would not entertain illegally obtained evidence. T1 at 128:5-7.

Appellant Guo then testified that the existing detached garage "cause [sic] some water runoff to adjacent property," and does not qualify as an accessory use, thus requiring removal to comply with the zoning code, based on its distance from her property line. T1 at 128:25-130:22. She further asserted that the proposed driveway entrance location "breaks the well stablished harmony and pattern of the driveway entrance in the neighborhood," and "impairs the value of [her] property." T1 at 130:23-131:2. Ms. Guo provided no evidence to support her claim that the location of the driveway would reduce her property value.

Appellant Guo further asserted, without any expert support or a planning license, that the potential detrimental impacts of the Hegdes' application on the neighborhood outweighed the benefits, by disturbing the "solid future foundation," "destroy[ing] the existing natural retaining wall structure and the trees," and creating

"massive manmade retaining walls that are to[o] close to each other and not compliant with zoning codes" T1 at 133:11-20.

Appellant Guo went on to allege that the proposed rebuild doesn't blend into the established aesthetics of the neighborhood, and that 70 trees would be removed, thereby disturbing the "foundation of the land." T1 at 134:3-15. Ms. Guo provided no evidence to support these allegations and was not qualified as an expert by the Board in the area of neighborhood aesthetics, soil erosion, civil engineering, architecture, or indeed any professional field of relevance to the Board or the application.

Leanne Rakowitz, neighborhood property owner, testified that the issues of the application were well explained and that while steep slopes are not unique to the Property, she believed that anyone living at one of the steeply sloped properties would want to develop a driveway to safely access their home, and that doing so also brings a benefit to the neighborhood. T1 at 136:19-137:6.

Appellant Zheng commented that he supported the Hegdes rebuilding their home but expressed concern about the proposed driveway. T1 at 138:6-21. Mr. Zheng explained his worry that breaking integrity of the slope for the proposed driveway would affect all properties in the area, while the existing driveway has been there for over 100 years and "nobody ever have any complaint or whatever issue for driveway." T1 at 138:23-139:5. Mr. Zheng further asserted that he objected

to maintaining the preexisting non-conforming garage structure while a new garage was going to be included in the footprint of the rebuilt home. T1 at 139:12-17. Mr. Zheng also objected to the number of variances requested, explaining that the degree of variance requested for steep slopes was his concern. T1 at 139:18-140:11.

The Board's Findings of Fact

At the conclusion of the public portion of the meeting, Board Member Glatt commented that the Hegdes' proposal is "an extremely thoughtful, sensitive plan." T1 at 140:19-24. Ms. Glatt further stated that a hardship was present due to the steep slopes, that the criteria for a variance under both C-1 and C-2 had been met, and given the experts involved in the areas of tree removal and stormwater management, she was in support of the application without a reduction to the slope disturbance because of the benefit for stormwater management to the Property and surrounding properties. T1 at 140:24-142:7.

Board Member Caulfield spoke next, clarifying that the location of the driveway was not restricted by ordinance and agreeing with Ms. Glatt with respect to not reducing slope disturbances designed for stormwater management. T1 at 142:9-143:2.

Next, Chairman Ploetner expressed his belief that driveways grouped together would be beneficial because they provide for more street parking. T1 at 143:3-15. Chairman Ploetner further explained that when the driveway was built, vehicles were

not the same size as they are today, and that driveway access directly to a home should be part of proper planning and not a luxury. T1 at 143:16-25. Chairman Ploetner concluded his comments by stating that he would be in favor of eliminating some of the proposed disturbance in the rear of the property if the deviation could be reduced while maintaining the same stormwater mitigation efficacy. T1 at 144:1-10.

Board Member Rosen provided comments next, stating that she would not want to reduce any of the proposed slope disturbances that "to the extent it had any impact on the water management," and that the driveway looked large on the drawing, but she was "not so troubled" with an 8-foot-wide access driveway in the rear of the property. T1 at 144:13-145:5.

Board Member Harjani then commented, stating "I think this was a very thoughtful plan." T1 at 145:5-6. Mr. Harjani added that the plan meets the needs of the owner while being responsive the property location and topography, and stormwater drainage patters. T1 at 145:6-13. With respect to the proposed driveway design, Mr. Harjani stated that he believed the driveway was thoughtfully designed "from many angles." T1 at 145:14-22.

Board Member Truitt expressed her agreement with the other board members and stated that the design was "very tasteful" and "fits into the neighborhood well." T1 at 145:24-146:10. Ms. Truitt further affirmed that water mitigation and soil

conservation would be "addressed by township experts," and that the township engineers would review the required stormwater management plan for negative impacts on the community. T1 at 146:11-17. Ms. Truitt also noted the steepness of the existing driveway was "uniquely challenging" because of the retaining walls, which make the driveway "like a luge." T1 at 146:18-147:3. Ms. Truitt concluded her comments by stating that close driveways can be navigated by using car beeps and driving carefully and expressing her support for the application. T1 at 147:4-12.

Ms. Glatt made a motion to approve the Hegdes' application, which was seconded by Ms. Rosen. T1 at 147:17-20. The Hegdes' application was approved unanimously by the Board. T1 at 147:21-10.

The Resolution

A resolution memorializing the approval of the Hegdes' site plan and variance application was adopted by the Board on March 4, 2024 and published on March 14, 2024. Pa60.

The Resolution amply sets forth the Board's findings on the application and notes that the Board found the Hegdes "satisfied the statutory criteria of N.J.S.A. 40:55D-70c(1)," specifically identifying "the location of the existing dwelling on the downslope of the extreme upgrade in the rear of the subject property, the unsafe driveway condition, and extensive steep slopes on the property, are all hardships

specific to the same. . . which result in practical difficulties and undue hardship on the Applicants." Pa57-58.

The Resolution explicitly stated that the Hegdes:

> Satisfied the statutory criteria as required by N.J.S.A. 40:55D-70c(2) . . . as numerous purposes of the Municipal Land Use Law, . . . specifically, N.J.S.A. 40:55D-2, are advanced by the Application-namely, subsection (a) providing for the general welfare and safety of the subject property and the surrounding neighborhood; (b) to secure safety from a flood; (c) to provide adequate light, air and open space; and (d) to promote a desirable visual environment.
>
> [Pa58].

By way of the Resolution, the Board found "the application's proposed construction [] consistent with the character of the subject neighborhood, while improving overall functionality and safety of the Applicants' property." Ibid.

The resolution also identified that, "while the proposed construction requires variance relief," the deviations from strict compliance with the zoning ordinance "are relatively modest, can be accommodated by the subject property, and can be accomplished without undermining the intent and purpose of the Township Zoning Ordinance or the Master Plan." Pa58-59.

The Board, through the Resolution, "notes that no objecting member of the public presented any expert testimony to counter the expert testimony of the

Applicants' witnesses, including as to the variance relief required[.]" Ibid. The Board found Mr. Keller's testimony to be credible, including with respect to his testimony that "no variance relief is required for continued use of the detached garage structure as storage (whether partially or exclusively) as a use customarily incidental to the use of a single family home." Ibid.

The Board found the proposed construction to be "tasteful and modest" and "any negative impact from the proposed improvements is negligible and not a substantial detriment." Pa59. Furthermore, the Board found "the positive and negative criteria for variance relief have been met by the Applicants pursuant to N.J.S.A. 40:55D-70c(1) and c(2)."

Thus, notwithstanding Appellants' unfounded objections, the Board determined that no variance was required for the continued use of the pre-existing, non-conforming garage structure, and that variances for steep slope disturbance, and retaining wall height and separation were adequately supported and therefore appropriate for approval, consistent with the Municipal Land Use Law ("MLUL"), and the intent of the Township's Master Plan and Zoning Ordinance.

The November 14, 2024 Trial

The trial of Appellants' challenge to the Board's approval of the Hegde's application and associated variances was conducted on November 14, 2024.

Appellants raised the following relevant arguments before the trial court: (1) the nonconforming garage cannot be allowed to continue to exist pursuant to the Township's Ordinances; (2) Mr. Keller made several misrepresentations to the Board; (3) the application failed to satisfy the positive criteria necessary for the variances; and (4) the application failed to satisfy the negative criteria necessary for the variances. T2 at 9:15-19:5; T2 at 19:6-23:18; T2 at 24:23-31:19; T2 at 31:20-33:22. These arguments are functionally identical to the ones raised before this Court.

Respondents responded with the following relevant arguments before the trial court: (1) Appellants improperly relied on exhibits not a part of the record below; (2) Appellants failed to present any exhibits to the Board or support their conclusory statements which attempt to contradict the testimony of the Hegdes' qualified experts; (3) the Hegdes provided expert and personal testimony as to the hardship of the manmade and natural steep slope conditions of the Property; (4) the stormwater management features and safer access to the home for owners, workers, and emergency services advance the general welfare; (5) Mr. Keller testified that his design reduces the steepness of the slopes, reduces erosion potential, mitigates storm-water runoff, and also reduces flooding potential, while maintaining the aesthetic appeal of the surrounding area. T2 at 49:5-49:21; T2 at 49:22-51:2; T2 at 51:3-53:13; T2 at 53:14-54:13; T2 at 54:14-55:13.

The Trial Court's Order and Statement of Reasons

On February 7, 2025, the Trial Court issued an Order and Statement of Reasons affirming the Board's unanimous approval of the Hegdes application and dismissing Appellants' appeal.

The trial court first explained that "to determine whether a Board's actions were arbitrary, capricious or patently unreasonable, and whether the board acted in accordance with the statutory standard, the Court's review must be constrained to the record before the Board." Pa5 (quoting Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 258, 289 (1965). Therefore, the trial court could not consider the Appellants' supplementation of the record "with documents/exhibits that were not presented to the Board during the duly-noticed hearing on the Hegdes' application." Pa5.

In analyzing whether the application submitted by the Hegdes demonstrated a hardship under N.J.S.A. 40:55D-70c(1), the trial court looked to the Board's recognition of "the unique conditions and extraordinary and exceptional circumstances uniquely affecting the Hegdes' property" and the Board's finding that "strict application of the steep slope and retaining wall ordinances would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the Hegdes". Pa6-7. Critically, the trial court identified that "contrary to Appellants' assertion that the Board's decision was unsupported, the record by way of the Resolution reflects that **the Board accepted the expert testimony of the**

Hegdes' experts which was not contradicted by any other testimony". Pa7 (emphasis added). Given this information, the court explained, "the Board determined that the **evidence and testimony** presented at the January 22, 2024, hearing demonstrated that granting the requested variance would create no substantial detriment to the public good" Pa7 (emphasis added). Such a determination was not "arbitrary, capricious or unreasonable". Id.

The trial court then addressed Appellants' claims that the Hegdes failed to provide adequate, sufficient, and credible evidence to meet the c(2) variance requirements. The trial court noted that the "record reflects that the Hegdes' request for variances was rooted in their desire to create a new home with a safer driveway with better stormwater management. Again, there was testimony that the current driveway is so unsafe that people shouldn't be encourage[d] to drive up it and that the storm water management would better direct water to the benefit of the property and others downhill." Id. The trial court contrasted the presentation by the Hegdes against the lack of a presentation by the Appellants. "[Appellants] have offered no expert testimony at the time of the hearing and now offer conclusory statements regarding the "impact of the plans proposed by the Hegdes. These statements which were unsupported at the time of hearing and still today unsupported do not meet [Appellants'] burden of demonstrating the invalidity of the Board's decision by clear and convincing evidence." Pa8. The trial court went on the list the reasons for which

the Board determined the application fulfilled the purposes of the MLUL which were as follows: "(a) promoting the general welfare and safety of the subject property and the surrounding neighborhood; (b) securing safety from flood; (c) providing adequate light, air and open space; and (d) promoting a desirable visual environment." Id. The trial court also reiterated how, as noted in the Resolution, "the Board also found that any negative impact from the proposed reconstruction "is negligible and not a substantial detriment."" Id. Just as before, the trial court concluded this portion of its opinion by stating how the "[t]estimony in support of the application on behalf of the Hegdes was **unrefuted**…" Id. (emphasis added).

Moving to the application's satisfaction of the negative criteria for a variance pursuant to N.J.S.A. 40:55D-70c, the trial court contrasted the difference in presentations before the Board by the Hegdes and Appellants. The trial court explained that "[s]ubstantial testimony was presented by professional experts on behalf of the Hegdes regarding the benefits of the reconstruction to the Property as well as the potential benefits to the public which included testimony from a resident of a nearby property who supported the Application and the construction of a new driveway, stating that it was benefit to the neighborhood." Pa8. No evidence was provided by Appellants to support their contentions about the environmental impacts "either in the record below or at the time or oral argument." Id.

As to the remaining contention about whether the detached garage's non-conforming use required a variance, the trial court began by citing to N.J.S.A. 40:55D-68 which permits the continuation of any conforming structure. Pa9. The trial court then outlined how Appellants' reliance on Motley[1] was misplaced. Id. "This matter is distinguishable from Motley on a base level. The Motley plaintiff deliberately destroyed his nonconforming use, in contravention of the zoning permit he had received and whereas the Motley plaintiff sought to expand his nonconforming use, the Hegdes intend to use the stone garage less intensely than its historical use." Pa10. Yet again, the trial court identified a lack of uncontradicted testimony by Mr. Keller describing how "Mr. Keller's testimony that the stone garage is completely disassociated from the primary habitable space was not contradicted." Therefore, the trial court concluded, "the Board's decision to continue the non-conforming use of the garage without a variance [was] reasonable and neither arbitrary nor capricious." Pa10. Leaving no room for doubt about the uncontroverted proofs presented in favor of the application, the trial court reiterated in its conclusion the breadth of expert testimony presented by the Hegdes and the lack of any contradictory expert witness testimony.

[1] Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132 (App. Div. 2013).

COUNTER PROCEDURAL HISTORY

Appellants filed an appeal of the Board's decision in Essex County Superior Court on April 26, 2024. The Board filed an Answer on June 5, 2024. Appellants then filed an Order to Show Cause on June 14, 2024, seeking temporary restraints against the Hegdes. On June 19, 2024, the Hegdes filed opposition to Appellants' Order to Show Cause. Following a hearing on the same day, Appellants' Order to Show Cause was denied with prejudice. On June 25, 2024, Defendant Board filed an Answer to the Amended Complaint. The Hegdes filed an Answer to the Amended Complaint on June 27, 2024.

A Case Management Conference was initially scheduled for July 26, 2024 but, at the request of Appellants, was rescheduled to September 30, 2024.

On October 15, 2024, Appellants filed their trial brief. Appellants' trial brief referenced a previously submitted "Statement of Facts", which document attached a number of documents which were never submitted to the Board during the course of the land use application.

On October 18, 2024, the Hegdes and Defendant Board filed their trial briefs.

A bench trial was conducted on November 14, 2024 with the corresponding Order and Statement of Reasons issued on February 7, 2025.

On February 7, 2025, Respondents filed a Motion for Relief After Judgment for entry of an Order imposing sanctions and awarding reasonable attorneys' fees and other expenses incurred as a direct result of defending against Appellants' frivolous complaint.

The next day, on February 8, 2025, Appellants filed the Notice of Appeal.

On March 19, 2025, Appellants filed their opposition to the Motion for Relief After Judgment.

On March 24, 2025, Respondents filed their reply to Appellants' opposition.

Oral argument on the Motion for Relief After Judgment was held on April 1, 2025, and a corresponding order was issued immediately thereafter which denied the request for sanctions.

This appeal now follows.

STANDARD OF REVIEW

"The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). See also, State v. Camey, 239 N.J. 282, 306 (2019) ("[w]e will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in

credibility assessments by the trial court"); Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017) ("[w]e review the trial court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016) (findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence); State v. K.W., 214 N.J. 499, 507 (2013) ("[w]e defer to the trial court's factual findings 'so long as those findings are supported by sufficient credible evidence in the record'").

There are however specific, well-settled general principles of appellate review that guide consideration of the issues presented in the instant case. Initially, it is important to note that a reviewing court should defer to the judgment of local land use boards because the members of such bodies "are thoroughly familiar with their community's characteristics and are the proper representatives of its people [and] are undoubtedly best equipped to pass initially on such applications." Lang v. Zoning Bd. of Adj. of North Caldwell, 160 N.J. 41, 58 (1999) (quoting Kramer v. Bd. of Adj. Sea Girt, 45 N.J. 268, 296-97 (1965)). Furthermore, the "factual determinations of the planning board are presumed to be valid[.]" Fallone Properties, LLC v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 560 (App. Div. 2004).

When making such determinations, local land use boards "must be allowed wide latitude in the exercise of delegated discretion." Ibid. (citing Kramer, supra, 45

N.J. at 296-97). As such, "there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved." Kramer, supra, 45 N.J. at 297. In light of the deference afforded to the actions of local land use boards, the party challenging such action bears the weighty burden of overcoming that presumption of validity by demonstrating, with substantial evidence, that the challenged action is "clearly arbitrary, capricious and unreasonable." Fallone, supra, 369 N.J. Super. at 552 (emphasis added). Put simply, "both trial and appellate courts should review a zoning board's decision merely to "determine whether the board could reasonably have reached its decision."" Pa4 quoting Pullen v. Township of South Plainfield Planning Board, 291 N.J. Super. 1, 6 (App. Div. 1996).

As set forth in greater detail herein, Appellants have utterly failed to meet the substantial burden of proof necessary to overturn the Board's approval. Appellants rely solely on bald and conclusory arguments which are contrary to the record evidence. Appellants' appeal should be rejected by this Court.

LEGAL ARGUMENT

I. THE HEGDES' APPLICATION DID NOT REQUIRE A VARIANCE WITH RESPECT TO THE PRE-EXISTING, NON-CONFORMING GARAGE STRUCTURE. (Pa9-10)

The Hegdes' application did not require a variance with respect to the pre-existing non-conforming garage structure.

Municipal ordinances, like legislative enactments, should be interpreted to "effectuate the legislative intent in light of the language used and the objects sought to be achieved." Merin v. Maglaki, 126 N.J. 430, 435 (1992). Zoning ordinances, moreover, "generally are liberally construed in favor of the municipality." State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 171 (1999) (citing Place v. Board of Adjust. of Saddle River, 42 N.J. 324, 328 (1964)). Above all else, an ordinance will "not be construed to lead to absurd results." State v. Provenzano, 34 N.J. 318, 322 (1961).

Appellants' argument is premised on the belief that the stone garage structure became a part of the main dwelling upon its connection by way of hallway by the previous owner, and that the destruction of the main dwelling must include the later-attached garage. Pb at 14-18. Otherwise, Appellants argue, the nonconformance of the garage structure is exacerbated because it can no longer be considered an accessory structure or part of the main dwelling. Pb at 16-17. This argument overlooks the fact that the garage structure has long been a feature of the Property, well before the enactment of the zoning ordinance and, further that the footprint of the garage will not increase due to its detachment from the main dwelling. Rather, the garage's rooftop patio, elevator, and hallway connection associated with the pre-existing, non-conforming stone garage will be removed, thereby rendering the structure closer to conformance

with the zoning ordinance. In other words, any non-conformity associated with the garage is actually being reduced.

While Appellants do provide the relevant portion of the ordinances governing preexisting nonconforming uses and structures, Appellants misapply those ordinances to the instant facts. Specifically, Appellants fail to account for the age of the pre-existing stone garage structure on the Hegdes' property and understand how the nonconformity is reduced as proposed in the application.

For ease of reference, Millburn Zoning Ordinance § DRZ 605-Existing Uses reads as follows:

> Except as otherwise specified for nonconforming uses, structures, sites, or lots, any use, building, or structure existing at the time of the enactment of this ordinance may be continued even though such use, building, or structure may not conform with the provisions of this ordinance for the district in which it is located.

Millburn Zoning Ordinance § DRZ 609.8-Nonconforming Lots and Structures, which provides, in relevant part under subsection (a):

> Any existing structure on a nonconforming lot, or any existing structure on a conforming lot which violates any yard requirements, may have additions to the principal building or construct an accessory building without an appeal for a variance, provided the accessory building or the addition to the principal building does not violate any requirements of this ordinance, and does not extend or increase any existing nonconformity.

A plain reading of § 605 makes clear that the pre-existing stone garage structure on the Hegdes' property may continue to be used as an accessory structure despite its non-conformance with the yard setback requirements, because the setback requirements were enacted after the garage was constructed. See T1 at 84:11-14 (the setback requirements are from the 1950's, whereas the existing garage structure is nearly 100 years old). Furthermore, because the non-conformity of the existing structure is not being increased by the Hegdes' proposed plans to raze and rebuild the primary dwelling, § DRZ 609.8 explicitly provides that no application for a variance is required. § DRZ 609.8(a). See T1 at 84:11-17 (the nonconformity is being reduced by no longer using the structure's rooftop, and no longer using the structure to park cars).

The failure of Appellants is not limited to their misapplication of Millburn's zoning ordinance, but includes a failure to understand the terms of the application itself. Appellants' misunderstanding of the application is explicitly stated in their papers to this court; Appellants stated "[a]llowing the garage to remain as a nonconforming structure **with a patio atop** undermines the policy objective and sets a dangerous precedent for future zoning enforcement." Pb at 18 (emphasis added). The application proposed removal of the rooftop pergola. Next, Appellants mischaracterized the testimony of Mr. Keller. Appellants allege that "Mr. Keller asserted that the garage level was

completely disassociated from the primary habitable space, yet he also testified that the garage was attached to the principal building via an elevator and constructed hallway by the previous owner" and that the trial court "failed to address **the contradiction** in Mr. Keller's testimony and used this conflicted information to support its findings". Pb at 18. This is not an actual contradiction; the elevator and hallway allow a person to enter the home from the garage by creating a transition from the garage level to the house level. Relatedly, the photos of other homes (Pa167-168) do not establish that the 99 Sagamore garage level is not disassociated from the house level. In the conclusion of their argument, Appellants state that "the reconstruction of the garage as a detached storage area will further intensify the nonconformance." Pb at 19. Again, the garage is not being reconstructed, it is just not being removed and its nonconforming use (which significantly predated the implementation of Millburn's zoning ordinance) will decrease in intensity.

Still further, Appellants misapply Motley[2] to the instant application. Appellants represented that "[t]he case of Motley centers on the distinction between partial and total destruction of a nonconforming structure under N.J.S.A. 40:55D-68, highlighting the legal boundaries surrounding the

[2] Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132 (App. Div. 2013)

restoration of nonconforming structures." Pb at 19. In doing so, Appellants conflate the destruction of the main dwelling with the partial or total destruction of the existing garage and in so doing demonstrate again a lack of understanding of the Hegdes' application.

Here, the plain language of Sections 605 and 609.8 of the Millburn Zoning Ordinance explicitly provide for continued use of preexisting non-conforming structures, like the garage structure situated on the Hegdes' property, without the need for appeal to the Board. To interpret the Ordinance otherwise, i.e., to require removal of a pre-existing non-conforming structure or to require a variance application for the continued use of such a structure, would lead to an "absurd result" in contravention of all principles of statutory construction, and render meaningless the Millburn Ordinance which exempts pre-existing non-conforming structures from variance requirements when their non-conformity with after-adopted zoning provisions remains unchanged.

II. THE BOARD PROPERLY DETERMINED THE HEGDES MET THE REQUIREMENTS FOR A VARIANCE PURSUANT TO N.J.S.A. 40:55D-70c(1). (Pa5-7).

Appellants argue that the Board's decision to grant the Hegdes' variance application was arbitrary, capricious, and/or unreasonable because, according to the Appellants, the Hegdes failed to demonstrate a hardship to qualify them for

a variance pursuant to N.J.S.A. 40:55D-70c(1). This argument is without merit and should be rejected by Court. Indeed, the Board's grant of variance relief was supported by the uncontroverted testimony of several experts and is entitled to deference by the Court.

Five criteria must be met before a C1 variance can be granted. Those criteria consist of:

> (1) a lawfully existing structure on a specific piece of property; (2) an extraordinary and exceptional situation uniquely affecting that structure; (3) an extraordinary and exceptional situation resulting in (a) peculiar and practical difficulties or (b) exceptional and undue hardship if there were a strict application of the zoning code; (4) the grant of the variance would have no substantial detriment to the public good; and (5) the grant of the variance would not substantially impair the intent and purpose of the zoning plan and zoning ordinance.
>
> [N.J.S.A. 40:55D-70c].

The unique condition of the property must be the "cause" of the hardship claimed by a variance applicant. Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 122 (App. Div. 2000) (citing Lang v. Zoning Board of Adjustment, Borough of Caldwell, 160 N.J. 41, 56 (1999). Therefore, the Board's inquiry must be directed at "whether the unique property condition relied on by the applicant constitutes the primary reason why the proposed structure does not conform to the ordinance." Ibid.

In both their comments at the conclusion of the hearing and the Resolution memorializing their decision to grant the Hegdes' requested variance, the Board recognized the unique conditions and extraordinary and exceptional circumstances uniquely affecting the Hegdes' property. Further, the Board found that strict application of the steep slope and retaining wall ordinances would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the Hegdes. See, e.g., Pa57-58; see also N.J.S.A. 40:55D-70(c).

To be sure, the steep slopes directing stormwater runoff toward the main dwelling's foundations, which caused the mold that requires the Hegdes to demolish and rebuild their home, and the steep slopes which render access to the main dwelling dangerous or impossible for larger vehicles, are extraordinary conditions uniquely affecting the Hegdes' property and the structures lawfully existing thereon. The abundant steep slopes which direct water toward the main dwelling create the hardship to the proposed main dwelling rebuild because, as evidenced by the extensive mold at the existing main dwelling, strict compliance with the steep slope ordinance would allow stormwater runoff to continue being directed toward the main dwelling, risking damage to the foundation and the structure thereon.

It is well established that "undue hardship" requires a showing that "no effective use can be made of the property in the event the variance is denied." Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 605 (1980). Here, the record conclusively demonstrates that the home cannot be rebuilt without disturbing steep slopes, as such disturbance is necessary to create safe access to the house while also directing stormwater away from the main dwelling. As previously noted, this testimony was uncontroverted.

As it specifically relates to steep slopes, Appellants wildly misapply Lang and present nothing other than conclusory statements. Appellants stated "[i]n Lang, the court held that a hardship must be specific to the property and not a condition affecting the general neighborhood." Pb at 21. Immediately afterwards, Appellants state "[t]he applicants failed to demonstrate that the steep slopes and unsafe driveway of 99 Sagamore are unique compared to neighboring properties." Ibid. No citation to Lang is provided by Appellants in support of this position; no citation can be provided in support of this position because that is not what Lang held. Contrary to what was presented by Appellants, Lang held that the conditions which trigger the need for a variance must relate specifically to the subject property. Lang, 160 N.J. at 471. As it relates to the context of this application, Lang does not mention any kind of comparison to the conditions affecting the general neighborhood. Id. As described above, applicants

demonstrated the need for a variance by establishing the unique size of the slope, the topography of the Hegdes' property, and the other existing conditions of the property including the stone garage, walled driveway, and the property's foundation. All of these factors made compliance with the steep slope ordinance impossible.

Appellants' argument that the steep slopes of the property are a self-created hardship is without merit. Pb at 22. The unique hardship is the steep slopes that could create greater disturbance if the house needed to move back from the street. Again, the steep slopes create the need for a longer driveway and must be disturbed to create a safer driveway. To claim that it is the "design preferences" of the Hegdes that created the unique hardship are unfounded. Appellants' conclusory judgments do not justify disregarding the decision of the Board or the trial court.

Appellants' subsequent arguments regarding "unnecessary excessive disturbance" and "no proof of undue hardship without variance" fail for similar reasons. Pb at 22-23.

Appellants claim that "[o]ne of the reasons to have the backyard disturbance is to build a vehicle access path, which prompts significant disturbance, is deemed "unnecessary" for this neighborhood." Pb at 22. Consistent with Appellants' other purported "facts", not one iota of evidence is

cited in support of this argument. Moreover, the alleged "lack of necessity" is not just unfounded but categorically incorrect; the necessity for the backyard disturbance allows the creation of stormwater mitigation and clearing up dead and fallen trees and other debris to ensure the stormwater mitigation remains effective.

Appellants then contend that the dismissed alternative options referenced by Mr. Keller "without [a] detailed analysis or evidence[] raises question about the necessity of the proposed design". Pb at 23. Yet again, Appellants fail to understand that the unique hardship is the steep slopes of the property, which make the longer driveway necessary to safely access the home but must be disturbed in order to make that change. Moreover, this contention by Appellants is the very reason the Lang court reversed the Appellate Division. Lang, 160 N.J. at 471. It is the conditions of the subject property that determine whether a variance is required, not whether the application deems something necessary. Ibid. Appellants' attempt to propose an alternative method of construction is of no moment. Pb at 23. The Hegdes sufficiently demonstrated the variance is necessary to prevent water intrusion and create safe vehicular access to the home; Appellants' assertion that the existing driveway can just be winded overlooks the stormwater runoff concerns addressed by the longer driveway configuration thereby reinforcing the irrelevance of their lay-person opinions.

Contrary to these conclusory, lay-person opinions, the Board's decision was founded on uncontroverted expert testimony and Applicants' submissions regarding conditions of the property.

The Board also determined that the evidence and testimony presented at the January 22, 2024 hearing conclusively demonstrated that granting the requested variance would create no substantial detriment to the public good. Pa58-59. The Board accepted the expert testimony of the Hegdes' experts and was presented with no contrary expert testimony. The Board found that any negative impacts from the Hegdes' proposal are "negligible and not a substantial detriment" and the proposed construction can be done "without substantial detriment to the public good and without substantially impairing the intent and purpose of the Zone Plan and Township Zoning Ordinance." Pa59. Appellants' bizarre insistence that the Board's decision was based on the "unsupported" testimony of Mr. Keller overlooks how expert testimony has functioned in New Jersey for decades, if not centuries—Mr. Keller is in fact an expert who is qualified, and was qualified by the Board, to offer opinions in these areas. See T1 at 9:13-15; 10:15-18; Pb at 33-39. Appellants' arguments also conveniently ignore the factual findings of the Board which relied upon the expert testimony the Hegdes' other experts (all of whom were qualified in their respective fields), as well as the Board consultants' review of the application and supporting

testimony. See T1 at 146:11-17; Pb at 33-39. Appellants cannot simply ignore and or disagree with the testimony of Mr. Keller as to the steep slopes, soil loss, natural topography, and flooding potential to sustain their burden.

Apart from these failings, Appellants imply requirements to the Board absent from any authority and inappropriately rely on material presented to this Court that was not present in the record before the Board.

The numerous rhetorical questions posed by Appellants which presumably attempt to highlight the insufficiency of the Board's findings as to the consistency with the Township's ordinances, simply seek to impose a requirement on the Board that does not exist. Pb. at 32-35. This implied requirement is for the Board to go through the expert testimony and submissions by the Applicant and then to specifically identify how each and every portion of that testimony and submissions are consistent with the Township's ordinances. This requirement does not exist in any authority published or otherwise.

Almost the entirety of Appellants' argument regarding the intent and purpose of the Master Plan is purportedly supported by documents which were not a part of the record before the Board or supported by references to the appropriate transcript. In order for a court to determine whether a Board's actions were arbitrary, capricious or patently unreasonable, and whether the board acted in accordance with the statutory standard, the Court's review must

be constrained to the record before the board. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 289 (1965) ("the record made before the Board is the record upon which the correctness of the Board's action must be determined"). The transcript of the proceedings in the trial court is clearly not a part of the record that was before the Board at the time of the application. Accordingly, any and all reliance on this transcript by the Appellants cannot be considered by this Court. Furthermore, Appellants omit any citation to the record as it relates to their arguments regarding how the allegedly excessive disturbance, tree removal, modern house, driveway orientation, and historical retaining wall/structure substantially impair the goals and objectives set forth in the Master Plan. In this regard, Appellants have utterly failed to meet their substantial burden.

III. THE BOARD'S REASONING FOR ITS APPROVAL OF THE HEGDE'S APPLICATION UNDER N.J.S.A. 40:55D-70c(2) IS APPROPRIATE AND CANNOT BE SUBSTITUTED BY APPELLANTS' LAY-PERSON OPINIONS. (Pa7-8).

Appellants next assert that the Hegdes failed to provide adequate, sufficient, and credible evidence to meet the c(2) variance requirements. As with the positive and negative criteria discussed in the preceding section, Appellants' critique of the Board's analysis misconstrues the standard of review in actions such as this.

Because the action of the Board is presumed to be valid, only a showing by the Appellants of "clear and compelling evidence" may overcome the presumption. Medici v. BPR Co., 107 N.J. 1, 14-15 (1987) (internal citations omitted); see also Dome Realty, Inc. v. City of Paterson, 83 N.J. 212, 235 (1980) ("courts place a heavy burden on the proponents of invalidity"). Here, Appellants have offered nothing more than conclusory statements regarding the "impact" of the Hegdes' proposed plans on the surrounding neighborhood and failed to meet their burden of demonstrating the invalidity of the Board's decision by clear and convincing evidence.

Even if the Court were to take Appellants' conclusory statements regarding the c(2) criteria at face value, this Court must affirm the decision of the trial court and uphold the decision of the Board. As stated above, "both trial and appellate courts should review a zoning board's decision merely to "determine whether the board could reasonably have reached its decision."" Pa4 (quoting Pullen v. Township of South Plainfield Planning Board, 291 N.J. Super. 1, 6 (App. Div. 1996)). In this hypothetical scenario where the Court takes Appellants' evaluation of the c(2) criteria at face value, it would, at most, demonstrate that the Board could have reached a different conclusion **but not** that the conclusion the Board did reach was invalid. Therefore, even in this hypothetical scenario, Appellants' argument would still fail.

IV. THE DESIRE OF APPELLANTS TO SUBSTITUTE THEIR OWN ASSESSMENT OF THE HEGDES' APPLICATION FOR THE BOARD'S ASSESSMENT HAS NO BEARING ON THE VALIDITY OF THE BOARD'S ASSESSMENT. (Pa8-9)

In sum, Appellants have rhetorically asked now, as they did before the trial court: "using common sense, how could the Board not see this matter the same way we do?" During oral argument before the trial court, Appellant Guo stated "[i]t's no that I try to use my, you know, opinion, like subject matter challenge, you know, Mr. Keller. Just use common sense and the facts they [(the Hegdes' qualified experts)] try to present." T2 75:4-7. In other words, they admit outright that the only basis for their argument is their unqualified, lay-person opinion. Similarly, Appellants state in their brief before this Court "[i]f these Board members had and adequately exercised the "peculiar knowledge of local conditions", their assessment would have yielded a different result." Pb at 45.

Appellants' lay opinion – supported by bald, conclusory statements only - is thankfully not the standard by which Courts are directed to review the decisions of a zoning board. Since a zoning board is a quasi-judicial board, a reviewing court is not permitted to conduct a *de novo* review of factual disputes on appeal or "substitute its judgment for that of the board". Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 54 (1998). Instead, because of its "peculiar knowledge

of local conditions," the Board's factual findings are entitled to substantial deference and are presumed to be valid. Burbridge v. Mine Hill Twp., 117 N.J. 376, 385 (1990) (internal citations omitted); see also Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965). Therefore, the question for the Court is only "whether or not the action of the board was arbitrary, capricious or patently unreasonably, and whether [the Board] acted . . . in accordance with the statutory standard." Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 54-55 (1998).

Pursuant to the above-described standard, Appellants' alleged discrepancies between the meeting minutes has no bearing on the testimony and application exhibits submitted to the Board. Pb at 39-41. Even if they were relevant to this Court's determination, Appellants can offer nothing other than fanciful speculation as to how those alleged discrepancies affected the Board's decision. Ibid. In any event, the transcripts of the hearings below is what governs appellate review – not uncertified minutes which are prepared for the convenience of the Board and the public.

Consistent with Appellants' arguments throughout this litigation, there is no citation to the resolution or transcript of the proceeding before the Board to support Appellants' contentions that there were failures to address critical errors on the variance application, an erroneous basis for the Board's decision on

structure impact, or that the new location of the driveway was, somehow, improper. Pb at 41-42. By way of example, such a citation is particularly critical to support Appellants' contention that the Board's alleged misunderstanding of the "driveway entrance distance was pivotal in evaluating whether the impact on adjacent neighbors was negligible or significant". Pb at 42. It is not possible for a citation to be provided because no such confusion exists in the record.

Here, the record clearly supports the Board's approval of the application. It is abundantly clear that Appellants disagree with the Board's judgment. Pb at 43-47. However, there is no reasonable argument supported by the record that the Hegdes' application failed to meet the statutory standard for a variance award, or that the Board's decision to grant the Hegdes' application was patently unreasonable. In this regard, the hearing transcript and memorializing Resolution reflect that the steep slope disturbance proposed by the Hegdes provides for substantial stormwater mitigation **where none previously existed**, in addition to **safe and improved** access to and from the main dwelling for construction vehicles, emergency service vehicles, visitors, and the owners.

The Board, acting within the statutorily defined parameters of its authority, found that granting the requested steep slope and associated retaining wall variances would not substantially impair the intent and purpose of the zone plan and zoning ordinance because the application, as proposed, had mitigated

the detriments associated with steep slope disturbance and demonstrated that the benefit of improved stormwater management outweighed the negative impact of deviation from strict compliance with the relevant ordinances. Thus, being substantially supported by the record, the Boards' decision is entitled to a presumption of validity and must be affirmed by this Court. Pa58-59; see also T1 at 141:6-142:4 (Board Member Glatt explaining why the benefits of the proposed project outweigh the detriment of deviation from the zoning ordinance).

V. APPELLANTS' ALLEGATIONS REGARDING AN APPEARANCE OF IMPROPRIETY AT THE TRIAL COURT ARE FACTUALLY INCORRECT, LEGALLY WRONG, AND SHOULD BE REJECTED OUT OF HAND. (Not raised below)

The alleged procedural irregularities, appearance of impropriety, substantive deficiencies, and lack of neutrality allegedly present in the record below are nothing more than Appellants' disagreement with the outcome and a lack of understanding of court rules.

Regarding the alleged procedural irregularities, Respondents are incorrect that the schedule and restrictions that were put in place for the trial briefs "were inconsistent with fairness and due process principles, severely limiting the [Appellants'] ability to adequately prepare their case, contrary to the general spirit

of the principle of New Jersey Court Rule 4:46-2(c), which mandates that parties must be given a reasonable opportunity to respond to motions and present their arguments." Pb at 48. Appellants are under the mistaken impression that a trial brief qualifies as a motion which renders the rule inapplicable. Nevertheless, because there was a trial, Appellants had an opportunity to be heard and respond to Respondents' trial brief and arguments. Indeed, Appellants presented a voluminous and extensive trial brief and pre-trial statement of facts and arguments exceeding 75 pages in total. Appellants could have retained legal counsel to undertake this work on their behalf, yet they chose not to – and our Rules of Court treat *pro se* parties in the same fashion as admitted attorneys.

As to the alleged appearance of impropriety, the described interaction is not captured whatsoever on the transcript of the November 14, 2024 trial – and indeed, it did not occur. At the time of trial, the courtroom had several other counsel awaiting their own trial calls or motion calls on other matters, which is to whom the Trial Court was speaking following the conclusion of the matter at bar. Putting the factual inaccuracy aside, for the moment, rather than citing to the code of conduct governing federal judges, Appellants should have referenced the Rules Governing the Courts of the State of New Jersey Code of Judicial Conduct. As plainly stated in Rule 2.1 of this Code of Judicial Conduct, "a judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the

judiciary, and shall avoid impropriety and the appearance of impropriety." Comment 3 to this rule clarifies that "[w]ith regard to the judicial conduct of a judge, an appearance of impropriety is created when a reasonable, fully informed person observing the judge's conduct would have doubts about the judge's impartiality." Judge Spencer's request to speak with other counsel not involved in the pending matter, after the trial had concluded, is far from enough to sustain the necessary burden. A reasonable, fully informed person observing Judge Spencer's conduct would know that there a myriad of reasons for which a judge might ask to speak to counsel including but not limited to matters that have nothing to do with why counsel was in front of the judge at that time. Similar to the substantial burden Appellants must overcome to challenge the decision of the Board, Appellants face a substantial burden here. Appellants' conclusory statements fail to meet the standard required to challenge the Board's decision and to establish the appearance of impropriety.

Turning to the substantive deficiencies Appellants claim are present in the decision, namely the "trial court's criticism of the [Appellant]s for [] supplementing the record with exhibits attached to the "CMC Sept 25" submission", these deficiencies represent Appellants' erroneous understanding of the standard of review for these kinds of matters. Pb at 49. In order for a court to determine whether a Board's actions were arbitrary, capricious or patently unreasonable, and whether the board acted in accordance with the statutory standard, the Court's review

must be constrained to the record before the board. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 289 (1965) ("the record made before the Board is the record upon which the correctness of the Board's action must be determined"). Appellants were and remain limited to the record before the Board; no other materials are permissible for the Appellants to rely upon to challenge the decision of the Board. Accordingly, any supplemental materials are not eligible to be considered in Appellants' challenge of the decision of the Board. Moreover, the citation to NJ Court Rule 2:10-2 is a rule that applies only to the Appellate Division and cannot be construed to undermine the merits of the decision of the trial court or the Board.

Lastly, the alleged dismissal and "attack" of Appellants' arguments is not conduct that amounts to a lack of neutrality that suggests "a predetermined inclination towards the defendants, resulting in an unjust outcome." Pb at 50. A weak case is a weak case. A court's determination of the merits of a party's case, be it a positive or negative determination, is a result of careful analysis by that court. This is no different than what has happened here. The trial court carefully analyzed the record presented to it and determined the outcome accordingly. Appellants disagree with that analysis, but that alone does not sustain the necessary burden.

CONCLUSION

For the reasons described above, this Court should affirm the decision of the trial court.

Respectfully submitted,

INGLESINO TAYLOR

By: /s/ Derek W. Orth
DEREK W. ORTH

Dated: June 30, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-001930-24

DOROTHY GUO & HENRY ZHENG

Plaintiffs-Appellants

v.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MILLBURN, AND NARAYAN & AYRA HEGDE

Defendants-Respondents

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
ESSEX COUNTY
DOCKET NO. ESX-L-002897-24

Honorable Judge Louise Grace Spencer, J.S.C.

Sat Below

REPLY BRIEF FOR
PLAINTFF-APPELLANTS DOROTHY GUO & HENRY ZHENG

DOROTHY GUO & HENRY ZHENG
APPELLANTS
101 SAGAMORE ROAD
MILLBURN, NJ 07041
(973) 801 6179
guodorothy@aol.com; szheng0488@aol.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authority **Brief page number**

Court Rules:

Statues:

Cases:

Millburn Zoning Ordinances

PRELIMINARY STATEMENT

The Defendants' arguments of the nonconforming garage fundamentally misstate both the law and the facts. When a principal building is demolished, any accessory structure that served it – particularly one physically attached – cannot retain its nonconforming status. The Defendants disregard critical statutory and ordinance requirements, misapply the standards for this nonconforming structure. The Hegdes fundamentally misunderstand the well-established legal requirement that c(1) hardship must be unique to the property and not a condition common to the neighborhood, as mandated by the statute and case law. Unsurprisingly the record contains no credible evidence that the claimed hardship is unique to the property.

The Board's decision is predicated almost exclusively on the unsubstantiated and conclusory testimony of the Hegdes' experts. Rather than engaging in an independent evaluation or applying its peculiar local knowledge, the Board merely recites the experts' bare assertions, couched in statutory language, in its resolution, overwhelmingly disregarding numerous significant errors and inaccuracies present in the record - application materials and testimony. These significant errors necessitate, at a minimum, additional variance requests. The Board's decision, based solely on misrepresented testimony rather than a comprehensive consideration of the full record, is entitled to no deference and should be reversed

REPLY TO COUNTER STATEMENT OF FACTS (Nonconforming Garage)

The Defendants' statements of fact are both inaccurate and incomplete, as they focus only on the Plaintiffs' concerns about the existing side yard encroachment and incorrectly suggest that the Plaintiffs' request to bring the garage into compliance is based solely on its distance from the property line (DBb13, DAb9[1]).

[1] References: DAb – (Applicants' brief); DBa – (Board's appendix); DBb – (Board's brief)

First of all, the Hegdes' own Variance Application site data box (Pa254, Pa252) makes clear that under "MIN SIDE YARD SETBACK FRONT YARD GARAGE", the permitted setback is 12 feet, while both the existing and proposed setbacks are 4.45 feet, explicitly marked as ENC-V (Existing Nonconforming – Variance required) (Pa254; 1T84:17-20).

Secondly, the record shows that the Plaintiffs raised broader objections, including that continued use of the nonconforming garage would require an additional variance in light of the proposed reconstruction of the main house (1T83:24-84:10). The Plaintiffs objected to continued use of the nonconforming garage and stated that under the development plan, the problematic nonconforming garage with a rooftop patio – no longer to be used as a garage – should be removed and brought into compliance with current zoning standards as its use would perpetuate violations of both side yard setback and rear yard accessory structures ordinance (1T130:13-22). They further argued that the Hegdes cannot retain a noncompliant structure while building a new one (1T139:4-17).

LEGAL ARGUMENT

Reply to Standards of Review (Nonconforming Garage)

The Board's assertion that Rule 2:10-2 is inapplicable (DBb21) fundamentally mischaracterizes the nature of the errors presented. The Plaintiffs' arguments (Pb13-30) are grounded in the Board's and trial court's willful and unreasoning actions, including the failure to consider critical facts, misapplication and misinterpretation of relevant ordinances and statutes, and disregard of substantial evidence. These are precisely the types of errors that warrant reversal under Rule 2:10-2.

I. Reply: The trial court erred in determining that the detached garage continuing non-conforming use did not need a variance.

The undisputed facts regarding the existing nonconforming garage are as follows: The garage is nonconforming because it did not meet Millburn Township's side yard setback requirements (4.45 feet vs 12 feet) when the relevant ordinance was adopted. Prior to 2011, the previous owner connected the garage to the house by installing an elevator and a covered integrated indoor hallway, as established by Mr. Keller's testimony (Pb5), photographic evidence (Pb5-6), and house drawings (Pb15), and as acknowledged by Defendants (DAb25). The Hegdes propose to demolish the principal building, construct a new principal structure with a new garage on the opposite side, and repurpose the existing nonconforming garage as a detached storage accessory. The proposed reconstruction involves removing the elevator and hallway (DAb25), rooftop pergola (DAb27; 1T26:14-15), and boiler room inside the garage (1T18:10-15; 1T85:4-5); replacing the existing wooden fencing with living Hegdes for the patio atop the garage (1T26:15-16); and enclosing the open section of the garage ceiling where the elevator is located.

Although the Board's brief omitted any discussion of the garage's attachment to the old principal building, it argued that (DBb23-24):

> "Plaintiffs have consistently presented a convoluted argument that because, at one point, an elevator was installed to create easier access from the garage to the existing house, the garage merged with the principal structure, causing the garage to lose its preexisting structure status."

The Board failed to recognize that the Hegdes' effort to keep the nonconforming garage structure is contrary to the express terms of established principles of New Jersey land use law and Millburn Township's zoning ordinances.

First, N.J.S.A. 40:55D-68, provides that a nonconforming structure existing at the time of the passage of an ordinance may be continued and any such structure may be restored or repaired in the event of partial destruction. However, this statute does not grant an absolute right to perpetuate a nonconforming structure in all circumstances. New Jersey courts have consistently held that nonconforming uses and structures are disfavored and should not be expanded or perpetuated beyond what is necessary to protect vested rights. The continued right to maintain a nonconforming accessory structure depends on the ongoing existence and use of the principal structure it serves. If the principal building is demolished and replaced, the nonconforming status of the accessory structure does not automatically persist unless expressly allowed by ordinance or variance.

Second, Millburn §DRZ-609.8a allows existing nonconforming structure may have additions to the principal building without a variance, provided that the new addition complies with all ordinance requirements and does not increase the existing nonconformity. Under §DRZ-609.1g, when an accessory structure is attached to the principal building, it should be considered as part of the principal building and as such shall comply with all bulk requirements applicable to the principal building.

Once the nonconforming garage was attached to the principal building by the elevator and hallway and the rooftop pergola was added, the garage became part of the main structure. Consequently, both the garage and its rooftop patio became subject to the more stringent side yard setback requirements for principal buildings – 15 feet vs. 12 feet per §DRZ-606.2. e.1.(e)(2)(b). After this integration, any side yard nonconformity was attributed to the principal building as a whole. The complete demolition of the principal building constitutes more than partial destruction; therefore, under N.J.S.A. 40:55D-68,

neither the principal building nor the formerly attached garage may be restored or repaired in a way that perpetuates the prior nonconforming side yard setback. Upon total demolition, the right to continue the nonconforming status is extinguished, and any subsequent use or structure must comply with current zoning requirements.

Third, converting the formerly attached garage into a detached storage structure creates two separate accessory uses – a detached storage unit and a rooftop patio terrace with living Hegdes. Contrary to defendants' assertion that the patio will be removed (DAb25), the rooftop patio remains. Both accessory structures violate the 12-foot side yard setback and fail to meet location requirements, as all accessory uses must be in the rear yard under §DRZ-609.1b. Maintaining the nonconforming garage and rooftop terrace in the front yard increases the nonconformity, since these detached structures now breach both setback and location requirements for accessory uses, rather than being subject only to the principal building's setback standard when previously integrated.

Defendants contend that detaching the garage, removing the elevator, hallway, and rooftop pergola, and reducing use of the rooftop patio or garage will lessen the nonconformity (DAb25-27, DBb23, DBb25). However, the nonconforming status of a structure (not a nonconforming use) is determined by its physical characteristics – such as location, setbacks, and size – not by how it is used. Structural violations, like inadequate side or rear yard setbacks, persist regardless of changes in use; reducing the intensity or manner of use does not cure the underlying physical noncompliance.

The Defendants attempted to rely on §DRZ-609.8a to argue that no variance is required for the continued use of the preexisting nonconforming garage structure (DBb22, DAb29). However, under §DRZ-609.8a "any existing structure on a conforming lot which

violates any yard requirements may have additions to the principal building or construct an accessory building without an appeal for a variance"; this provision does not apply to converting an attached nonconforming garage into a detached storage structure with a rooftop patio terrace. Even if §DRZ-609.8a were deemed applicable, it is expressly conditions, allowing the avoidance of a variance application only "provided the accessory building does not violate any requirements of this ordinance, and does not extend or increase any existing nonconformity." The phrase "this ordinance" refers to the Ord. No. 2471-16 or §DRZ-609 in its entirety, which includes the explicit requirement in §DRZ-609.1b that "all accessory uses shall be constructed only within rear yards." The continued use of the nonconforming structure in this case clearly fails to satisfy these conditions, as it not only remains in violation of the side yard setback but also disregards the location requirement for accessory uses. Therefore, at a minimum, a variance is required for its continued use or modification.

Lastly, Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132 (App. Div. 2013) is directly applicable for both nonconforming structures and nonconforming uses. In Motley, two single-family dwellings (213A and 213B) on a single-family-zoned lot constituted a preexisting nonconforming use, and the subject front building (213A) was also a nonconforming structure due to bulk violations in front, rear, and side yard setbacks. The plaintiff in Motley sought to rebuild a nonconforming structure after it was demolished, aiming to continue both the nonconforming use and the nonconforming structure. The court held that the statutory right to restore or repair a nonconforming structure is strictly limited to cases of partial destruction; once the

principal structure is completely demolished or fundamentally altered, the right to continue the nonconforming status – whether as a use or a structure – is extinguished.

Similarly, the Hegdes seek to demolish the nonconforming principal building, which had integrated the preexisting nonconforming garage, and then to retain and convert the attached nonconforming garage into a detached storage structure with a rooftop terrace, thereby attempting to continue the preexisting nonconforming status of the garage – now as a detached accessory structure – despite the demolition of the principal building to which it was once attached to or subordinate to. New Jersey law does not distinguish between nonconforming uses and nonconforming structures when it comes to the right to restore or continue after total destruction or removal. In both situations, the law applies the same statutory and policy limitations: the protections for nonconforming status do not survive total or fundamental destruction or removal, regardless of whether the nonconformity is one of use or structure. Thus, the Hegdes' proposal closely parallels the unsuccessful attempt in Motley to revive nonconforming status after demolition, and is likewise inconsistent with established New Jersey land use law.

At DBb23, the Board relied on §DRZ-301.23's definition of "garage" – "a structure used to store vehicles, and other items associated with residential structures" – to argue that the nonconforming garage may remain classified as a garage even if used solely for storage. However, the Board overlooks that the ordinance's use of "and" requires a garage be used for both vehicles and other residential items, not just one or the other. If the structure is no longer used to park vehicles (1T38:22-39:1) and is used for storage, it does not meet the ordinance's definition of a garage and instead becomes a storage structure.

II. Reply: The trial court erred in affirming that the application met the N.J.S.A. 40:55d-70c(1) hardship requirement.

The Hegdes' accusation that Lang v. Zoning Board of Adjustment, 160 N.J. 41 (N.J. 1999) does not address the distinction between property-specific hardship and general neighborhood conditions (DAb32) is unfounded. In Lang, it states:

> "The Board's conclusion that those unique conditions of Calabrese's property caused the need for variance relief is amply supported by the record. The property's rear yard width of 77.9 feet is 22.1 feet narrower than the minimum width permitted by ordinance, and many properties in the immediate vicinity of Calabrese's property are significantly wider than the minimum width."

This comparison to neighboring properties was central to establishing that the hardship was unique to the applicant's property, not a condition common to the area. The Hegdes argued that the conditions triggered the need for a variance are the unique size of the slope, topography of the subject property, and others including the stone garage, walled driveway, and the property's foundation, which made compliance with the steep slope ordinance impossible (DAb32-33). However, they overlook that "[t]he language of the bulk variance provision deals with the nature of the land and not with the nature of the buildings or structures that are to be placed upon that land." Cranmer v. Township of Evesham, 162 N.J. Super. 204 (N.J. Super. Ch. Div. 1978). Lang explains:

> "[s]ubsection (c)(1) …. setting forth three categories of proof that can satisfy the statutory criteria: (a) exceptional narrowness, shallowness or shape of the property; (b) exceptional topographic conditions or physical features uniquely affecting the property; or (c) an exceptional situation uniquely affecting the property or its lawfully existing structures.

The conditions claimed by the Hegdes to justify the c(1) variance do not satisfy these statutory criteria as interpreted in Lang and Cranmer, and do not support the Board's conclusion that the (c)(1)(c) standard was met. (See Pa58, paragraph 21). Similarly, the Hegdes' assertion that an alternative and necessity analysis for variance relief is not

needed (DAb34) is a misapplication of Lang. In fact, the Board itself questioned whether the requested variances could be avoided or reduced as part of the variance review and approval process (1T67:11-17; 1T70:1-10), and the Hegdes failed to provide sufficient evidence to demonstrate that strict application of the zoning regulations would result in undue hardship or exceptional practical difficulty (Pb21-25).

The Hegdes' argument regarding "self-created hardship" (DAb33) is flawed. After the demolition, the Hegdes are basically starting off with a redevelopment site, and §DRZ-608.5 expressly allows steep slope disturbance for redevelopment area (Pb7). However, the Hegdes proposed an additional 15,052 square feet of steep slope disturbance – over 60% of the total steep slope inventory. The excessive disturbance is not based necessitated by any extraordinary and exceptional conditions affecting the property or a peculiar site condition, but is instead the result of the Hegdes' deliberate plan to construct a larger house and the longest possible driveway, thereby creating or exacerbating the very hardship they claim. There is no legal basis to grant a hardship variance where the hardship is self-created through the applicants' own development choices.

III. Reply: The trial court erred in affirming that pursuant to N.J.S.A. 40:55d-70c(2) the positive criteria for variances were satisfied.

The Board's assertion that "unrefuted expert testimony before the Board provided ample evidence to support granting the requested variance pursuant to N.J.S.A. 40:55D-70c(2)," and thus its decision was not arbitrary, capricious, or unreasonable (DBb32), is both legally insufficient and factually inapplicable in this matter. First, New Jersey law is clear that the mere presence of unrefuted expert testimony does not automatically satisfy the statutory criteria for a variance. Tomko v. Vissers, 21 N.J. 226 (N. J. 1956). The Board

cannot simply adopt an expert's opinion without demonstrating, through its own findings supported by competent evidence in the record, that the statutory standards are met and that the variance advances the purposes of the MLUL for the benefit of the community, not just the applicants. Second, here, the Board reached its conclusions without any relevant expert testimony to support them. While the Board concluded several purposes of MLUL were met using conclusory statements couched in statutory language, there were no detailed and relevant findings of fact to support its conclusions (Pa58, paragraph 22, and DBb32), simply because there was none provided or testified by the Hegdes' experts. Conversely, Mr. Keller testified that currently, stormwater from the South Mountain does not cause any issues on Sagamore (1T49:8-13). Where, as here, the applicants failed to provide the necessary testimony or proofs, the Board had no power to grant the c(2) variance, and any such action is fatally defective.

In DAb38-39, the Hegdes asserted that the Board's action is presumed to be valid, yet offered no evidence that the c(2) criteria were actually met. Instead, they attempted to shift the burden by insisting that the Plaintiffs must demonstrate the Board's decision is invalid by clear and convincing evidence, and even suggesting that the Plaintiffs were required to provide evidence of the proposed plan's impact on the surrounding neighborhood. This argument is fundamentally misplaced. It is the Hegdes' burden – not the Plaintiffs' – to present competent, credible evidence establishing that the c(2) standards are satisfied. The record contains no such evidence, and the Plaintiffs have demonstrated why the statutory criteria were not met (Pb26-31). The Hegdes' arguments only underscore the absence of any supporting evidence, and a misunderstanding of the c(2) requirements and the proper allocation of the burden of proof under New Jersey law.

IV. Reply: The trial court erred in affirming the application satisfied the negative criteria for a variance pursuant to N.J.S.A. 40:55d-70c.

The Defendants' arguments about the Boards' responsibilities (DAb36), and its reliance on uncontradicted expert testimony (DBb34-35) are misplaced. "The primary responsibility of the applicant is to supply competent and credible evidence to apprise the board of the nature and degree of the zoning burden sought to be alleviated through the variance procedure.…", Tomko, and "[t]he responsibility of the board is then to weigh the evidence submitted and reach basic factual determinations. These basic findings, in essence, serve to reflect the board's conception of the true facts in the evidence presented. From the basic factual determinations, the ultimate facts are to be derived." Id.

The N.J.S.A. 40:55D-10(g) requires the Board to issue a written resolution. "[T]he resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the applicant's variance request in accordance with the statute and in light of the municipality's master plan and zoning ordinances." N.Y. SMSA, L.P. v. Bd. of Adj. of Twp. of Weehawken, 370 N.J. Super. 319 (App. Div. 2004) (quoting Medici v. BPR Co., 107 N.J. 1, 23, 526 A.2d 109 (1987)). "The factual findings set forth in a resolution cannot consist of a mere recital of testimony or conclusory statements couched in statutory language. "Id (quoting Harrington Glen, Inc. v. Bd. of Adjustment of Leonia, 52 N.J. 22, 28, 243 A.2d 233 (1968); Loscalzo v. Pini, 228 N.J. Super. 291, 305, 549 A.2d 859 (App. Div. 1988), certif. denied, 118 N.J. 216, 570 A.2d 972 (1989)).

The Board's discretion to accept or reject expert testimony is not unfettered, it must ensure that such testimony is credible, factually supported, and not merely conclusory. The absence of rebuttal expert testimony or specific objections does not, by itself, render

the applicants' expert testimony automatically credible or sufficient, as established in Tomko. The Board can't accept expert opinions at face value if they are not substantiated by facts in the record; bare assertions, without supporting facts or analysis, are inadequate.

Here, the Board failed to fulfill its obligations by relying on unsupported and conclusory expert assertions, such as unsubstantiated claims about the Master Plan's goals and the absence of negative impact (1T122:4-12), without conducting its own analysis to ensure that the intent and purpose of Master Plan would not be substantially impaired. (Pa58, paragraph 22). Additionally, Mr. Keller's assertion that "the project is fully compliant with the DRZ" (1T55:22-25; DBb34) was contradicted by the variance application record itself (Pb28-29). The Board's acceptance of these unsupported expert statements, without independent scrutiny or factual verification, particularly in the face of clear evidence of noncompliance, demonstrates a failure to properly analyze the application in accordance with the statute and in light of the municipality's Master Plan and zoning ordinance, as required by statute and case law. In N.Y. SMSA, the board's decision was reversed because "its decision was unsupported by either the memorializing resolution or the record." At DAb36-37, the Hegdes miss that the key issue is whether the Board's reasoning and evidentiary basis are adequate. The Plaintiffs' arguments about the Master Plan highlight the Board's failure to meet this standard.

The Board's claim that Plaintiffs' arguments about detriment lack record support (DBb35) is unfounded. The Plaintiffs raised specific factual concerns at the hearing, including excessive disturbance, tree removal, modern house design, driveway orientation and entrance proximity, and the historical retaining wall/structure, and cited the transcript (Pb36-38). These are concrete facts and observations, not matters requiring expert

testimony for their validity or relevance. The Board must consider all facts in the record, not just the applicants' submissions, and it remains the applicants' burden to prove that the project will not impair the Master Plan or public good. The Plaintiffs' challenge to Mr. Keller's credibility is well-founded, as they identified specific instances where his testimony was contradicted by the record or lacked factual support (Pb45-47).

The Defendants failed to recognize that the Hegdes' request for 15,052 square feet of steep slope disturbance – 15 times what the ordinance allows – directly contravenes the clear intent of both Millburn Township's steep slope protection ordinance (Pb32-35) and its Master Plan (Pb36). In Briar Rose Grp. Inc. v. Planning Bd. of Denville, 2011 N.J. Super (App. Div. 2011), the Appellate Division affirmed denial of a variance for excessive steep slope disturbance (17,027.27 square feet), noting that "because variances should be granted sparingly and with great caution, courts must give greater deference to a variance denial than to a grant". In comparison, the Board's action undermines both the ordinance and the Master Plan, and no deference is warranted for a grant of such an excessive variance; the court should not presume the validity of the Board's decision (DBb35-36).

V. Reply: The Board failed to exercise due care and due diligence in assessing the application, making numerous material errors in its decision-making process. Its decisions are not grounded on credible and reliable findings.

The Board's arguments in regards to the number of variances approved in the Resolution (DBb37-38) is unavailing. The Resolution references four variances at the outset (Pa51, paragraph 3), acknowledges during the hearing that one was to be withdrawn (Pa54, paragraph 8), but ultimately grants "the variance relief requested" (Pa59) without specifying which or how many. The inclusion of a general condition does not cure this defect, especially when the findings themselves misstate or contradict the applicants'

actual representations (Pb42-47). Such lack of clarity and internal inconsistency constitutes a significant error, rendering the Board's decision arbitrary, capricious, and unreasonable under New Jersey Supreme Court precedent.

At DBb38, the Board denial of material errors in the Hegdes' variance application (Pb40-41)– including front yard impervious area ratio noncompliance (Pb29, 2T19:11-21:2, 2T43:20-44:4), alteration of Board Meeting Minutes (2T44:4-19), and other critical errors (Pa34-37, 2T44:20-45:8; ENC: 2T70:15-19) – is contradicted by the record, which shows these errors were raised in the trial court. The Board cannot evade responsibility for material errors in the application or the record by claiming objectors failed to identify or object them at the hearing. It is the Board – not the objectors – is responsible for ensuring the accuracy and integrity of the proceedings, and its attempt to shift this burden is legally unfounded. The Plaintiffs also specified the removal of 15 front yard trees in both their CMC Submission (Pa136, Pa156-157), and at the trial (2T21:9-22).

VI. Reply: The trial court's decision should be reversed due to procedural irregularities, appearance of impropriety, substantive deficiencies, and lack of neutrality that compromised fairness.

Contrary to the Board's claim, it was the Board, not the Plaintiffs (DBb39), that violated Rule 4:69-1 and the June 19, 2024 CMC order by submitting its response late on July 23, 2024 (deadline: five (5) days before July 26, 2024 Pa93). The Plaintiffs promptly notified the Court of their unforeseen emergency abroad on July 21, 2024, and the Court adjourned the CMC on July 24, 2025. The Board failed to timely submit the Hegdes' variance application record as agreed at the June 19, 2024 OTSC hearing, withholding the materials until October 24, 2024, well after the Plaintiffs' Trial Brief was filed and only after the CMC was upheld (no record submission was discussed at the CMC).

At DBb40, the Board's criticism of the Plaintiffs' cross-referencing their CMC submission in their Trial Brief ignored that the trial court itself directed the Plaintiffs to include supplemental information only in their Trial Brief – the very procedural irregularity at hand (Pb48). The Defendants' objection to the inclusion of seven photos in the CMC Submission is unfounded (DAb44-45, DBb40-41): the photos were submitted at the court's direction to clarify the record, not as new evidence, and the content was already established by Mr. Keller's testimony (1T14:21-23). Demonstrative materials are permitted to aid understanding without altering the factual basis.

The Hegdes are mistaken at DAb45: although Rule 2:10-2 address appellate review, when the trial court acts in an appellate capacity (Pa4), the substantive standard remains the same. Regarding "appearance of impropriety" argued at DAb43-44, DBb41, the Plaintiffs' concern stemmed from the judge's explicit request, in open court, to speak privately with the Defendants' counsel immediately after trial. This objection is properly grounded on Canon 3 – not Canon 2, as stated in DBb41 – of the New Jersey Code of Judicial Conduct. The Plaintiffs raised this issue in good faith, acknowledging the evidentiary limitations, and welcome any clarification of the record.

CONCLUSION

For the foregoing reasons and those set forth in the original brief, the trial court's February 7, 2025 Order affirming the Board's approval of the Hegdes' bulk variance and continued use of the nonconforming structure should be reversed and declared null and void, and the Board's decision reversed.

Respectfully submitted,

Dorothy Guo & Henry Zheng

Dated: July 16, 2025

/s/ Dorothy Guo /s/ Henry Zheng