

G & I PROPERTIES, LLC and
GEORGE & I, INC.,

Plaintiffs-Appellants,

v.

BOROUGH OF WILDWOOD
CREST PLANNING BOARD and
MAHALO WILDWOOD CREST,
LLC,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2199-24

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY
DOCKET NO. CPM-L-175-24

SAT BELOW:
HON. MICHAEL J. BLEE, A.J.S.C.

Civil Action

**BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS
G&I PROPERTIES, LLC AND GEORGE & I, INC.**

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PRELIMINARY STATEMENT

This appeal addresses a planning board's authority, or lack thereof, to grant sweeping variances that do not advance the municipality's planning goals and only benefit the developer.

The property at issue (the "Property") is a motel located on an ocean- front lot in the Borough of Wildwood Crest (the "Borough") in one of its motel districts. Defendant-Respondent Mahalo Wildwood Crest, LLC ("Mahalo") purchased the Property and plans to substantially renovate. The motel was open and operational at the time of the purchase. Plaintiffs-Appellants G & I Properties, LLC and George & I, Inc. own and operate the Compass Motel (collectively "Compass") located across the street from the Property on the second block from the ocean.

The Borough's clearly stated planning goal in the motel/hotel districts is to maintain "view corridors," a term that refers to the unobstructed views of the ocean, in order to provide the community with a visual connection to the ocean. To achieve this planning goal, the Borough's zoning ordinance, amended in 2005, requires significant setbacks from side streets leading to the ocean. In exchange for the setback requirement, the Borough allows existing motels to renovate existing structures by building additional stories. In other words, motels can build up, but not out.

The existing structure on Mahalo's Property consists of a 5-story motel with a ground-level parking lot abutting the side street which preserves the view corridor. For decades, Compass's patrons across the street from the Property, as well as residents and visitors at other locations further away, have enjoyed a largely unobstructed view of the ocean. Mahalo's proposed renovations will substantially block the view corridor.

In 2023, Mahalo submitted a site plan application to Defendant-Respondent Borough of Wildwood Crest Planning Board (the "Board") proposing major changes to the existing motel. Instead of building additional stories to the existing motel as permitted by the ordinance, Mahalo plans to construct a new 5-story addition over a portion of the ground-level parking lot. The proposed addition will only have an 11-foot setback rather than the required 30-foot setback from the street leading to the ocean. The addition will block the ocean view from Compass and elsewhere contrary to the planning goals and zoning ordinance provision for a view corridor. Mahalo plans to build out, not up.

In addition, Mahalo's site plan includes significantly fewer parking spaces than required, all of the proposed parking spaces are undersized, and drive aisles are narrow. The project involves other significant setbacks as well as lot and building coverage variances.

Mahalo had previously submitted a site plan application in 2022, which the Board denied because of its impact on the view corridor and parking deficiencies, among other deficiencies. Mahalo resubmitted the at-issue application in 2023, but *increased* the parking deficiency, and requested the same setback that blocks the ocean view. The resubmitted application was substantially similar to the previously-denied application, and failed to address the Board's previous concerns. The Board should not have considered the 2023 application because of the doctrine of *res judicata*, but decided to hear the application.

The Board granted all of Mahalo's requests for variances. The trial court below affirmed the Board's resolution.

The Borough's planning goals adopted in 2005 envisioned a motel district comprising of 5- and 6-story buildings with adequate parking that preserve the ocean view. Mahalo's proposed plan is grossly oversized for this lot. The variances granted by the Board are not a better zoning alternative and do not advance the planning goals of the Borough. The Board, as a matter of law, is not authorized to grant variances that do not advance the Borough's planning goals. The Board's action to approve the variances is arbitrary, capricious, and unreasonable, and the trial court erroneously affirmed the Board resolution.

PROCEDURAL HISTORY

Mahalo submitted a site plan and variance application to the Board on or about September 22, 2022 (the “2022 Application”).¹ (Pa053; Pa103). At the Board meetings on April 5, 2023 and June 7, 2023 (1T, 2T), Compass presented evidence as an interested party pursuant to the Municipal Land Use Law (“MLUL”), challenging the 2022 Application pursuant to N.J.S.A. 40:55D-4. The Board denied the 2022 Application, which was memorialized as Board Resolution PB-23-11. (Pa112).

Mahalo submitted another site plan and variance application on August 24, 2023 (the “2023 Application”), with only slight modifications to the previously-denied 2022 Application. (Pa145; Pa218). Compass objected to the 2023 Application based on *res judicata*. At the Board meeting on December 6,

¹ In 2019, Mahalo filed an initial site plan application (the “2019 Application”), which was heard and approved by the Board on March 4, 2020, memorialized as Board Resolution PB-20-11. However, it is uncontested that no members of the public were present at that Board hearing to oppose the application, as the Board meeting had been postponed multiple times without additional mailed notice. When Compass learned that the Board had approved Mahalo’s site plan application, Compass retained counsel and filed a complaint in lieu of prerogative writ, Docket No. CPM-L-160-20. The Honorable Stanley L. Bergman, Jr., J.S.C. affirmed the Board’s approval in an order dated February 8, 2021, based on the uncontested record. Compass then filed a notice of appeal with the Appellate Division, Docket No. A-1894-20. During the pendency of the appeal, the New Jersey Department of Environmental Protection (“NJDEP”) required site plan modifications, rendering the approved site plan, and the subsequent appeal, moot. The 2022 Application superseded the 2019 Application.

2023 (3T), the Board concluded that the doctrine of *res judicata* did not preclude the Board from hearing the 2023 Application. (3T23-22 to 25-16).

On February 13, 2024 (4T), the Board heard testimony in support of Mahalo's Application, as well as in opposition to the Application, but the Board approved the 2023 Application, memorialized as Board Resolution PB-24-04 (Pa244).

On April 25, 2024, Compass filed a Complaint in Lieu of Prerogative Writ. (Pa031). After a plenary hearing on December 19, 2024 (5T), the Honorable Michael J. Blee affirmed the Board's resolution granting variances and approving Mahalo's 2023 Application. This appeal followed.

STATEMENT OF FACTS

BACKGROUND

Mahalo's Property is located at 6501 Ocean Avenue on the beach block at the intersection of Ocean Avenue, which runs parallel to the beach, and Rosemary Road, a side street that runs toward the ocean. The Property is in the M-1-A Zone which permits hotels and motels, and is one of three hotel/motel zones in the Borough. (Pa377 to Pa378). The Property, formerly known as the Ocean Holiday, was an operating 58-unit, 5-story motel with 53 parking spaces at grade parking along the side until Mahalo's purchase in or around June 2019. (1T22-1 to 2).

Plaintiff's motel Compass is a 50-unit motel located at 6501 Atlantic Avenue on the second block from the beach on the other side of Ocean Avenue directly across from Mahalo's Property, and also abuts Rosemary Road. Compass is owned and operated by George and Irene Pawlowski along with their two sons, George Jr. and Paul.

Prior to Mahalo's ownership, the Ocean Holiday operated for decades as a motel with ground-level parking, largely in conformance with the municipal requirement for an open view corridor along Rosemary Road, albeit with some non-conforming structures, such as a pool deck, within the setback. As photographs taken in 2019 show (Pa235), the existing structure is a rectangular 5-story structure situated on the southern portion of the lot, with open space that formerly provided parking and a swimming pool on the northern portion of the lot along Rosemary Road. The Property's design gave patrons of Compass and others an almost unobstructed view of the ocean. (Pa241 to Pa242).

Immediately after purchasing the Ocean Holiday, Mahalo partially demolished exterior portions of the Property including the pool and the parking lot even though it had not obtained land use approvals for its planned renovation. The structure remains in place. (Pa235).

THE BOROUGH'S PLANNING GOALS

In 2005, the Planning Board adopted a new master plan ("2005 MP") which provided recommendations to the Borough's governing body pursuant to N.J.S.A. 40:55D-28 (a planning board may prepare and adopt a master plan "to guide the use of lands within the municipality"). When the 2005 MP was being drafted, the then-existing M1 Hotel, Motel, and Multi-Family Zones required an 18-foot setback along east/west streets leading to the ocean. Maximum building height was 65 feet. Maximum lot coverage was 80%, and maximum building coverage was 50%. (Pa294 to Pa295; Pa373 to Pa374).

The 2005 MP listed several goals for future development, including:

- "To maintain east/west view corridors to the beaches."
- "To preserve and enhance existing motels/hotels in the Motel zone."
- "To use a system of zoning incentives in order to encourage the preservation and enhancements of the motels/hotels."

[Pa287.]

The 2005 MP sought to preserve the view corridor and to preserve and enhance existing motels by allowing vertical development. The 2005 MP discussed how the then-existing zoning ordinance provided disincentives for motels to upgrade their facilities, such as height limitations. Accordingly, the 2005 MP recommended an increase in height for existing motels. Referring to

the area that would become M-1-A Zone (in which the Property is located), the 2005 MP stated, “Many of the motels are four to six stories in height and *have significant setbacks on the east/west streets* with on-site parking in the front yard.” (Pa297 (emphasis added)). The 2005 MP recommended an increase in the permitted height of motels/hotels from 65 to 85 feet “within the existing footprint for motel/hotel only.” (Pa299).

In order to preserve the view corridor, the 2005 MP recommended a 30-foot setback for lots 100 feet wide, such as Mahalo’s Property, that front east/west streets, where the setback had previously been 18 feet. (Pa281). The 2005 MP recommended the grandfathering of existing setbacks but recommended no further encroachments into the setbacks. The 2005 MP stated: “*[N]o renovation or addition may encroach further into the setback. This is a key condition since the tradeoff for increased height is the preservation of the view corridors toward the ocean.*” (Pa298 (emphasis added)).

The Borough thereafter adopted the recommendations of the 2005 MP and enacted a zoning ordinance that increased the setback on east/west streets from 18 feet to 30 feet for a lot the size of Mahalo’s Property. The ordinance also was changed to permit motels to increase the height to 85 feet, allowing renovations that would add an additional floor to an existing footprint as a tradeoff for the new 30-foot setback requirement. (Pa373; Pa375). The enacting

ordinance specifically states that existing nonconformities would be grandfathered, but that “[n]o renovation or addition shall encroach into the existing setbacks.” (Pa380).

In 2012, the Board adopted the 2012 MP Reexamination Report (“2012 MP”). The 2012 MP acknowledged that the Borough acted on previous recommendations, as “*setback requirements have been increased in all zones to encourage additional light and air and open up view corridors to the beach.*” (Pa304).

In 2022, another Master Plan Reexamination Report was adopted by the Board (“2022 MP”). It states, “View corridors to the water have been maintained and public access to the beach and open space has been enhanced.” (Pa314).

The 2022 MP acknowledged the loss of hotels/motels to condominium conversion. But these concerns were directed at the M-1-B and M-1-C zones, not the M-1-A zone, the location of Mahalo’s Property. The 2022 MP states:

Extent Of Reduction or Increase...The conversion of older properties to condominiums presents a myriad of issues as previously outlined.

The 2005 Land Use Plan created three distinct Motel Hotel Zone Districts, the M-1A, M-1B, and M-1C, based upon the existing building activity, function, or structure-type. The trends outlined for the motel and hotel districts in the 2005 Land Use Plan have continued. **The M-1A District continues to exhibit strength compared to the M-1B District which has seen accelerating conversions since 2005...**

The M-1A District highlighted as the largest collection of operating motels and hotels of four to six stories, with on-site parking located within the front yard area... **The proximity to the beach, bike path, and Wildwood Convention Center contribute to the [M-1A] district's desirability for transient lodging.**

[Pa344 (emphasis added).]

The M-1-A Zone, in which Mahalo's Property is located, has not been at risk for condominium conversion.

The current zoning requirements for Mahalo's property reflect the recommendations of the 2005 MP. The current zoning ordinance requires a 30-foot setback along Rosemary Road to preserve the view of the ocean, and the ordinance also allows Mahalo to build additional stories up to 85 feet. (Pa359). The current ordinance also requires parking spaces to measure 9 feet by 18 feet (Pa370), and 1.2 parking spaces per motel unit.

MAHALO'S 2022 SITE PLAN APPLICATION DENIAL

On or about September 28, 2022, Mahalo submitted the 2022 Application to the Board seeking preliminary and final site plan review with variance relief. The 2022 Application contemplated a substantial rehabilitation and expansion of the existing motel, and sought significant c(2) variance relief for a proposed 66-unit motel notwithstanding the planning goals of the Borough. The relief requested is as follows:

1. minimum front yard setback - Rosemary Road (the view corridor street) (30 feet required, 11 feet proposed)
2. minimum front yard setback - Beach Avenue (20 feet required, 0 feet existing and proposed)
3. minimum front yard setback - Ocean Avenue (20 feet required, 0 feet proposed)
4. maximum building coverage (50%, 74.1% proposed)
5. maximum lot coverage (80%, 100% is proposed)
6. minimum pool deck setback (16 feet required, 8.5 feet proposed)
7. minimum rear yard setback (8 feet required, 4 feet proposed)
8. permitting a swimming pool in a front yard (not allowed but proposed)
9. not providing a loading zone (required, none proposed)
10. minimum off-street parking spaces (79.2 on-site parking spaces, 70 proposed)
11. minimum parking space dimensions (9 feet x 18 feet required, most of the spaces proposed were 8 feet by 18 feet, some were 7.5 feet x 16 (1T23-15 to 16))
12. forgoing the installation of a landscape buffer in off-street parking areas
13. minimum drive aisle width (20 feet required, 16.1 and 18.5 feet proposed)
14. maximum number of signs (2, 3 proposed)
15. maximum individual sign area (25 square feet, 144 square feet proposed)
16. maximum total sign area (50 square feet, 432 square feet proposed)
17. minimum motel unit size (375 square feet, 257 existing and proposed)

18. minimum raised curb (50% required, 45.25% proposed)

[Pa112]

The Board held meetings on April 5, 2023, and June 7, 2023. Compass presented testimony that highlighted the effect of the view corridor encroachment (2T6-6 to 32-10) as well as the unfeasibility of the proposed parking scheme (1T62-12 to 171-6). The owners of Compass, the Pawlowskis, appeared and expressed significant concerns about the encroachment within the required 30-foot view corridor. (Pa133; 2T45-11 to 62-8). Other members of the public also objected to the application. (Pa125).

The Board unanimously voted to deny the 2022 Application in a vote of 8-0. (Pa134 to Pa135). Board members² Tenaglia, Vogdes, Cava, D’Antonio, Melchiorre, Hunt, Mayor Cabrera, and Chair Davenport all voted no. (2T161-3 to 163-7). At least 3 of the 8 Board members expressed concerns specifically about violating the zoning ordinance requirement to preserve the view corridor: Cava, D’Antonio, and Mayor Cabrera.³ Resolution PB-23-11 states that the Board was concerned about parking, and “agreed that the undersized drive aisles [16.1 feet and 18.5 feet proposed where 20 feet is required] and parking spaces

² The transcripts of the Board hearings misspelled several board members’ names.

³ A newspaper article in the Press of Atlantic City on June 14, 2023 reported that Mayor Cabrera said the “impact of sight lines for other properties” was a “major concern.” “Cabrera said the board did not want the proposal to hurt views of the beach.” (Pa139).

[70 undersized proposed where 79.1 is required] presented significant safety concerns and were not functional to address the needs of the proposed hotel.” (Pa134).

MAHALO’S 2023 SITE PLAN APPLICATION APPROVAL

On or about August 22, 2023, Mahalo submitted the 2023 Application seeking preliminary and final site plan review with variance relief. The 2023 Application again sought significant c(2) variance relief for the now proposed 64-unit motel, most of which had been previously denied:⁴

1. *minimum front yard setback - Rosemary Road (30 feet required, 11 feet proposed)*
2. *minimum front yard setback - Beach Avenue (20 feet required, 0 feet existing and proposed)*
3. minimum front yard setback - Ocean Avenue (20 feet required, **5 feet** proposed)
4. *maximum lot coverage (80% required, 100% proposed)*
5. minimum pool deck setback (16 feet required, **11 feet** proposed)
6. *minimum rear yard setback (8 feet required, 4 feet proposed)*
7. *permitting a swimming pool in a front yard (not allowed but proposed)*
8. *not providing a loading zone (required, but not proposed)*

⁴ Italics indicates variances that were *previously denied* in the 2022 Application without any change; bold font indicates a **change** to a previously-requested variance; and underlining bold font indicates an **increase in deficiency** than what was previously requested and denied.

9. minimum off-street parking spaces (**77** off-street parking spaces required whereas **64** proposed)
10. minimum parking space dimensions (9 feet x 18 feet required whereas **8 feet x 17.25** feet proposed) (4 spaces at **7.5 x 18 feet**)
11. *forgoing the installation of a landscape buffer in off-street parking areas*
12. minimum drive aisle width (20 feet required, **15.75 feet** proposed)
13. *maximum number of signs (2 required, 3 proposed)*
14. *maximum individual sign area (25 square feet, 144 square feet proposed)*
15. *maximum total sign area (50 square feet, 432 square feet proposed)*
16. not providing a screened trash/recycling area
17. maximum number of curb cuts (1 required, 3 proposed), and
18. minimum contiguous raised curb (35% is required, 39.9% is proposed)

[Pa245.]

Mahalo's previous 2022 Application proposed 66 motel rooms and 70 parking spaces where the zoning ordinance required 79.2 spaces. That application was deficient by 9 parking spaces for a parking deficiency of 11.6%. Mahalo's 2023 Application reduced the total motel rooms to 64, but proposed only 64 parking spaces where 77 spaces were required. (3T3-1 to 5). The 2023 Application is deficient by 11 spaces which is 16.8% deficient. Thus, the 2023 Application further deviates from the zoning ordinance requiring 1.2 parking spaces for each room. In addition, the 2022 Application requested variances for

drive aisles that were 16.1 feet and 18.5 feet, whereas the 2023 Application requested drive aisles that were only 15.75 feet wide, thereby increasing the deficiency for drive aisles. The 2022 Application included many undersized parking spaces, but all of the spaces in the 2023 Application were undersized. (Pa245).

The ocean view corridor on Rosemary Road did not change. Both the 2022 Application and the 2023 Application proposed only an 11-foot setback from Rosemary Road, whereas a 30-foot setback is required. (3T3-6 to 16). While the 2023 Application changed the setback on Ocean Avenue, which runs parallel to the beach, from 0 to 5 feet for the 5-story addition, where 20 feet is required, this change did not impact the view corridor.

The existing building, when operated as the Ocean Holiday, contained 58 motel units. Mahalo's 2023 Application, with the newly-constructed addition, proposed 64 units, for a net increase of just 6 motel rooms. (4T78-14 to 24).

The 2023 Application did not request a building coverage variance, but Mahalo had previously requested a building coverage variance in 2022. (2T104-13 to 15). The 2023 Application site plan did not indicate any material change in building coverage from the 2022 Application.

DECEMBER 6, 2023 HEARING – RES JUDICATA

Because the requested variance relief in the 2023 Application was virtually identical to the requested variance relief in the previously-denied 2022 Application, and because the minor changes to the parking lot design actually increased the deficiencies, Compass sought Board action to decline to hear the 2023 Application based on *res judicata*. (3T2-11 to 21).

Compass argued that the 2023 Application was a “second bite at the apple” and was unfair to the Board members who denied the 2022 Application to have to reconsider the entire application again, with only minor, and in some cases more noncompliant, changes to the site plan. (3T10-16 to 20).

The Board determined that the 2023 Application made enough changes to the 2022 Application such that the doctrine of *res judicata* would not preclude the 2023 Application from proceeding. (3T24-7 to 25-16). As such, the 2023 Application proceeded at the next meeting.

FEBRUARY 13, 2024 HEARING

On February 13, 2024, the Board heard Mahalo’s 2023 Application. The Board was comprised of Chair Davenport, Tenaglia, Vogdes, Cava, Daniels, Melchiorre, and Hunt. (4T1-23 to 2-14).

Mahalo presented two expert witnesses, Steve Tomassetti, the project architect, and Vincent Orlando, the project engineer and planner. (4T8-5 to 8). Neither are experts in traffic engineering.

Tomassetti, after being recognized as an expert in architecture, addressed whether Mahalo could build vertically rather than horizontally. Mahalo's initial site plan application in 2019 (supra n.1) included a plan with an additional floor (Pa358), which was omitted in subsequent site plans. Tomassetti stated, "We had our structural engineer on the team evaluate building an addition up as well. We found that the existing conditions in the motel are not suitable to build up as they are. To improve those conditions and also meet current code, we would need to modify the entire vertical wall and improve upon the foundation and possibly do some pile work there." (4T20-10 to 16). He admitted that the existing structure could be demolished and Mahalo could construct a new building, taking advantage of the ability to increase the motel's height as provided in the zoning ordinance, and could keep the footprint of the existing oversized structure as existing non-conformities were grandfathered in. (Pa264; Pa298).

On cross-examination, Tomassetti admitted he was not a structural engineer. (4T76-3 to 5). Tomassetti did not independently determine that adding an additional floor was structurally impossible because Mahalo's structural

engineer, who did not testify, had “eliminated that possibility” of adding another floor to the existing motel. (4T76-6 to 17).

Orlando was then recognized as an expert engineer and planner. Regarding the criteria for a c(2) variance, Orlando testified that the setback variances that blocked the view corridor would serve the purpose of zoning. (4T42-15 to 44-1 (referring to N.J.S.A. 40:55D-2(a), (g), and (i)). According to Orlando, the 2012 MP referenced the loss of motels to residential condominiums, albeit in another district,⁵ and sought to remove barriers to motel upgrades. Orlando opined that Mahalo’s requested setback variances purportedly address these concerns of the MP regarding condo conversion. (4T43-20 to 44-13). Orlando stated that requested setback variances are “consistent with the type of development that has occurred in the community,” without identifying when the referenced development was constructed. Orlando claimed that Mahalo’s plan provides for “a better alternative to taking a [motel] facility down and putting up residential units [such as condos].” (4T45-25 to 26-

⁵ Mahalo’s Property is in the M-1-A district, which has the highest number of motels and hotels, is thriving, and is presently not at risk of condo conversion, according to the 2022 MP. (Pa334). The 2012 MP identified another motel/hotel district, the M-1-B district, as containing motels/hotels that are “struggling economically and pose the highest risk for condo conversion. The Borough is in ongoing discussions regarding the need to provide zoning and financial incentives to preserve the motels and hotels in [the M-1-B] zoning district.” (Pa310).

4). Orlando provided no testimony that the variance was necessary to preserve the motel use.

Orlando admitted that the proposed plan does impact the view corridor. (4T155-23 to 24). On cross-examination, Orlando was asked how a setback variance advances the goal of appropriate use of land, since the proposed motel use was already permitted in this zone and was, in fact, thriving. (4T85-16 to 24). Orlando just responded that “this project doesn’t move forward unless relief is granted.” (4T87-5 to 6). Orlando was questioned how the requested 11-foot setback was more visually desirable than a 30-foot view corridor as required in the Borough’s zoning ordinance. Orlando simply responded that it was “an aesthetic enhancement.” (4T90-16). Orlando provided no testimony as to how the Rosemary Road setback variance would advance the planning goals of the Borough.

Orlando also provided testimony about the parking plan although he was not qualified as a traffic engineer expert.⁶ The parking spaces are undersized at 8 by 18 feet, with at least two spaces less than 8 feet wide because of the location of existing columns throughout the parking area (4T28-17 to 21; Pa228 to Pa230). He opined, “I would rely on the fact that I believe 8 foot wide [parking

⁶ Mahalo proposed two parking plans, Plan A and Plan B, and the Board chose Plan B. (4T64-9 to 11).

space] is kind of the norm now in parking standards” (4T50-8 to 10) at least within a two-block radius of Mahalo (4T48-15 to 20), despite the ordinance requiring 9 feet by 18 feet. Orlando admitted that the proposed parking plan “create[s] challenges on entering and exiting the site with the driveways being somewhat narrow so that you don’t have that easily turned maneuverability that you would have off a 24 foot” drive aisle. (4T28-22 to 25).

Orlando was asked, on cross-examination, how many of the 64 parking spaces need variance relief, to which he responded that all are undersized and all need variance relief. (4T91-7 to 14).⁷

Compass then introduced its witnesses, Peter G. Steck, a licensed planner, and David Shropshire, a licensed traffic engineer, and the only traffic engineer to testify.

Steck described what the Property used to look like when it was the Ocean Holiday, as well as the existing conditions after Mahalo demolished the pool and parking lot abutting Rosemary Road in or around October 2019. (4T94-5 to 6; Pa235). However, after demolition, the pool and parking lot are no longer “existing conditions.” (4T94-20 to 4T95-1).

⁷ Orlando added that he agreed with Compass’s expert Steck that two additional variances were required as the pool deck had been removed, such that it was no longer a preexisting non-conforming condition, and additional variances would be required for a setback along Beach Avenue and along Rosemary Road. (4T84-4 to 8; 4T156-4 to 11).

Then, Steck reviewed the negligible changes between the 2022 Application and the 2023 Application. He noted that the footprint was reduced by only 1.3 percent, or 216 square feet in the 2023 Application. (4T94-13 to 17; Pa236).

The exhibits proffered by Steck depict the significant encroachment of the view corridor. A rendition of the view from across Ocean Avenue – the view from Compass – clearly shows the extent to which Mahalo will block the view along Rosemary Road, as compared to what is permitted by ordinance. The exhibits also include photographs taken from Compass of the view as it exists presently, versus what portion of that view will be blocked by Mahalo’s proposed addition. (Pa239 to Pa241).

Steck testified that the proposed addition is 5 floors with only an 11-foot setback from Rosemary Road. The intrusion on the view corridor is substantial. (4T104-1). He stated, “11 feet versus 30 feet is a big deal.” (4T104-1 to 2). According to Steck, Mahalo “is constructing a totally new building toward the [view] corridor that interrupts the view corridor.” (4T97-25 to 98-3).

Addressing Mahalo’s claim that they are unable to build vertically, Steck noted that “there was an application [by Mahalo] in 2019 that proposed a top floor on the building. And the applicant is now saying that’s not feasible.”

(4T98-11 to 14; Pa358). “So apparently at one time the applicant felt that they could put an additional story on it.” (4T99-20 to 23).

Steck also explained that while the applicant talked about aesthetics as a zoning purpose, and although the building is nice-looking, “aesthetics are not just the surface look, aesthetics are setbacks and view corridors.” (4T103-6 to 9). He asserted that the property “violates the corridor, the view corridor, which is a major issue in your master plan.” (4T103-21 to 22). Steck specifically noted that the 2005 MP did not view the district in which Mahalo is located as an area threatened by condo conversion. (4T106-8 to 9).

Steck further testified that all of the parking spaces are too small. (4T94-19 to 20). “[N]one of the spaces comply with the [zoning ordinance] requirements.” (4T98-4 to 7). In addition, the drive aisle is only 15.75 feet, which, compounded by the narrow width of the parking spaces, will make backing out challenging because the vehicle cannot start to turn until it is well in the drive aisle, which is also narrow. Steck opined that the parking was “a substandard design.”⁸ (4T105-12 to 20).

⁸ A typical SUV such as a 2025 Ford Explorer is 198.7” long (about 16.5 feet) by 89.3” wide including mirrors (about 7.5 feet), according to Ford’s website. If 2 Ford Explorers park side by side in the center of the proposed 96” (8-foot) wide spaces, that will leave approximately 6 inches between the two vehicles. The proposed 15.75 drive aisle is less than the length of a typical SUV.

In conclusion, Steck opined that the proposed plan “will substantially impair the intent and purpose of your master plan and your zoning ordinance.” (4T107-7 to 9).

David Shropshire, PE, PP, was sworn in and recognized as an expert in traffic engineering. (4T109-8 to 9). He noted the plan’s parking deficiencies regarding both the size of the spaces and the ratio to motel rooms. (4T110-2 to 15). Shropshire then described another problem with parking. He stated, “There are five parking spaces...that are substandard in length with a substandard drive aisle. And they butt up to the handicap access from the internal handicap space to the front door.” (4T112-25 to 113-4). He continued to explain how there may be an encroachment into the handicap space. (4T113-5 to 7). He stated, “[B]ecause you have a substandard sized space with a substandard sized drive-by, and it might need that person, whether it’s professional or whether it’s a personal vehicle to cheat on that space, and where are they cheating? They’re cheating into a handicap access aisle.” (4T113-8 to 12).

Shropshire pointed out that some of the undersized parking spaces have adjacent walls or columns. He questioned how anyone, other than a professional valet driver, could effectively park a car under such challenging conditions, especially if there is an adjacent “wall or a column or something like that, that

prevents you from” opening the vehicle door. The narrow drive aisles exacerbate the conditions. (4T112-9 to 24).

Shropshire concluded that Mahalo’s proposed parking plan does not comply with “generally accepted traffic engineering standards.” (4T109-19 to 21; 4T116-1 to 5). No other traffic expert testified at the hearing.

George Pawlowski, who owns the Compass motel with his family, testified. (4T118-6 to 8; 14 to 15). Pawlowski emphasized the importance of the view corridor and stated that the new construction “will block the ocean views of every unit at our hotel.” (4T119-18 to 19; 20 to 23). He stated that “customers won’t be able to see that view they’ve seen for 20 years that we’ve been there.” (4T121-7 to 8). Paul Pawlowski then spoke, describing the detriment of setback variances, and that they “will produce an undesirable change in the character of the neighborhood, creating a detriment to the nearby properties.” (4T122-19 to 21).

In addition to the Pawlowskis, eleven neighbors spoke at the hearing, opposing the application. Steve Tecco stated, “I have the Armada Motel. I have the adjacent property to the old Ocean Holiday, the proposed Mahalo.” (4T125-9 to 11). Tecco had concerns about parking. (4T125-16 to 18). He stated that in his 50 years of operating the Armada, his guests have had issues finding parking spaces that are big enough for their vehicles. (4T125-21 to 126-11). He stated

his concern that Mahalo guests are going to find whatever parking spot is available and end up parking in the spaces surrounding the Armada. (4T126-22 to 127-8).

Other neighbors addressed the Board, expressing concerns about the view corridor and parking. (4T128-12 to 4T150-11).

BOARD VOTE AND BOARD RESOLUTION

The Board approved the 2023 Application with a 5-2 vote: Tenaglia, Vodges, Cava, Daniels, and Hunt voted to approve the Application, and Melchiorre along with Chair Davenport voted against the 2023 Application. Mayor Cabrera, an elected member of the governing body that enacted the zoning ordinances, who had vociferously opposed the 2022 Application, was not present at the meeting. The Board decision was memorialized in Resolution PB-24-04 on March 6, 2024. (Pa245).

The Board Resolution specifically notes that Eustace Mita, the principal of Mahalo's LLC, testified that he is an owner of multiple hotels at the Jersey Shore, and even apologized to the Board that the Property has been vacant and partially demolished since his purchase in 2019. Mita testified, and the Board acknowledged, that he intends to "proceed with renovating the existing hotel" which "amounts to one of the first new [renovated] hotels within the Borough in over 50 years." (Pa249 to Pa250).

Regarding the view corridor, the Resolution states that “a majority of the Board took no issue with the proposed 11 ft. setback along Rosemary Road.” (Pa274). The Resolution conclusively states that the 11-foot setback off Rosemary Road, where 30 feet is required, “was adequate and preserved a sufficient view corridor” (Pa274). The Board added that “there are hardly any existing hotels/motels within the Borough that comply with the 30ft. view corridor setback requirement (Pa274) – despite Steck’s testimony that other motels in the area have view corridors (4T100-1 to 6) or that the 2005 MP stated that “[m]any of the motels are four to six stories in height and *have significant setbacks on the east/west streets* with on-site parking in the front yard.” (Pa297 (emphasis added)). The Resolution fails to note that the setback requirement was increased in 2005 from 18 feet to 30 feet.

The Resolution indicates that the Board “agreed that the Master Plan calls for flexibility in relation to the renovation of existing motels in order to maintain and preserve same,” and they “disagreed that horizontal expansion would impair the intent of purpose of the zone plan in light of the goals and objectives identified to maintain and preserve existing hotels.” (Pa275). The Resolution states that the Board majority “agreed that preserving an existing hotel within the Borough is consistent with the Master Plan and is vital to sustaining the Borough’s tourism industry.” (Pa276). The Board cited no evidence indicating that there was any plan to repurpose

the use of the Property to anything other than a motel, as all of the evidence, including Mita's testimony, supports the conclusion that the Property was being renovated as a motel. (Pa249 to Pa250). With or without the variances, the Property will continue as a motel.

In terms of parking, the Resolution simply states that the proposed parking "is an improvement over what was presented back in June 2023, and resolved the majority of the Boards concerns in relation to one-way back-out drive aisles and back-out parking spaces." (Pa275).

The Board claimed that "hotels throughout the Borough...contain parking spaces which are similar in size [8 feet wide where 9 feet is required] and consistent with the Applicant's proposal" (Pa275) – despite testimony from Orlando that he measured parking spaces only within a 2-block radius that measured only 8-feet wide (4T48-15), and that the zoning ordinance had increased the required parking space width to 9 feet.

The Resolution notes that Compass's witness Steck opined that the parking plan is "substandard" and that "Applicant's proposal amounts to an overdevelopment of the subject property." (Pa270). The Resolution also notes that Shropshire "testified that neither of the proposed parking plans complies with generally accepted traffic engineering standards." (Pa270). Yet the Resolution claims that a 1-to-1 parking space to unit ratio would not "impair the

intent or purpose of the zone plan and/or zoning ordinance” without commenting why it disregarded Compass’s expert testimony. (Pa275).

The Resolution concludes, generally, that the purposes of zoning would be advanced and that there are no substantial detriments to the public good or the surrounding community, and that the benefits of the variances outweigh any potential detriments. (Pa276). The Resolution fails to explain how the variances, particularly the Rosemary Road setback variance, advances any planning goal of the Borough other than preserving motel use.

TRIAL COURT’S OPINION

After Compass filed a Complaint in Lieu of Prerogative Writ on April 25, 2024 (Pa031), the trial court affirmed the Board’s resolution granting variances and approving Mahalo’s 2023 Application. (Pa1).

The trial court first determined that the 2023 Application was not barred by the doctrine of *res judicata*. (Pa15 to Pa17). The court wholly ignored Compass’s argument that the changes to the 2023 Application were minimal in terms of the variance relief requested, and that the requested parking variances actually increased in scope.

In terms of c(2) variance relief, the trial court accepted the Board’s determination that an 11-foot view corridor was somehow acceptable, even though 30 feet is required by the 2005 ordinance. (Pa19). The opinion admits

that the MP seeks to preserve the view corridor, but claims that the MP also seeks to “preserve and enhance existing motels and hotels in the ‘Motel Zone.’” (Pa21). The trial court concluded, without any reasonable explanation, that the Board considered the reduced view corridor acceptable because the 2023 Application “would help maintain the hotel and motel industry.” (Pa22). The opinion cites no evidence that the setback variances were actually necessary to maintain a hotel use at the Property, as required for a c(2) variance.

The opinion contends that the MP called for “flexibility in renovation to maintain and preserve the motel and hotel industry.” (Pa21 to Pa22). The opinion fails to recognize that the MP made a recommendation to the Borough, not the Board, to provide flexibility in enacting ordinances to preserve the motel industry, as a master plan cannot give the Board flexibility in granting variances.

Regarding parking, the trial court noted that other motels have less than a 1-to-1 ratio. (Pa20). The trial court also highlighted Orlando’s testimony (not a traffic expert) that other motels have parking spaces that are only 8 feet wide. (Pa21). The opinion ignores the testimony by Compass’s traffic engineering expert that the parking plan fails generally accepted engineering standards. The opinion fails to address that amendments to the parking ordinances after 2005 had increased the ratio and now requires 1.2 parking spaces per motel room, and the ordinance has also increased the width of parking spaces to 9 feet. (Pa076).

For the negative criteria, the trial court accepted Orlando’s testimony that the project is consistent with other development in the area. (Pa21). Mita testified at the Board hearing that there had been no substantial motel renovations in 50 years. Yet the trial court failed to specify whether the other development predated the 2005 MP and amendments to the ordinances. The opinion neglects any analysis regarding whether the requested variances substantially impair the existing zone plan. (Pa18 to Pa19).

The trial court incorrectly commented that Mahalo planned to build an upscale hotel resort “which is a significant upgrade to the unoccupiable, deteriorating motel that is currently at the Property” without acknowledging that the Property is “unoccupiable” because Mahalo shut down the operating motel in 2019 and started demolition prior to securing land use approvals. (Pa22).

LEGAL ARGUMENT

POINT I STANDARD OF REVIEW

Appellate review of a planning board’s judgment defers to the broad discretion of the Board and will reverse only if the board’s decision is arbitrary, capricious, or unreasonable. Bressman v. Gash, 131 N.J. 517, 529 (1993). However, “[t]he deference accorded to the board’s denial of a variance is greater than that given to its grant of a variance.” Med. Ctr. v. Twp. of Princeton Zoning Bd., 343 N.J. Super. 177, 199 (2001). “Variances to allow new nonconforming uses should

be granted only sparingly and with great caution since they tend to impair sound zoning.” Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268, 275 (1967).

Courts are not bound by a planning board’s determination on a question of law, and “the court’s construction of an ordinance under review is *de novo*.” Fallone Properties, L.K.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 561 (App. Div. 2004). Importantly, “it is essential that the board’s actions be grounded in evidence in the record.” Id. at 562. This court is not bound by a board’s interpretation of the statutory criteria that is required to authorize the grant of a variance. A review of the application of the statutory criteria is *de novo*.

POINT II
THE PLANNING BOARD PREVIOUSLY DENIED
THE 2022 APPLICATION, PRECLUDING
ANOTHER HEARING UNDER THE DOCTRINE
OF *RES JUDICATA* (Pa249; Pa2; Pa15)

Res judicata prohibits an applicant from bringing the same or a substantially similar application back to a land use board after it was already heard and denied. *Res judicata* protects municipal resources from applicants who may continually bring the same application over and over again, but before a different composition of the Board – exactly what happened in the instant matter.

The relief Mahalo requested in the 2023 Application is virtually identical to the 2022 Application, which the Planning Board denied. To the extent the two

Applications differ, the second one deviates even further from the zoning requirements, which in turn increases the variance relief requested. Rather than submitting another application that was more compliant with the zoning requirements, the 2023 Application that was less compliant, particularly as it relates to parking. The doctrine of *res judicata* prohibits resubmitting the 2023 Application as it is substantially similar to the previously-denied 2022 Application.

“The question for the municipal agency on a second application . . . centers about ‘whether there has occurred a sufficient change in the application itself or in the conditions surrounding the property to warrant entertainment’ of the matter again.” Allied Realty v. Upper Saddle River, 221 N.J. Super. 407, 414 (App. Div. 1987) (citing Russell v. Tenafly Bd. of Adjustment, 31 N.J. 58, 66 (1959)).

Therefore, if an applicant files an application that involves the same parties, where there are no changes in the conditions of the community affecting the property, that is substantially similar to a prior application, and both applications seek the same relief, the second application should be barred under *res judicata*. Ten Stary Dom P’ship v. Mauro, 216 N.J. 16, 39 (2013) (citing Bressman v. Gash, 131 N.J. 517, 527 (1993)).

A comparison of the only changes between the 2022 and 2023 Applications is as follows:

<p style="text-align: center;">2022 Application 66 rooms</p>	<p style="text-align: center;">2023 Application 64 rooms</p>
<p>Minimum front yard setback - Ocean Avenue (20 feet required whereas 0 feet proposed)</p>	<p>Minimum front yard setback - Ocean Avenue (20 feet required whereas 5 feet proposed)</p>
<p>Minimum off-street parking spaces (79.2 on-site parking spaces required whereas 70 proposed) (ratio 1.06 spaces per room)</p>	<p>Minimum off-street parking spaces (77 off-street parking spaces required whereas 64 proposed) (ratio 1 space per room)</p>
<p>Minimum parking space dimensions (9 feet x 18 feet required whereas most of the spaces proposed were 8 feet by 18 feet, some were 7.5 feet x 16 (1T23-15 to 16))</p>	<p>Minimum parking space dimensions (9 feet x 18 feet required whereas 8 feet x 17.25 feet proposed) (4 spaces at 7.5 x 18 feet)</p>
<p>Minimum drive aisle width (20 feet required whereas 16.1 and 18.5 feet proposed)</p>	<p>Minimum drive aisle width (20 feet required whereas 15.75 feet proposed)</p>
<p>Minimum pool deck setback (16 feet required whereas 8.5 feet proposed)</p>	<p>Minimum pool deck setback (16 feet required whereas 11 feet proposed)</p>
	<p>Not providing a screened trash/recycling area</p>
	<p>Maximum number of curb cuts (1 required whereas 3 proposed)</p>
	<p>Minimum contiguous raised curb (35% is required whereas 39.9% is proposed)</p>

[Pa112; Pa245 (bold represents variance request that **increased** the deficiency from the first application.)]

Regarding parking, the zoning ordinance requires motels to provide 1.2 on-site parking spaces per room, and the 2022 Application fell short of that requirement by only providing 1.06 parking spaces per room (66 rooms, 79.2 parking spaces

required, but only 70 proposed). The 2023 Application further reduced the parking ratio: only 1.0 parking space per room (64 rooms, 77 parking spaces required, but only 66 proposed). Similarly, the drive aisle width in the 2023 Application decreased, making it nearly impossible for an average vehicle to drive through the parking lot and every parking space in the 2023 Application is undersized, requiring variance relief. The 2023 Application is even less compliant with parking requirements than the 2022 Application denied by the Board. This is a change in the wrong direction.

Regarding building coverage and setbacks, the 2023 Application made insignificant changes: (1) the proposed footprint of the structure is nearly identical to the 2022 Application; (2) lot coverage stayed the same; (3) the setback into the view corridor on Rosemary Road stayed the same at 11 feet, 30 feet is required; (4) the setback on Beach Avenue stayed the same at 0 feet, 20 is required; (5) the rear yard setback stayed the same at 4 feet, 8 feet required; and (5) setback for the existing structure on Ocean Avenue stayed the same at 5 feet, 20 required.

The *only* change to the multitude of requested setback variances was to slightly increase the setback of the new 5-story addition on Ocean Avenue from 0 feet to 5 feet where 20 is required. This change has no impact on improving the Rosemary Road view corridor, as Ocean Avenue runs parallel to the beach.

Compass's expert Peter Steck testified that the 2023 Application reduced the overall structure's square footage by only 1.37% or 216 square feet. (4T94-13 to 17). Steck's illustration depicts the change as only a sliver of the entire structure. (Pa236). The proposed footprint in the 2022 Application was approximately 16,575 square feet and the lot size is 20,000 square feet. In the 2023 Application, the proposed footprint was approximately 16,325 square feet. (Pa236; Pa240).

This insignificant reduction in the footprint by increasing the setback for the addition from 0 to 5 feet on Ocean Avenue, coupled with the increase in parking variance relief, are not sufficient changes to the 2023 Application. The minor changes to the 2023 Application do not meet the standard of sufficient change as enumerated by New Jersey courts.

For example, in Pieretti v. Bloomfield, 35 N.J. 382, 388 (1961), the Court found that *res judicata* was applicable. There, the board denied a use variance which sought to expand a commercial use in a residential area. Years later, the property owner submitted another use variance application to allow an even larger commercial building in the residential zone. The Court concluded that *res judicata* prohibited the new application because the requested relief was *greater* than proposed in the earlier application denied by the board. The Court determined that the second application was "clearly much more objectionable" than the earlier application that was denied. Id. at 389. See also Cox, *New Jersey Zoning and Land*

Use Administration, §19-3.2(b) (Gann 2024) (“[w]here greater relief is requested in the second application it may be barred by the board upon a finding that *res judicata* is applicable”).

In the seminal case Russell v. Board of Adjustment of Tenafly, *supra*, 31 N.J. 58, an applicant requested a variance proposing a 25-foot setback. This application was denied. Subsequently, the applicant returned with an application increasing the proposed setback by 20% and decreasing the total percentage of the lot to be occupied from 18% to 12%, which **decreased** the deficiency and brought the property closer to what was required in the ordinance. The Court considered these changes together were enough to render the second application sufficiently changed, and was not barred by *res judicata*.

In Bressman v. Gash, *supra*, 131 N.J. 517, the Court determined that *res judicata* did not apply to block a second rear yard setback variance request where the rear yard setback plan was changed from twenty-eight feet to thirty-two feet, a change of 14.29%, a rear yard buffer was added, and an additional 2158 square feet from a neighboring lot was included to eliminate the need for additional variances for impervious coverage and maximum building coverage. *Id.* at 14. Again, these changes **decreased** the deficiency, rendering the plan closer to the Borough’s ordinances.

Res judicata is concerned with variance relief requested, not changes to the overall project. See Cox, supra, at §19-3.2(b) (where a board denies relief, “neither the applicant nor a succeeding owner may file an application seeking exactly the same kind of relief”). Even though Mahalo made some changes to the site plan, such as the direction of traffic in the parking lot, the focus must be on the variance relief denied by the Board after considering the 2022 Application as compared to the variance relief requested in the 2023 Application. The direction of traffic did not require a variance.

The doctrine of *res judicata* addresses situations exactly like this. It is meant to protect a community, which clearly opposes a project, from a developer returning to the Board again and again with the same application in order to exhaust the community opposition, or to have different board members grant variance relief.

Here, both the Board and the trial court avoided any explanation how *increasing* the requested variance relief warrants another hearing. The Resolution merely concludes that the 2023 Application addressed the Board’s previous concerns, specifically, reducing number of motel rooms and changing parking circulation. (Pa248 to Pa249). The 2023 Application was not seeking a variance for hotel rooms or parking circulation, but rather variances for setbacks, coverage, parking space ratio, stall width, and drive aisle width.

The trial court failed to address Compass’s argument that the 2023 Application “required increased variance relief.” Instead, the trial court, like the Board, impermissibly concluded, absent any facts in the record, that the changes between the two applications were “sufficient to warrant a hearing.” (Pa17). The trial court neglected to analyze the effect of submitting a second site plan application that is even less compliant with the zoning ordinances than the first application and is therefore “clearly much more objectionable” than the previously-denied application. Pieretti, supra, at 389. The trial court’s opinion regarding *res judicata* is not grounded in the record or the law.

The Board should not have heard Mahalo’s 2023 Application, which should have been barred under the doctrine of *res judicata*. Both the Board’s decision and the trial court’s decision as to *res judicata* warrant reversal, and the variance relief requested in the 2023 Application must also be reversed.

POINT III
MAHALO FAILED TO MEET THE LEGAL
REQUIREMENTS FOR C(2) VARIANCE RELIEF;
THE BOARD LACKED AUTHORITY TO GRANT
THE REQUESTED VARIANCES
(Pa2; Pa17; Pa274 to Pa278)

Mahalo’s proposed plan represents a significant departure from the planning goals embodied in the Borough’s zoning ordinance, in particular to preserve the view corridor. By granting so many variances, the Board, in effect, rezoned the Property, contrary to the governing body’s specific requirements for

ocean view corridors and functional parking. A c(2) variance may not be granted when the variance benefits only the developer at the expense of the municipal planning goals.

Mahalo requested relief pursuant to N.J.S.A. 40:55D-70(c)(2) to allow, *inter alia*:

- Setback along Rosemary Road: an 11-foot setback for the 5-story addition proposed where 30 feet is required;
- Setback along Ocean Avenue: a 5-foot setback proposed where 20 feet is required;
- Setback along Beach Avenue: a 0-foot setback proposed where 20 feet is required;
- Lot coverage: 100% maximum lot coverage where 80% is permitted;
- Parking to unit ratio: a 1 to 1 parking to unit ratio where 1.2 to 1 is required (64 parking spaces proposed whereas 77 are required);
- Parking space size: 8 feet by 17.25 feet proposed whereas 9 feet x 18 feet required) (some are less than 8 feet wide); and
- Drive aisle: 15.75 feet proposed whereas 20 feet required⁹

⁹Compass also submits that building coverage variance relief was also required. Mahalo's 2023 Application did not deem the proposed pool and outdoor deck over the parking area as building coverage—even though it was established during the 2022 Application process that building coverage includes the pool deck and that a building variance was, in fact, required. (2T104-13 to 15 (regarding the 2022 Application, "Orlando did testify tonight that based upon his review of the ordinance he amended his testimony to indicate that a building

A. Criteria for c(2) variance relief

The MLUL, N.J.S.A. 40:55D-1 et. seq., requires an applicant seeking a c(2) variance to prove both the positive criteria and the negative criteria so as to justify a planning board or board of adjustment granting a variance from the governing body's land use ordinance. The c(2) variance is intended to be narrow in scope, only applicable to a "very limited class of non-hardship variances." Kaufmann v. Planning Board for Warren Twp., 110 N.J. 551, 561 (1988).

1. Positive criteria

For the positive criteria, an applicant must prove that "the purposes of [the MLUL set forth in N.J.S.A. 40:55D-2] would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment." N.J.S.A. 44:55D-70(c)(2). Granting a c(2) variance "must be rooted in the purposes of zoning and planning itself and must advance the purposes of the MLUL." Kaufmann at 562.

Kaufmann addresses what it means to advance the purpose of the MLUL. The Court had previously refined the meaning of the term "special reasons" in the context of a use variance application, N.J.S.A. 44:55D-70(d). See Medici v. BPR Co., 107 N.J. 1, 18 (1987). The Kaufmann Court noted, "In refining the legislative content

coverage variance would be required"). Steck pointed out to the Board for the 2023 Application that Orlando "at the last meeting admitted that the pool, because it's elevated, is part of the building." (4T96-9 to 10).

of the phrase – to advance the purposes of the MLUL – it helps to remember the development of the ‘special reasons’ standard. The content of that legislative provision did not spring full-blown from the language of the statute. Rather, it evolved from a case-by-case analysis.” Id. at 562-563 (citing Medici, supra).

Thus, the Kaufmann Court refined the statutory language for a c(2) variance. To prove that a c(2) variance advances the purposes of the MLUL, there must be proof that the variance will further local planning goals. The Court held that granting a c(2) variance “must *actually benefit the community* in that it represents a *better zoning alternative* for the property.” Id. at 563 (emphasis added). The Court explained that the Legislature “has confined the discretion of boards. They cannot rewrite ordinances to suit the owner or their own idea of what municipal development regulations should be. Rather, the board should seek...*to effectuate the goals of the community as expressed through its zoning and planning ordinances.*” Id. at 564. (emphasis added).

Importantly, the Court also determined that “no c(2) variance should be granted when merely the purposes of the owner will be advanced.” Id. at 563.

In Kaufmann, the applicant sought and received a variance to subdivide its residential lot. The parcel was 167 feet wide and 392 feet deep in a zone that required a minimum lot width of 100 feet, and a minimum side yard of 20 feet. The applicant proposed a subdivision where each subdivided lot would be about

84 feet wide, approximately 16% narrower than the zoning ordinance required. However, the plans provided for the residences to be staggered to minimize the visual impact. The municipality had also recently reduced the minimum lot size in the relevant zone, which allowed more homes to be built.

The Court held that the applicant was entitled to the requested variances. The municipality had “sought to encourage a more intense use of the land. It was discouraging large lot zoning in this area of town.” *Id.* at 564. Noting that the board should advance the goals expressed in the governing body’s zoning and planning ordinances, the Court affirmed the board’s grant of a c(2) variance because it “put the land more in conformity with the *community’s development plans* and thereby would advance the purpose of zoning.” *Id.* at 564 (emphasis added).

The Kaufmann Court concluded that, in order to prove the positive criteria that the variance will advance the purpose of the MLUL, a c(2) variance must advance the specific zoning purposes of the local community, which goals are set forth in local zoning ordinances. *Id.* at 563.

2. Negative criteria

The negative criteria require proof that “relief can be granted without substantial detriment to the public good and will not substantially impair the

intent and the purpose of the zone plan and zoning ordinance.” N.J.S.A. 40:55D-70(d).

The negative criteria focus on the impact that the variance will have on the specific adjacent properties affected by the deviations from the ordinance, Lang v. Zoning Bd. Of Adjustment of Borough of North Caldwell, 160 N.J. 41, 57 (1999), as well as any detriment to the municipal zoning plan, Kaufmann, supra, at 565. “The board...must evaluate the impact of the proposed...variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute ‘substantial detriment to the public good.’” Medici v. BPR Co., supra, 107 N.J. at 22-23, n.12 (citing Yahnel v. Bd. of Adjust. of Jamesburg, 79 N.J. Super. 509, 519 (App. Div.), certif. denied, 41 N.J. 116 (1963)).

3. Effect of zoning ordinance amendments

An amendment to a zoning ordinance is significant. It represents a change in the community’s planning goals. In Cicchino v. Township of Berkeley Heights Planning Bd., 237 N.J. Super. 175 (App. Div. 1989), plaintiffs sought subdivision approval to subdivide two conforming residential lots to three non-conforming lots. Plaintiffs produced an expert planner who testified that plaintiffs’ proposal was “consistent with the overall pattern of development in the area.” Id. at 180. However, the planning board denied the c(2) variance

relief. The trial court reversed the board's denial. However, the Appellate Division found that the trial judge was incorrect in finding that the Kaufmann case was comparable. The Kaufmann mandate is "to effectuate the goals of the community as expressed through its zoning and planning ordinances." Id. at 182. Yet the governing body in Berkley Heights had amended its ordinance and "*reduced* the permitted density, thereby discouraging smaller lot zoning in this area of the township." Id. at 182 (emphasis in original). The community planning goal had changed to reduce density in the zone, but the requested variance would have increased density. Plaintiffs' expert testified that the requested variances were consistent with development in the area, yet failed to identify whether the substandard lots in the area predated the zoning amendments. Id. at 182. The trial court "'re-wrote' the zoning requirement involved and ignored or misinterpreted Berkeley Heights' policy of density reduction." Id. at 183. As such, this court reversed the trial court and affirmed the board's denial of the c(2) variance. The c(2) variance failed to advance the community planning goal to reduce density pursuant to the zoning ordinance amendment.

4. Cannot advance only the owner's interests

In Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 198 (App. Div. 2009), this court upheld the board's denial of c(2) variances because only the applicant's interests would be advanced. There, the applicant sought 7 bulk

variances within a residential zone that abutted Barnegat Bay. The requested variances would have permitted a raised deck expansion and swimming pool, which were already constructed without approval from the board. The board denied the requests for variances because they did not advance the purposes of the MLUL set out in sub-sections (a), (e), and (g) of N.J.S.A. 40:55D-2. Instead, the application would alleviate a self-created hardship, would benefit only the applicant, and would be “a detriment to the intent and purpose of the zoning ordinance” enacted by the governing body. Id. at 199-200.

B. Mahalo presented no evidence to the Board to satisfy the positive or negative criteria.

The record lacks evidence to satisfy the positive criteria for c(2) variance relief because Mahalo did not present any proof that its proposed plan would advance the planning goals of the Borough as expressed through its zoning ordinance. The Board’s fatal error was concluding that granting the variances would preserve the motel industry. Nothing in the record supports that the variances for setbacks, coverage, or parking would advance the Borough’s goal to retain motels. The record amply supports Compass’s position that the requested variances contravene the Borough’s goals to preserve the view corridor and establish sufficient parking while not undermining its goal of preserving motels.

Mahalo claims that its proposed motel satisfies the following purposes of zoning set forth in the MLUL:

a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;

* * *

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

* * *

i. To promote a desirable visual environment through creative development techniques and good civic design and arrangement

[N.J.S.A. 40:55D-2.]

None of these purposes directly advance the actual planning goals of the Borough to preserve the view corridor, to encourage motel upgrades, and to provide functional parking.

1. Positive criteria

When questioned how multiple setback variances will advance “appropriate use or development” of the property, N.J.S.A. 40:55D-2(a), Orlando simply replied that “this project doesn’t move forward unless relief is granted.” (4T87-5 to 6). Mahalo wanted the Board to believe it had to grant variance relief or the promised renovation would not occur. Nothing in the

record suggests that the motel use would be discontinued absent variance relief. Nothing in the record suggested that Mahalo could not design a project to renovate the existing motel while complying with the zoning ordinance. Orlando did not claim that a motel was not an appropriate use of this Property, or that a scaled-down version could not be built. In fact, at the hearing below, counsel for Mahalo stated that Mahalo's owner Eustace Mita "testified that he wanted to maintain this as a motel use or as a hotel use" (5T58-22 to 24), referring to Mita's testimony at the Board hearing (4T10-2 to 22).

The Board is not authorized to grant variances to ensure a particular project may proceed; instead, it must grant a variance because the variance in fact advances a planning goal of the Borough. Here, a motel is a permitted use. The record lacks any evidence suggesting that motel use for this Property is contingent upon the requested variances for horizontal expansion.

Mahalo also claims that the variances will advance the purpose of zoning to provide sufficient space in appropriate locations for a variety of uses to serve the needs of all New Jersey citizens. N.J.S.A. 40:55D-2(g). When asked how Mahalo's plan advances subsection (g), Orlando responded that the Board "has the ability to use that particular section as a guideline to grant variance relief." (4T90-1 to 4). It is not clear what Orlando meant by this statement. This

provision of the MLUL directs the governing body to enact zoning ordinances to ensure a variety of uses. Here, there is no claim that it does not.

Finally, Orlando claimed that the setback variances would result in a desirable visual environment. N.J.S.A. 40:55D-2(i). Orlando did not explain how decreasing setbacks along Rosemary Road would advance the zoning goals to preserve the view corridor, which also provides a desirable visual environment in the community. (4T90-16). The Rosemary Road setback variance undermines the visual improvement sought by the Borough's view corridor requirement.

Orlando testified generally that the variances for parking promoted the general welfare, was "an appropriate location for this type of development," and is an aesthetic enhancement for the community. (4T47-1 to 4T49-19). Orlando opined that the 1-to-1 ratio for parking would promote the general welfare under subsection (a) because it has become the "norm." (4T48-7 to 20). Orlando never explained how reducing the number of parking spaces advances the zoning ordinance standard of 1.2 spaces per room in order to justify a c(2) variance. Orlando's position that a 1-to-1 parking ratio has become the "norm" is contrary to the goal of the Borough to change the "norm." Finally, Mahalo did not show that fewer than 1.2 spaces per room was adequate for the motel use. See Commercial Realty v. First Atlantic, 235 N.J. Super. 577, 594 (App. Div. 1989),

aff'd, 122 N.J. 546 (1991) (granting a variance for a decrease in parking was a proper exercise of the Board's discretion where the number of spaces was adequate for the proposed motel and the approval of trees and shrubs in lieu of parking "promoted a desirable visual environment and prevented urban sprawl").

There is no evidence that the proposed variances would result in a project that would advance the purposes of zoning.

2. Negative criteria

Mahalo similarly could not prove the negative criteria: that granting all the requested variances for setbacks and parking would not result in a substantial detriment to the public good, or cause substantial impairment to the intent and the purpose of the zone plan and zoning ordinance. Both Tomasetti and Orlando claimed that the proposed variance would not be a detriment to the community. The community testified otherwise. The sheer number of community members, thirteen total, who opposed this massive project indicates the negative impact of an oversized, beach-block motel.

In 2005, the Borough amended its zoning ordinance increasing the setback for east/west streets, such as Rosemary Road, from 18 feet to 30 feet, adopting the recommendations of the 2005 MP. (Pa294). The 2005 MP specifies that renovations, which include demolition and rebuilding within the same

footprint, means that “no renovation or addition may encroach further into the setbacks.” (Pa298). The recommended increased setback was designated in the 2005 MP as a “key condition since the tradeoff for increased height is the preservation of the view corridors toward the ocean.” (Pa298). The planning goals of the Borough unquestionably include preserving a 30-foot setback on Rosemary Road. The Board granted Mahalo’s requested variance of 11 feet, which is contrary to the zone plan. This project does not bring the Property more in conformity with the planning goals. Instead, it is a substantial departure from the governing body’s design goals for this motel district.

For parking, Orlando failed to show how undersized spaces and reduced aisle widths brought the parking plan into better conformity with the parking design goals of the Brough. In fact, there was unrefuted testimony by Shropshire, who unlike Orlando, was qualified as an expert in traffic engineering, that the parking design failed to meet generally accepted engineering design criteria. Specifically, Shropshire testified that the undersized parking spaces, the narrow drive aisles, the location of columns and walls adjacent to the undersized spaces, the lack of valet service, and the impact upon the handicapped parking spaces create a substandard parking plan. The Borough’s zoning ordinance standards, if followed, would alleviate these deficiencies in design.

Furthermore, the Borough initially permitted a 1-to-1 parking space ratio in 2005 (Pa379), but thereafter changed the direction of the design plan in the motel district. The ordinance now requires 1.2 parking spaces per unit. Similarly, the size of the parking spaces was increased, and now requires a 9-foot parking space width. (Pa370). The evidence presented by Mahalo does not support the conclusion that reducing the ratio or the size of the parking spaces advances any planning goals of the Borough.

In sum, Mahalo was required to present evidence showing that the requested c(2) variances would advance the planning goals of the Borough by providing a better zone plan. See Kaufmann, supra, 110 N.J. at 563. The evaluation of a c(2) variance must focus on “purposes of zoning that are actually implicated or triggered by the requested relief.” Ten Stary Dom, supra, at 32. Here, the variances that substantially encroach upon the view corridor, substantially increase building and lot coverage, and allow for fewer and smaller parking spaces with narrow drive aisles, do not advance any planning goal of the Borough. To the contrary, it negatively impacts Compass and the public at large.

C. Resolution PB-24-04 does not provide reasons justifying the variances, rendering the decision arbitrary, capricious, and unreasonable

Reconciling a c(2) variance with the master plan and zoning ordinances “depends on whether the grounds offered to support the variance...adequately justify the board’s actions in granting an exception from the ordinance’s requirements.” Lang, supra, 160 N.J. at 58. Stated otherwise, the Resolution must set forth sufficient reasoning to support the Board’s decision.

Resolution PB-24-04 fails to convey adequate reasoning as to why the Board determined that Mahalo’s oversized motel advance the planning goals of the Borough. The Board overstepped its authority in order to approve a project some of the Board members favored.

The instant matter highlights the potential conflict between the governing body and the planning board. The governing body, comprised of elected officials, determines the planning goals of the community.

Here, the Board, in an attempt to justify approving the variances, looked backwards. It considered existing buildings with non-conforming setbacks and substandard parking designs to provide support for its decision, without regard to when those nonconformities arose, which is an important consideration given that the change to the setback requirements occurred in 2005, and changes to the parking-to-unit ratio occurred after 2005. The Board claimed that “there are

hardly any existing hotels/motels within the Borough that comply with the 30ft. view corridor setback requirement” (Pa274), and that “nearly all adjacent hotels, and hotels throughout the Borough for that matter, contain parking spaces which are similar in size and consistent with the Applicant’s proposal.” (Pa275).

By adopting the 2005 MP’s recommendations, the Borough indicated a shift in its design goals to preserve the view corridor and disallow further encroachment. By amending the ordinances to increase the required number of parking spaces per motel unit and to increase the size of the space, the Borough indicated a change to provide more spaces and more spacious parking stalls. The Board wholly disregarded the Borough’s new design plan and instead followed older planning practices embodied in motels constructed decades ago. Mita testified that Mahalo would be the first upgrade in 50 years, indicating that Wildwood Crest motel district is comprised of dated properties. (4T10-13). The Board also disregarded its own 2005 MP which stated that “[m]any of the motels ... have significant setbacks on the east/west streets.” (PA297).

Non-conforming properties cannot justify variances where there has been an amendment to the zoning ordinances. Cicchino v. Township of Berkeley Heights Planning Bd., supra, 237 N.J. Super. at 182 (noting the community planning goal was to reduce density, but the requested variance would increase

density, and plaintiffs' expert failed identify whether the substandard lots in the area predated the zoning upgrades).

Importantly, the MP does not give the Board "flexibility" to alter the Borough's zone plan. Yet the Board found that the "Master Plan calls for flexibility" with respect to preserving motels. (Pa274). The idea of "flexibility" is raised in the 2012 MP Reexamination Report: "Additional flexibility is needed to remove barriers to the successful upgrade of motels and hotels. The Borough is in the process of reviewing the existing height limitations standards, conditional uses, and definitions to permit additional flexibility for motel and hotel owners." (Pa310). The "flexibility" is a recommendation for the Borough to consider changes to the zoning ordinance that would assist motel owners. A master plan, which is adopted by a planning board, cannot give a planning board "flexibility" to grant a variance. Neither Mahalo nor the trial court cited any authority for that position. The zoning ordinance must provide that flexibility in terms of its development standards.

The Board "disagreed that horizontal expansion would impair the intent or purpose of the zone plan in light of the goals and objectives to maintain and preserve existing hotels." (Pa274). The Board apparently balanced the goal of preserving the view corridor with the goal of preserving existing hotels, and determined that the need to preserve the motel outweighed the need for a view corridor. ***There is no evidence in the record that the motel would not be preserved.*** The M-1-A district

has never been at risk for condominium conversion.¹⁰ A board cannot grant a c(2) variance absent evidence that it would advance a planning goal. Here, while true that the Borough enacted ordinances to preserve motel use, that particular planning goal is not in jeopardy here. Mahalo's intent is to upgrade the motel, albeit with an oversized structure. The Board erred in concluding that the variances requested by Mahalo would advance the planning goal to preserve motel use.

The Board is authorized only to consider the application before it, and the relevant ordinances specific to the application, or it will overstep its authority. Under the MLUL, only the governing body has the power to amend or adopt zoning ordinances. Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555, 561 (App. Div. 1996). A zoning or planning board may not utilize its power to grant variances to usurp the legislative power delegated to the governing body to effect the zoning scheme. Ibid. (quoting Feiler v. Fort Lee Bd. of Adj., 240 N.J. Super. 250, 255 (App. Div. 1990)). A planning board may not usurp the legislative power reserved to the governing body of the municipality to amend or revise the zoning plan. Leimann v. Bd. of Adjustment, 9 N.J. 336, 340 (1952), certif. denied, 127 N.J. 325 (1991). The MLUL "exhibits a preference for municipal land use

¹⁰ Mahalo has owned the property since 2019. Mahalo has had almost 6 years to convert the property to residential uses. It has chosen not to do so because the motel use is Mahalo's preferred use for the Property. The zoning ordinance, which permits residential development, would only permit 11 residential units because of its density limit of 1 unit per 1800 square feet of lot area.

planning by ordinance rather than by variance.” Medici v. BPR Co., supra, 107 N.J. at 5. Stated otherwise, the Planning Board may not rezone by variance.

Clearly the Board was taken by Mahalo’s site plan. However, the only beneficiary of the variance relief is Mahalo. The Board has no authority to grant variances that benefit Mahalo alone. Kaufmann, supra, 110 N.J. at 563 (holding that a c(2) variance is not justified when “merely the purposes of the owner will be advanced”).

Here, the sheer number of significant variances granted to Mahalo exceeds the Board’s authority. The grandfathered preexisting non-conformities (side yard setback, Ocean Avenue setback, Beach Avenue setback, and lot coverage) already render the Property incongruous with the current planning goals. Yet Mahalo seeks to make the Property even further removed from the Borough’s goals. Mahalo’s project proposes 100% impervious lot coverage (a 25% increase from what is permitted); significant setback reductions, particularly along Rosemary Road (a 63% decrease from what is required); only a 1-to-1 parking ratio; all of the parking spaces undersized; and substandard drive aisles. Mahalo’s plan does not request a minor departure from the requirements in the zone; instead Mahalo’s variance all but redefine the district, contrary to the Borough’s planning goals as embodied in the zoning ordinance.

A reviewing court affords less deference to a planning board for granting a variance than for denying a variance. Med. Ctr. v. Twp. of Princeton Zoning Bd., supra, 343 N.J. Super. at 199. Mahalo's failure to prove the positive and negative criteria, along with the Board's failure to justify its Resolution, render the Board's decision arbitrary, capricious, and unreasonable.

The Board action so contravenes the Borough's planning goals that the Resolution is not just arbitrary, capricious, and unreasonable: it is unauthorized as a matter of law. The MLUL and the decisional law interpreting the MLUL require the Board to ensure that variances actually advance the community's goals. The MLUL does not allow Board action that contravenes the Borough's zoning ordinances. Here, the Board's Resolution has no basis in law or fact. Mahalo's experts failed to establish any rationale for granting the requested variances. As a matter of law, the Board's action here is unauthorized.

D. The trial court's opinion lacks evidence to support the affirmance of the Board's Resolution

When reviewing a planning board's decision, a trial court must make findings of fact and draw legal conclusions therefrom in the opinion. Failure to do so may result in a remand or reversal. Zalinsky v. Zoning Bd. Of Adj. of Verona, 105 N.J. 363 (1987); Cohen v. Borough of Rumson, 396 N.J. Super. 608, 620 (App. Div. 2007). The trial court failed to make findings of facts actually based on the record, and the conclusions from his findings are fatally flawed.

Regarding positive criteria, the trial court simply highlighted Orlando's testimony citing the purposes of the MLUL purportedly satisfied by the Mahalo's plan, without reconciling the cross-examination where Orlando failed to explain how reducing the view corridor advances a purpose of zoning. The trial court opinion notes that Compass's "major concern" was that the plan "encroaches upon the view corridor" but then merely states that the Board "took no issue" with the 11-foot setback where 30 is required "because it preserved a sufficient view corridor." (Pa19). The zoning ordinance does not require a "sufficient" view corridor. It requires a 30-foot view corridor. The trial court wholly fails to cite a scintilla of evidence in the record that supports such a gross violation of the zoning requirements for setbacks. The opinion further lacks analysis as to how the variances, particularly the Rosemary Road variance, advances a planning goal.

For the positive criteria for parking, the trial court highlights Orlando's testimony that other motels have parking spaces with a one-to-one room-to-unit ratio. But, like the applicant in Cicchino, supra, 237 N.J. Super. 175, there is no evidence when the non-conforming ratio at the other motels was built. The Borough now requires 1.2 parking spaces per room. In addition, the spaces must be 9 feet wide, another more recent ordinance requirement. Mahalo failed to provide evidence that less parking was in fact needed for the motel use. The trial court failed to justify the positive criteria with the record evidence.

The trial court, like the Board, made the egregious error of placing undue weight on the purported zoning goal of preserving the Property's use as a motel. The judge concluded that the Board considered the reduced view corridor acceptable because the 2023 Application "would help maintain the hotel and motel industry." (Pa22). The trial court erred for the same reasons the Board erred in placing too much weight on a planning goal – loss of a motel – that was never in jeopardy. The court was required, but failed, to make finding of fact that the c(2) variance actually advanced the Borough's planning goal to help preserve motel use.

Neither the trial court nor the Board engaged in the balancing test required for positive criteria for a c(2) variance, which requires proof that the "benefits of the deviation [from the existing zoning ordinance] would substantially outweigh any detriment." N.J.S.A. 44:55D-70(c)(2).

The trial court's analysis of the negative criteria is even worse. Mahalo must prove that there is no substantial detriment to the Borough's zone plan, yet the trial court's opinion is woefully deficient in citing anything in the record to support Mahalo's claim. Mahalo's plan contravenes the Borough's zone plan to protect the view corridor and provide adequate parking.

The Board and the trial court claimed that the MP called for "flexibility in renovation to maintain and preserve the motel and hotel industry." (Pa21 to

Pa22). The opinion also lacked any analysis about how a master plan, written by the planning board, could legally give authority to a planning board to grant variances. The trial court compounded the Board's error in claiming that the MP gave the Board flexibility, when that recommendation was for the governing body to be flexible in enacting ordinances to encourage motel use.

The trial court also wrongfully commented that the 2023 Application planned to build an upscale hotel resort "which is a significant upgrade to the unoccupiable, deteriorating motel that is currently at the Property." (Pa22). The existing motel is presently vacant because Mahalo preemptively demolished part of the Property in 2019 in advance of the site plan and CAFRA approvals. The present status of the existing structure, created by Mahalo, cannot justify unauthorized Board action.

The trial court was required to make findings of fact and legal conclusions. Yet the opinion misstates the facts, highlights irrelevant facts, and the legal conclusions therefrom are erroneous as argued above. The trial court simply accepts the Board's findings, without any citations to facts or any reasoning. The court merely adopted the Board's faulty reasoning that the requested variances advance the planning goal of preserving motel use, when nothing in the record suggests that the variances were necessary to renovate the structure for use as a motel, particularly when the zoning ordinance permits vertical

expansion. All the evidence presented by Compass proves that the proposed motel will substantially impair the Borough's goal of preserving the view corridor. Ultimately, the court glossed over the record and rubberstamped the Board's flawed and baseless opinion.

In sum, Kaufmann requires proof that the variances "must actually benefit the community in that it represents a better zoning alternative for the property" and will "put the land more in conformity with the community's development plans." 110 N.J. at 563-64. The record evidence lacks any proof that Mahalo's planned, oversized motel that blocks two-thirds of the required view corridor and provides substandard, inefficient parking aligns with the Borough's planning goals. Both the Board and the trial court below erred in concluding that Mahalo's requested variances should be granted, warranting reversal.

POINT IV
THE BOARD ERRONEOUSLY APPROVED
MAHALO'S SITE PLAN (Pa2; Pa23; Pa277)

A planning board cannot grant or deny a site plan application for any reason. The board must base its decision upon whether the application meets the requirements of state law or local ordinances, which prevents the board from approving or denying a site plan application for arbitrary or capricious reasons which would exceed the board's authority. Hence, if a planning board approves a deficient site plan, regardless of whether variances are sought, the board's

decision warrants reversal. Specifically, if the site plan includes a substandard parking scheme regarding ingress and egress, for which a variance is unnecessary, the board is prohibited from approving the site plan.

“Site Plan” is defined in the MLUL as “a development plan of one or more lots on which is shown...the location of all existing and proposed buildings, drives, **parking spaces**, walkways, **means of ingress and egress.**” N.J.S.A. 40:55D-7 (emphasis added). N.J.S.A. 40:55D-41 sets forth what factors such a local zoning ordinance must include. Amongst those factors is subsection (b) which requires “safe and efficient vehicular and pedestrian circulation, parking and loading.”

Taken together, courts have concluded that planning boards may properly deny site plan applications due to safety conditions of ingress and egress at a proposed location. See Lionel’s Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 268-69 (Law Div. 1978) (holding the municipal planning board could deny a site plan application based solely upon unsafe and inefficient vehicular circulation regarding ingress and egress).

Here, Compass proffered testimony by an expert traffic engineer. Shropshire’s un rebutted opinion concluded that the proposed parking plan fails to meet generally accepted engineering design standards. All of the parking spaces are too narrow, and the drive aisles are similarly too narrow, making it

virtually impossible for an average driver to drive a vehicle through the parking lot. There are too many parking spaces for the size of the lot. He concluded that the proposed parking scheme fails to comply with “generally accepted traffic engineering standards” and he would not recommend approval by the board.” (4T116-1 to 5).

Mahalo failed to produce a traffic engineer. As such, the record cannot support the Board’s approval of site plan with substandard parking as it relates to traffic circulation. Even if the Board determined, albeit erroneously, to grant variances specifically for all of the undersized parking spaces and the narrow drive aisles, the Board was additionally required to consider traffic circulation and safety. Compass’s traffic engineer provided unrebutted testimony that the traffic did not meet accepted traffic engineering standards. The Board failed to reconcile its approval of the site plan with the expert testimony. Accordingly, the Board’s decision approving the site plan is arbitrary, capricious, and unreasonable. The trial court had no basis to affirm the Board’s action.

CONCLUSION

The Board should not have considered the 2023 Application because of the doctrine of *res judicata*. The 2023 Application was almost identical to the previously-denied 2022 Application, except that the new application increased the parking deficiencies, making the parking lot even more non-compliant with the zoning ordinance.

Alternatively, the requested setbacks, particularly on Rosemary Road, do not advance the intent and purpose of the MLUL, do not align with the Borough's zoning ordinance, and detract from the common good by encroaching on the view corridor.

The parking scheme proposes too few spaces, all of which are undersized, and have narrow drive aisles. Mahalo's claim that the variances are required to maintain its use as a motel is specious, as the zoning ordinances allow upward expansion and grandfathers existing non-conformities.

The Planning Board failed to effectuate the goals of Wildwood Crest's zoning ordinance, thus its decision to approve Mahalo's site plan application is arbitrary, capricious, and unreasonable, and unauthorized as a matter of law. The trial court erred in affirming the Planning Board's action by failing to cite any evidence in the record to support the opinion.

Plaintiffs-Appellants G&I Properties, LLC and George & I, Inc., the owners of Compass, respectfully request that this court reverse the trial court's order affirming the Planning Board's decision that erroneously granted Mahalo's site plan application with variance relief, and remand to the Planning Board for a Resolution denying the 2023 Application.

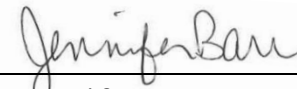
Respectfully submitted,

COOPER LEVENSON, P.A.

By:



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G&I Properties, LLC and George &
I, Inc.

Date: July 21, 2025

August 3, 2017

G & I PROPERTIES, LLC and	:	SUPERIOR COURT OF NEW
GEORGE & I, INC.,	:	JERSEY
Plaintiffs-Appellants,	:	APPELLATE DIVISION
	:	Docket # A-002199-24
v.	:	
	:	ON APPEAL FROM:
BOROUGH OF WILDWOOD	:	SUPERIOR COURT OF NEW
CREST PLANNING BOARD and	:	JERSEY
MAHALO WILDWOOD CREST,	:	LAW DIVISION
LLC,	:	CAPE MAY COUNTY
Defendants-Respondents.	:	DOCKET NO. CPM-L-175-24
	:	
	:	
	:	SAT BELOW:
	:	HON. MICHAEL J. BLEE, AJSC
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**BRIEF OF RESPONDENT,
BOROUGH OF WILDWOOD CREST PLANNING BOARD**

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PRELIMINARY STATEMENT

This is a land use case from Cape May County. Appellants, G & I Properties, LLC and George & I, Inc. (collectively referred to as “G & I Properties”), appeal the well-reasoned decision of the trial court by which Hon. Michael J. Blee, A.J.S.C. affirmed decisions of Respondent, Borough of Wildwood Crest Planning Board (the “Board”), finding that the development application of Respondent, Mahalo Wildwood Crest, LLC (“Mahalo”), was not barred by the doctrine of res judicata and granting site plan approval, with variances, with respect to Mahalo’s hotel property located at 6501 Ocean Avenue in the Borough of Wildwood Crest. The issues presented on appeal therefore are whether the Board’s decisions were arbitrary, capricious and unreasonable. Giving deference to the Board’s factual findings where required, the record clearly demonstrates, and the trial court found, that the Board properly applied the relevant statutes and precedential case law. As a result, the Board’s decisions were not arbitrary, capricious and unreasonable, meaning that this Court should not hesitate to affirm the trial court’s judgment.

In August 2023 Mahalo filed a land development application with the Board by which it sought preliminary and final major site plan approval along with variances and design waivers (the “2023 Application”). The 2023 Application was not Mahalo’s first for the property. Approvals allowing for

renovation of Mahalo's hotel were granted in 2019 but NJDEP's application of CAFRA administrative regulations required that the approved plans be modified. As a result, in 2022 Mahalo submitted second application to the Board (the "2022 Application"). The Board denied the 2022 Application. Its denial primarily was based upon the Board's dissatisfaction with the proposed parking plan. Hence, the 2023 Application was Mahalo's third for the property.

The Board's decision on the 2023 Application granted preliminary and final major site plan approval, with variances, to Mahalo with respect to property located at 6501 Ocean Avenue in the Borough of Wildwood Crest. Those land use approvals will pave the way for Mahalo to fully renovate the former Ocean Holiday Motel, an old, vacant, non-operational 5-story hotel that has been closed for many years, into an upscale, contemporary resort hotel possessing amenities expected of such resorts by 21st Century hospitality industry standards.

For the reasons discussed below, the Board contends that a careful examination of the record will leave this Court without any doubt that the Board's approval of the 2023 Application was the very antithesis of arbitrary, capricious and unreasonable decision-making. Judge Blee's decision and judgment, therefore, should be affirmed.

PROCEDURAL HISTORY

On August 23, 2023, Mahalo filed a land development Application with the Board by which it sought preliminary and final major site plan approval along with variances and design waivers (the “2023 Application”). Pa145. The property that is the subject of the 2023 Application is developed with the former Ocean Holiday Motel; an old 5-story hotel that has been closed for many years. Pa149; Pa219. For all intents and purposes, the subject property is beach-front or ocean-front property. The property is located in the M-1A zoning district in which motels and hotels are permitted uses. Pa219; Pa359.

The public hearing on the 2023 Application commenced on December 06, 2023. 3T. At that hearing G&I Properties argued that the 2022 Application and the 2023 Application were substantially the same application and, since the 2022 Application was denied, the Board should not hear the 2023 Application by reason of the doctrine of res judicata.¹ 3T2-3 – 3T6-21. Mahalo argued that the two Applications were not substantially similar, a position with which, after thorough analyses and debate, the Board agreed. 3T6-24 – 3T9-20; 3T-21 – 3T25-16. The public hearing then was continued and resumed on February 13, 2024.

¹ The 2022 Application is referenced in the Preliminary Statement, above, and is described in greater detail below in the Statement of Facts.

At the conclusion of the February 13, 2024, hearing, by a 5-2 vote, the Board approved Mahalo's 2023 Application with the variance relief sought. 4T189-19 – 4T193-11. That decision was memorialized in the Board's Resolution PB-24-04 which it adopted on March 6, 2024. Pa244.

On April 25, 2024, G & I Properties initiated an action challenging the Board's decisions by filing its Complaint in lieu of prerogative writs in the Cape May County Law Division. Pa031. Mahalo filed its Answer on April 29, 2024. The Board filed its Answer on May 31, 2024. Pa046. The case was assigned to Honorable Michael J. Blee, A.J.S.C.

On December 19, 2024, Judge Blee conducted a prerogative writ trial by way of hearing oral arguments from the Parties. At the conclusion of trial, Judge Blee reserved decision.

On February 13, 2025, Judge Blee issued a written opinion in which he found that the Board's decision to not invoke res judicata as a bar to a hearing of Mahalo's 2023 Application was reasonable. Judge Blee further concluded that the Board's decision to grant Mahalo's 2023 Application for preliminary and final site plan approval, with variance relief, was not arbitrary, capricious nor unreasonable. Pa003 – Pa024. An accompanying Order implementing that decision concurrently was signed and filed. Pa001.

On March 26, 2024, G & I Properties timely filed a Notice of Appeal with this Court. Pa381.

STATEMENT OF FACTS

The Parties - Appellant, G&I Properties, LLC, is the owner of a motel property located in the Borough of Wildwood Crest known as the Compass Family Resort which is located at 6501 Atlantic Avenue. Pa031 at par.1. Appellant, George and I, Inc., is a related entity that operates the Compass Family Resort. Pa031 at par.1.² With the approvals Mahalo received from the Board and which are the subject of this appeal, G & I Properties would be a competitor of Mahalo in the Wildwood Crest tourism industry.

Respondent, Mahalo Wildwood Crest, LLC, is a New Jersey Limited Liability Company that maintains its principal office in Chester, Pennsylvania. Mahalo owns the property in the Borough of Wildwood Crest, which is the subject of this matter. Pa146.

Respondent, Borough of Wildwood Crest Planning Board, is the Planning Board for the Borough of Wildwood Crest in Cape May County. It has been organized, and operates, pursuant to the Municipal Land Use Law (“MLUL”), N.J.S.A. 40:55D-1, et. seq., and the ordinances of the Borough of Wildwood Crest.

² Throughout this Brief the Appellants collective are referred to as “G & I Properties.”

The Property - Mahalo is the owner of real property in the Borough of Wildwood Crest, and has been for several years, which is designated on the Tax Map as Block 50.04, Lots 3, 4, 7 & 8 (the “property” or the “subject property”). Pa145; Pa245. The property has frontage on three streets, Beach Avenue, Ocean Avenue and Rosemary Road. Pa219. Beach Avenue and Ocean Avenue are generally north-south streets that basically run parallel to the beach and Atlantic Ocean. Pa219. Ocean Avenue lies one block to the west of Beach Avenue. Pa219. Rosemary Road is a generally east-west street that is perpendicular to the beach and Atlantic Ocean. Pa219. There is no development on the easterly side of Beach Avenue. As a result, the subject property can be considered beach-front or ocean-front property.

The subject property has 100 feet of frontage on both Ocean and Beach Avenues and 200 feet of frontage along Rosemary Road. Pa149; Pa219. The property is 20,000 square feet in size. Pa149. The subject property is developed with an old, 5-story hotel structure which formally was known as the Ocean Holiday Motel. Pa149. The Ocean Holiday Motel has been closed for several years. 4T10-14

As to local zoning, the subject property is located in the M-1A zoning district. Pa145. Hotels and motels are permitted in the M-1A zoning district. Pa359. There are various preexisting, non-conforming conditions at the

property which pertain to the Beach Avenue front yard setback, side yard setback, lot coverage, minimum unit area, parking area setback, curb cuts, and back out parking. Pa158. As discussed in greater detail below, by its 2023 Application, Mahalo sought preliminary and final site plan approval, along with “c” variances, so as to allow reconstruction of the first-floor lobby, renovation of the existing hotel units, construction of a 5-story addition, and construction of a second-floor swimming pool and patio area. The reconstructed hotel would contain 64 units.

The 2022 Application - On September 22, 2022, Mahalo filed the 2022 Application with the Board. Pa053 – Pa069. By its 2022 Application Mahalo sought to “reconstruct the existing first-floor lobby of the premises, to renovate the existing five-story motel, reconstruct the second-floor pool/patio area, and add an additional five-story motel building. The renovated motel would have contained 55 units, and the new motel building would have contained 11 units, for a total of 66 units.” Pa053 – Pa069. As detailed in its Resolution PB-23-11, adopted July 5, 2023, Mahalo sought preliminary and final major site plan approval with variances pertaining to minimum hotel unit size, Rosemary Road yard setback, Beach Avenue yard setback, Ocean Avenue yard setback, rear yard setback, building coverage, lot coverage, off-street parking, parking stall dimensions, tandem parking, back-out parking within

public right-of-way, landscape buffering, no loading zone, drive aisle width, swimming pool in front yard, signage, and raised curbs. Pa112. A public hearing on the 2022 Application was held on April 5, 2022, (1T) and June 8, 2022 (2T). At the conclusion of the hearing the Board voted to deny the 2022 Application, primarily because of its disapproval of the proposed parking plan. 2T159-20 – 2T163-10. In that respect PB-23-11 indicated:

137. Board Members unanimously agree that the proposed off-street parking arrangement was problematic. They agreed that the undersized drive aisles and parking spaces presented significant safety concerns and were not functional to address the needs of the proposed hotel. Pa134.

138. Board Members found that the requirement that vehicles back out of the parking area presented safety concerns to vehicle operators and the general public. Pa134.

139. Moreover, Board Members found that the proposed parking arrangement presented substantial detriments to the public good. Pa134.

The 2023 Application - On August 23, 2023, Mahalo filed the 2023 Application with the Board. Pa145. Between the time that the Board rendered its decision on the 2022 Application and the filing of the 2023 Application, there were no changes with regard to the pre-existing, nonconforming conditions of the property. By its 2023 Application Mahalo sought to "reconstruct the existing first floor lobby, renovate the existing five-story motel, construct a second-floor pool/patio area and add an addition to the five-

story motel building." Pa145 – Pa160. The renovated hotel would contain 64 units. As previously indicated, there were a variety of pre-existing, nonconforming conditions at the property. None of those conditions were to be exacerbated by the 2023 Application.

As noted in Resolution PB–24–04, the following variances from the Borough’s zoning ordinance were sought pursuant to N.J.S.A. 40:55D–70c:

1. Front yard setback (Rosemary Road) – 30’ required, 11’ proposed.
2. Front yard setback (Beach Avenue) – 20’ required, 0’ existing and proposed.
3. Front yard setback (Ocean Avenue) – 20’ required’ 5’ proposed.
4. Lot coverage – 80% permitted, 100% proposed.
5. Minimum contiguous raised curbing – 35% required, 24.7% proposed.
6. Minimum pool deck setback – 16’ required, 11’ proposed.
7. Rear yard setback – 8’ required, 4’ existing and proposed.
8. Permission to locate swimming pool in front yard.
9. Permission to not provide a loading zone.
10. Minimum required off-street parking – 77 spaces required, 64 proposed.
11. Minimum parking space dimensions – 9’ x 18’ required, 8’ x 17.25’ proposed.
12. No landscape buffer in off-street parking area.
13. Minimum drive aisle width – 20’ required, 15.75’ proposed.
14. Maximum number of curb cuts – 1 permitted, 3 proposed.
15. Maximum number of signs – 2 permitted, 3 proposed.
16. Maximum individual sign area – 25 sq. ft. permitted, 144 sq. ft. proposed.
17. Maximum total sign area – 50 sq. ft. permitted, 432 sq. ft. proposed.
18. Permission to not provide screened trash/recycling area. Pa245 – Pa246.

Mahalo sought preliminary and final major site plan approval. Pa147. Mahalo did not seek any exceptions from the Borough's site plan ordinances pursuant to N.J.S.A. 40:55D-51b. Therefore, although the 2023 Application sought "c" variances from the requirements of the zoning ordinance, the 2023 Application complied with the Borough's site plan ordinance.

The application was deemed complete on October 5, 2023 at which time it was scheduled for hearing before the Board to be conducted on December 6, 2023 whereupon Mahalo mailed notice to all property owners within 200 feet of the property and caused notice of the hearing to be published in the Board's official newspaper all in accordance with the MLUL and the Borough's land development ordinances. Pa246.

The December 6, 2023 Public Hearing³ - The hearing on the 2023 Application commenced on December 6, 2023. 3T. This portion of the hearing was devoted solely to the assertion made by G&I Properties that the 2023 Application was substantially the same as the 2022 Application and, as such, the Board should not hear it by virtue of the doctrine of res judicata. Counsel for G&I Properties, LLC, was afforded the opportunity to make his arguments to the Board. 3T2-3 – 3T6-21; 3T9-23 – 3T10-20. Similarly,

³ It is noted that references in 3T to “Mr. Velasco” should be to “Mr. Belasco” meaning Board Solicitor, Robert T. Belasco, Esquire.

counsel for Mahalo was afforded the same opportunity. 3T6-24 – 3T9-20. No witnesses testified during the December 6, 2023 hearing. During the December 6, 2023, hearing the parties discussed the differences between the 2022 Application and the 2023 Application and G&I Properties agreed that changes from the 2022 Application had been made in the 2023 Application. In that regard, paragraph 11 of Resolution PB-24-04 indicated:

[Counsel for G&I Properties] acknowledged that the Application before the Board was modified to address the prior concerns raised by the Board, including modifying the overall traffic/parking circulation plan, reducing the overall number of proposed hotel rooms from 66 to 64, improved the overall off-street ratio of parking spaces to hotel rooms, reduced the number of back out parking spaces, and increased the proposed setback along Ocean Avenue. Pa247.

Board Members extensively reviewed and analyzed the differences between the two Applications, decided that the two Applications were not substantially similar and unanimously voted to hear the 2023 Application. 3T14-20 – 3T25-16. Their findings in that regard were set forth in Resolution PB-24-04 which included the following:

18. The Board deliberated and ultimately determined that the modifications made by the Applicant were incorporated to address concerns previously raised by the Board at the June 2023 hearing. Pa248.

19. The Board determined that the overall reduction in the number of hotel rooms, the change in the parking plan and

circulation, and the increased Beach Avenue setback were substantial and warranted treating this as a new application.⁴ Pa248.

20. Accordingly, the Board determined that the application was not barred by the doctrine of res judicata. Pa249.

Due to the late hour and the length of time anticipated to hear the 2023 Application, the hearing was continued to February 13, 2024.

The February 13, 2024 Public Hearing⁵ - At the February 13, 2024, public hearing, Mahalo presented testimony of two expert witnesses. They were its project engineer and planner, Vincent Orlando, PE, PP, and its architect, Steven Tomasetti, PE, PP. Each was accepted by the Board as an expert in their respective professional fields. 4T23-14 – 25; 4T11-3 – 16. Additionally, Mahalo’s principal, Eustace Mita, was sworn and provided testimony as well. 4T9-23 – 4T10-22.

Generally speaking, Mr. Mita described the 2022 Application and the current conditions at the subject property. 4T10-14. He described how the 2023 Application differed from the 2022 Application and indicated that, if

⁴ The reference to “Beach Avenue” is a typographical error. The increased setback was to Ocean Avenue. Compare Resolution PB-23-11 (Pa112) with Resolution PB- 24-04 (Pa244).

⁵ Throughout 4T Board Solicitor, Robert T. Belasco, Esquire, variously is referred to as “Mr Senaglia” and as “Unidentified Speaker.”

approved, the project would constitute the first new hotel in the Borough in over 50 years. 4T10-2-13.

Mr. Tomasetti reviewed his architectural drawings with the Board and described the various types of units that would be in the new hotel. 4T11-23 – 4T16-9. He gave the Board an overview of two proposed parking plans for the project and described how they differed from the parking plan that had been a component of the 2022 Application. 4T12-12-23. Mr. Tomasetti also described the setback deficiencies for which variance relief was being sought. 4T17-19 – 4T20-5. He provided testimony relative to the proposed reconstructed pool deck, described the exterior features of the hotel and provided testimony regarding the proposed signage for the hotel, including the lighting for the proposed signs. 4T20-25 – 4T23-10.

Mahalo's project engineer and planner, Vincent Orlando, PE, PP, described the site plan and explained how it differed from the 2022 Application. 4T24-3 – 4T25-1. He provided extensive testimony as to how each of the two proposed parking plans would operate. 4T25-3 – 4T38-8. He testified that none of the preexisting, nonconforming conditions at the property would be exacerbated. 4T38-9 – 4T39-8. Mr. Orlando described all of the variance relief that was being sought and as to the variance relief being sought offered testimony in support of the positive and negative criteria for each

group of variances; i.e., setback variances, parking variances, and signage variances. 4T41-12 – 4T43-20; 4T48-7 – 4T49-10; 4T49-14 - 4T49-19; 4T49-21 – 4T50-16; 4T52-19 – 4T53-12; 4T53-22 – 4T54-3. Mr. Olando opined that granting the requested variances would advance several of the goals of the MLUL, would not cause substantial detriment to the public good, would not substantially impair the intent and purpose of the zone plan and zoning ordinance and that the benefits to be obtained by granting the requested variance relief would substantially outweigh any potential detriment. 4T45-20 – 4T46-4; 4T49-21 – 4T50-11; 4T54-20-25. Mr. Tomasetti and Mr. Orlando both were cross-examined by counsel representing G&I Properties. 4T9-23 – 4T65-14.

During the February 13, 2024, hearing G&I Properties presented testimony of two expert witnesses. They were its professional planner, Peter G. Steck, PP, and its traffic engineer, David Shropshire, PE, PP. Each was qualified by the Board as an expert in their respective professions. 4T92-18 – 4T93-8; 4T109-11 – 4T109-9.

Generally speaking, Mr. Steck described the existing nonconformities at the property and testified that the 2023 Application was inconsistent with the Borough's Master Plan. 4T100-9 – 4T102-14; 4T107-7-9. He disagreed with the proposition that granting the requested variances would advance any of the

purposes of the MLUL. 4T107-3-6. He opined that the benefits to be obtained by granting the requested variances would be outweighed by the resultant detriments to the community. 4T107-7-20.

G&I Properties' traffic engineer, David Shropshire, PE, PP reviewed the two proposed parking plans for the project. 4T109-10 – 4T116-5. He testified that they did not conform to generally accepted traffic engineering standards. 4T109-19-21. He described what, in his opinion, were deficiencies with regard to each proposed parking plan. He opined that the parking plans would be detrimental to the surrounding neighborhood and to the Borough and could not recommend that either be approved. 4T96-16 – 4T116-5.

The Board heard testimony from 14 individuals, two of whom supported the Application and 12 of which opposed the Application. Pa273 (PB-24-04 at par. 170).

The Board did not reject the testimony of any of the expert witnesses that testified and, indeed, carefully considered and weighed all of the expert testimony that was presented to it. 4T181 – 4T189-17.

As indicated in the Procedural History, at the conclusion of the February 13, 2024 hearing, by a 5-2 vote, the Board approved Mahalo's 2023 Application with the variance relief sought (4T189-19 – 4T193-11) and

memorialized its decision in the Board's Resolution PB-24-04, adopted on March 6, 2024. Pa244.

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW IN THE SUPERIOR COURT.

It is well-settled that the factual determinations of a land use board are presumed to be valid and that the exercise of discretionary authority by land use boards will not be disturbed unless it is arbitrary, capricious and unreasonable. Dunbar Homes, Inc. v. Zoning Bd., 233 NJ 546, 558 (2018). Review of a land use board's actions in the Superior Court is intended to be determinative of the validity of those actions and not as means by which a reviewing court substitutes its own judgment for that of the board's, the rationale being that the citizens who comprise local land use boards are familiar with the characteristics and interests of their own communities and therefore are better equipped than the courts to assess evidence presented to them in connection with development applications. CBS Outdoor v. Lebanon Plan. Bd., 414 N.J. Super. 563, 578 (App. Div. 2010).

A reviewing court must determine whether the board followed the relevant statutory guidelines and properly exercised its discretion. Burbridge v. Mine Hill Tp., 117 NJ 376, 385 (1990). When considering a variance

request, a land use board is given wide latitude in exercising its discretion. Kramer v. Bd. of Adj., Sea Girt, 45 NJ 268, 296 (1996). On review in the Superior Court, a board's decision enjoys a presumption of validity. Cell S. of NJ, Inc. v. Zoning Bd. of Adj., 172 N.J. 75, 81 (2002). "In evaluating a challenge to the grant or denial of a variance, the burden is on the challenging party to show that the zoning board's decision was 'arbitrary, capricious or unreasonable.'" Price v. Himeji, L.L.C., 214 N.J. 263, 284 (2013). So long as the record reflects an adequate basis for the board's conclusions, substantial deference should be accorded the board's factual determinations and exercise of discretionary authority based on those determinations. Kramer, 45 N.J. at 296-97; Lang v. Zoning Board of Adjustment, 160 N.J. 41 (1999).

To provide an appropriate record for review, a board must memorialize its findings of fact and the conclusions based thereon. N.J.S.A. 40:55D-10(g); N.Y. SMSA v. Bd. of Adjustment; Twp of Weehawken, 370 N.J. Super. 319, 333-334 (App. Div. 2004); Smith v. Fair Haven Zoning Bd. Adj., 335 N.J. Super. 111, 123 (App. Div. 2000). A decision is arbitrary and capricious when it disregards circumstances proven or ignores controlling law or demonstrated fact. Bayshore Sewerage Company v. Department of Environmental Protection, 122 N.J. Super. 184, 199 (Ch. Div. 1973), aff'd 131 N.J. Super. (App. Div. 1974). There must be "substantial evidence" before the Board to

support its determination. Cell S. of NJ, Inc. v. Zoning Board of Adj., 172 NJ 75, 89 (2002). “[I]t is essential that the board’s actions be grounded in evidence in the record.” Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 196-97 (App. Div. 2009) (citing Fallone Properties v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)).

When this Court considers an appeal of a trial court’s review of a land use board’s decision, this Court is bound by the same standards as the trial court. N.Y. SMSA v. Bd. of Adjustment; Twp of Weehawken, 370 N.J. Super. at 331. “When the Law Division in its review has applied the proper substantial-evidence standard, the appellate court’s review is limited to a determination of whether that standard was properly applied.” Pressler & Verniero, Current N.J. Court Rules, Comment R. 4:69-7 [5.2] (Gann 2025), citing ERG Container v. Board of Chosen, 352 N.J. Super. 166, 173-174 (App. Div) certif. den. 174 N.J. 546 (2002).

In this matter the record amply demonstrates that there was substantial, competent evidence supporting its decision to hear the 2023 Application and to not invoke the doctrine of res judicata as a bar to its consideration of the 2023 Application. The record also clearly demonstrates that there was a substantial body of competent evidence supporting its approval of the application for preliminary and final major site plan approval with associated “c” variances.

The record unquestionably demonstrates that the evidence in support of the requested approvals was so overwhelmingly in favor of Mahalo's application that the Board's approvals should easily be deemed to have not been arbitrary, capricious or unreasonable. As such the trial court's judgment should be affirmed.

II. THE BOARD'S DECISION THAT MAHALO'S 2023 APPLICATION WAS NOT BARRED BY REASON OF THE DOCTRINE OF *RES JUDICATA* WAS SUPPORTED BY THE FACTS AND THE CONTROLLING LEGAL PRECEDENT.

During the December 2023 hearing the Board considered the issue of whether Mahalo's 2023 Application was substantially similar to its 2022 Application which had been the subject of a full public hearing and a decision on the merits. After consideration and debate the Board determined that the two applications were not substantially similar. G & I Properties disagree and contend that the two applications were substantially similar. Therefore, G & I Properties argue, by reason of application of the doctrine of res judicata, the Board should not have heard the 2023 Application, and it erred in doing so. The authority to invoke res judicata as a bar to hearing the 2023 Application rests with the Board and was for the Board to make. The authority to invoke the doctrine is not for G & I Properties, as an objector to the 2023 Application,

to impose upon the Board. The facts and the relevant precedent support the Board's decision to hear the 2023 Application.

“The principle of *res judicata* has evolved principally in the judicial system to prevent the same claims involving the same parties from being filed and brought before a court repeatedly.” Ten Stary Dom P'shp. v. Mauro, 216 N.J. 16, 39 (2013). Stated differently, under the doctrine of *res judicata* if the same party seeks the same relief in the same factual setting as was previously sought and denied, then the second application should be dismissed on the ground that it already has been decided. The doctrine applies to the decisions of administrative agencies such as planning and zoning boards. Bressmar v. Gash, 131 N.J. 517, 526 (1993). In that regard, our Supreme Court has explained:

If an applicant files an application similar or substantially similar to a prior application, the application involves the same parties or parties in privity with them, there are no substantial changes in the current application or conditions affecting the property from the prior application, there was a prior adjudication on the merits of the application, and both applications seek the same relief, the later application may be barred. It is for the Board to make that determination in the first instance. Ten Stary Dom P'shp., 216 N.J. at 39.

See also Home Builders Assn. of Northern N.J. v. Paramus Bor., 7 N.J. 335 (1951); Pieretti v. Bloomfield, 35 N.J. 382 (1961) (where greater relief is

requested in the second application it may be barred by the Board upon a finding that res judicata is applicable).

In Bressmar our Supreme Court observed: “The application of res judicata to adjudicative decisions of administrative agencies, like its application to judicial decisions, rest on policy considerations such as ‘finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; eliminations of conflicts, confusion and uncertainty; and basic fairness’” Bressmar, 131 at 527 quoting Hackensack v. Winner, 82 N.J. 1, 32-33 (1980).

Clearly, the purpose of the doctrine is to prevent the same case from being brought before a court, or in the case of a land use board, to prevent the same application from being brought before the board, time after time. That is to say, the purpose of the doctrine is to prevent the same party from having a bite at the apple time after time after time. That said, even where an application is "closely similar" to a prior application, if the applicant demonstrates changed circumstances, "it is within the discretion of the board whether to reject the application on the ground of res judicata, and the exercise of that discretion may not be overturned on appeal in the absence of a showing of unreasonableness." Mazza v. Bd. of Adjustment, 83 N.J. Super. 494, 496 (App. Div. 1964), appeal dismissed, 47 N.J. 161 (1966); see also Russell v.

Board of Adjustment of Tenafly. 31 N.J. 58, 67 (1959) (noting courts should not disturb a board's finding unless it is arbitrary, capricious, or unreasonable). The board's decision, one way or another, "is presumptively valid, and is reversible only if it is arbitrary, capricious and unreasonable." In re Convery, 166 N.J. 298, 306 (2001).

Given the prevailing jurisprudence discussed above, the Cox & Koenig treatise indicates:

In order for the doctrine of res judicata to be applicable, it must be shown, among other things, that:

- (1) The second application is substantially similar to the first;
 - (2) The same parties or their privies are involved;
 - (3) There must be no substantial change in the application itself or conditions surrounding the property;
 - (4) There must have been an adjudication on the merits in the first case;
 - (5) Both applications must involve the same cause of action.
- Cox & Koenig, NJ Zoning and Land Use Administration, §19-3.2 (Gann, 2025).

In this case the two Applications involved the same applicant and the same property and there was a decision on the merits with respect to the 2022 Application. Therefore, the only real issue for the Board to resolve was whether the 2023 Application was substantially similar to the 2022 Application.

The Board devoted the entirety of the December 06, 2023, portion of the public hearing on the 2023 Application to the issue of whether a hearing on the Application should be barred by reason of the application of the res judicata doctrine. See generally 3T. Counsel for G&I Properties was afforded the opportunity to make his arguments to the Board. 3T2-3 – 3T6-21; 3T9-23 – 3T10-20. Similarly, counsel for Mahalo was afforded the same opportunity. 3T6-24 – 3T9-20. Board Members debated the issue. In doing so, they specifically identified what, in their respective opinions, made the 2023 Application substantially different from the 2022 Application.

In that regard, and by way of example, Board Member Daniels stated:

Obviously you don't have to – you're not going to change all of the variance requests. That's never going to happen. That's – there's some certain things they're always going to ask for. But I do think that in – in what I have read here and in looking at the plan, they have tried to address the parking issue, which was huge for us (emphasis added). And I think what makes this different is they're coming in with two different potential plans and, giving us an opportunity to look at two different potential plans, which are nothing like the first plan. So in my mind, that makes it a new application. 3T17-4 – 3T17-14.

Board Member Hunt stated: “I think actually pulling the building off of Ocean Avenue makes it substantially different (emphasis added).” 3T17-15.

Board Member Vodges stated: “... I mean, the parking is – parking was my main issue last time and they've worked on it and worked on it and they've

changed it.” 3T17-23 – 3T17-25.⁶ He further stated: “I feel as though they’ve made a substantial change in the parking and the setback on Ocean Avenue and I view it as a different application in all (emphasis added).” 3T24-7 – 3T24-9. Board Member Melchiorre said: “I think they have made enough changes to warrant us hearing this (emphasis added).” 3T24-25 – 3T25-1.⁷ The Board’s Resolution PB-24-04 indicated:

18. The Board deliberated and ultimately determined that the modifications made by the Applicant were incorporated to address concerns previously raised by the Board at the June 2023 hearing. Pa248.

19. The Board determined that the overall reduction in the number of hotel rooms, the change in the parking plan and circulation, and the increased Beach Avenue setback were substantial and warranted treating this as a new application.⁸ Pa248.

20. Accordingly, the Board determined that the application was not barred by the doctrine of res judicata. Pa249.

In Russell, the New Jersey Supreme Court held that courts should not preclude a board from considering a second variance application if the second application contains changes that are “sufficient.” Russell, 31 N.J. at 67. A local board’s decision on the issue of whether the changes from one

⁶ In transcript 3T Board Member, Bradley Vodges, is referred to as “Mr. Vajas.”

⁷ In transcript 3T Board Member, Brian Melchiorre, is referred to as “Mr. Navyad.”

⁸ The reference to “Beach Avenue” is a typographical error. The increased setback was to Ocean Avenue. Compare Resolution PB-23-11 (Pa112) with Resolution PB- 24-04 (Pa244).

application to a second application are “sufficient” should “be overturned on review only if it is shown to be unreasonable, arbitrary or capricious.” Id. Thus, the reviewing court need not decide whether it would have reached a different decision if the question had been before the court in the first place, but it should decide if the local board’s decision was unreasonable, arbitrary and capricious. If it finds that the local board’s decision to hear the second application was unreasonable then it should not hesitate to overturn that decision. Kaufmann v. Planning Bd. for Warren Tp, 110 N.J. 551, 558 (1988).

In order for the 2023 Application to be substantially different, or sufficiently different, from the 2022 Application Mahalo had to address the Board’s concerns regarding the parking plan for the property. The Board’s decision on the 2022 Application made that crystal clear and that is precisely what Mahalo did, and more. G & I Properties engage in an exercise of counting variances. In the land use context, such an exercise is meaningless. Rather, the related issues of substantiality and sufficiency of differences must focus on the totality of the substantive differences between the two applications at issue. The precedents discussed above make it clear that when a land use board is considering res judicata as a bar to hearing an application, substance is to prevail over form. G & I Properties essentially argue the opposite.

The record in this matter clearly establishes that the Board carefully analyzed and considered the substantive differences between the 2022 Application and the 2023 Application –particularly, the differences in the parking plans-- and by a unanimous vote (3T23-22 – 3T25-16) was satisfied that there was sufficient difference between the two Applications and that they were not substantially similar thereby justifying the decision to hear the 2023 Application. Board Members clearly and cogently stated on the record their rationale for so deciding. The Board’s memorializing Resolution was equally clear. It cannot reasonably be said that the Board’s decision on the res judicata issue was arbitrary, capricious and unreasonable. As such, the Board’s decision to hear the 2023 Application was supported by the facts and the controlling legal precedents. It cannot be said that the Board erred. The argument of G & I Properties to the contrary should be resoundingly rejected by this Court.

III. THE TRIAL COURT’S JUDGMENT SHOULD BE AFFIRMED BECAUSE THE BOARD’S GRANT OF MAHALO’S APPLICATION WAS SUPPORTED BY SUBSTANTIAL, CREDIBLE EVIDENCE.

By its 2023 Application, Mahalo sought preliminary and final major site plan approval along with variances pursuant to N.J.S.A. 40:55D-70c(2). As to “c2” variances, the MLUL provides:

. . . where in an application or appeal relating to a specific piece of property the purposes of this act . . . would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow departure from the regulations pursuant to article 8 of this act [N.J.S.A. 40:55D-62, et. seq.] . . .

Our Supreme Court first considered the c2 variance in Kaufmann v. Planning Bd. for Warren Tp., 110 N.J. 551 (1988). In that matter the Court stated:

By definition, then, 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 the c(2) case, then, will not be on the characteristics of the land that, in light of current zoning requirements, creates a “hardship” on the owner warranting a relaxation of the standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community. Kaufmann, 110 N.J. at 563.

The inquiry on whether the purposes of the MLUL would be advanced by the c2 deviation and whether the benefits of such a deviation would outweigh any detriment constitute the so-called positive criteria. In that regard, this Court has observed: “A c2 variance must set forth what purposes of the MLUL will be advanced by granting the requested variance.” Wilson, 405 N.J. Super. at 198.

As with any other variance, a c2 variance may not be granted without satisfaction of the so-called negative criteria. That is to say, no c2 variance may be granted “without showing that such a variance or other relief can be granted without substantial detriment to the public good and will not impair the intent and purpose of the zone plan and zoning ordinance.” N.J.S.A. 40:55D-70. With respect to the negative criteria, in Medici v BPR Co., 107 N.J. 1 (1987), our Supreme Court indicated that the focus of the negative criteria is the effect of the variance on the surrounding properties and the impact that granting variance relief will have on adjacent properties.

As with all other variances, the c2 variance applicant bears the burden of proving both the positive and negative criteria. Ten Stary Dom P’shp. v. Mauro, 216 N.J. at 30. In this case, Mahalo overwhelmingly satisfied both the positive and negative criteria.

A. The Evidence that was Presented to the Board Satisfied the Predicate Positive Criteria for the c2 Variances.

As discussed above, to satisfy the positive criteria for the grant of a c2 variance the applicant must demonstrate that one or more the purposes of the MLUL, as they are set forth at N.J.S.A. 40:55D-2, would be advanced by the c2 deviation and that the benefits of such a deviation would outweigh any detriment. In this case the record below amply demonstrates that the evidence

presented to the Board undeniably established that a grant of the requested c2 variances would promote several of the statutorily defined purposes of zoning. Additionally, the evidence also clearly established that the benefits to be derived by granting the requested variances would outweigh any resulting detriment.

As to the variances sought, Mahalo's expert testimony dealt with them in three categories; one category being for all setback variances, the second category being for the parking variances, and the third category being for the signage variances. 4T40-8. Each of those three categories, and the evidence presented to the Board as to each, is discussed below.

With regard to the setback variances, Mahalo's Engineer/Planner, Vincent Orlando, PE, PP, testified that granting the setback variances would advance at least three purposes of the MLUL. 4T41-12 – 4T43-20. More particularly, he testified that granting the setback variances would advance the purpose of the MLUL found at N.J.S.A. 40:55D-2a stating that granting the variances would “encourage municipal action to guide the appropriate use of development of all lands within the state and manage [sic] will promote the public safety, health[,] morals, and general welfare.” 4T43-8 – 4T43-11. Mr. Orlando indicated that the MLUL purpose found at N.J.S.A. 40:55D-2g would be advanced by granting the setback variances because granting the variances

would allow for a variety of activities, including commercial and recreational, in an area which provided sufficient space for those activities. 4T43-11 – 4T43-16. Additionally, Mr. Orlando testified that granting the setback variances would advance the MLUL goal found at N.J.S.A. 40:55D-2i (promotion of a desirable visual environment through creative development techniques). 4T43-17 – 4T43-19. As to the benefit/detriment analysis, Mr. Orlando testified:

The variance relief that we're seeking I believe is consistent with the type of development that has occurred in the community, it provides for, I believe, a better alternative to taking a facility down and putting up residential units.

I think that when you look at the neighborhood, the way this has grown all the existing hotels have out parking, they're close to the setbacks, there's a lot of hotels that are within the setback of the BU Carter [view corridor]. And I think that in this particular case, there is no substantial judgment [detriment] to the public good. In fact, if anything, I think a rising tide lifts all boats and in this case, increasing this, the appearance of this hotel and the integrity of hotel will have a positive impact on all other hotels within the community.

Mr. Corrado: So, in other words, in your opinion, the benefits that allowing these variances that you've just described outweigh any disadvantages that might accrue from the granting of these variances. Is that correct?

Mr. Orlando: That's correct.

Mr. Corrado: All right. And you've just articulated the basis for that opinion, correct?

Mr. Orlando: I have. 4T45-25 – 4T46-21

With respect to the parking variances, Mr. Orlando testified that the plans that were being presented provided “a better circulation, a better parking alternative” to that which presently exists meaning that granting the requested variances for the parking plan would promote the general welfare of the community thereby advancing the MLUL purpose found at N.J.S.A. 40:55D-2a. 4T48-7 – 4T49-10. He also testified that, for the same reasons to which he testified with respect to the setback variances, the purposes of the MLUL found at N.J.S.A. 40:55D-2g and N.J.S.A. 40:55D-2i, would be advanced by granting the requested variances implicated by the proposed parking plan. 4T49-14 – 4T49-19. With regard to the benefit/detriment issue, Mr. Orlando testified that by allowing redevelopment of the hotel, in the manner proposed, would be a “better alternative to what was there and was previously approved” and would conform to what the master plan calls for in the location of the subject property. 4T49-21 – 4T50-16.

In addition to the foregoing, as far as the parking variances are concerned, it is noteworthy that while G&I Properties' planner disputed Mr. Orlando's testimony relative to the positive criteria, G&I Properties' traffic engineer, while disputing the functionality of the proposed parking plans, did not dispute Mr. Orlando's assertion that granting the requested parking variances would advance the MLUL purposes found at N.J.S.A. 40:55D-2a, -

2g and -2i. In that regard, Peter Steck, PP, who is not a traffic engineer, testified: “So in summary, I don't think there are valid municipal land use purposes that are advanced, I don't think the application has accurately addressed justification for variances.” 4T107-3 – 4T50-6. On the other hand, David Shropshire, PE, PP, who is a traffic engineer, did not offer such testimony. Mr. Shropshire did testify that neither proposed parking plan complied with generally accepted traffic engineering standards. 4T109-19 – 4T109-21. To that assertion he identified why the proposed parking plans did not comply with generally accepted traffic engineering standards, but he did not dispute Mr. Orlando’s assertion that granting the requested parking variances would advance the purposes of the MLUL found at N.J.S.A. 40:55D-2a, -2g and -2i.

As far as the requested variances for Mahalo’s proposed signage package was concerned, Mr. Orlando testified that, again, the purposes of the MLUL found at N.J.S.A. 40:55D-2a (promotion of the general welfare) N.J.S.A. 40:55D-2g (variety of uses in an appropriate location) and N.J.S.A. 40:55D-2i (desirable visual environment) would be advanced by granting the variance relief sought. 4T52-19 – 4T53-12. He also testified that granting the sign variances would promote the free flow of traffic thereby promoting the purpose of the MLUL found at N.J.S.A. 40:55D-2h. To that point he testified:

And whenever you have signage that exceeds the square footage, I think you could look at it to say it does have a positive impact on traffic because if cars are moving through the community, they're able to identify the building, they're identify this facility as their destination. So it doesn't create for any traffic concerns, it actually eliminates traffic concerns. 4T53-22 – 4T54-3.

That being the case, the benefits of granting of the signage variance clearly outweigh any corresponding detriment.

As to Mr. Orlando's testimony, the Board is well aware that it could not rely on "unsubstantiated allegations" or upon "net opinions that are unsupported by any studies or data." BOE v. Zoning Board, 409 N.J. Super. 389, 434-435 (App. Div. 2009); see also N.J.R.E. 703. Our courts long have held that experts are required to give the "why and wherefore" of their opinions and when they do not do so their opinions are mere net opinions and are of no evidential value. Matter of Yacarino, 117 N.J. 174, 196 (1989); Rosenberg v. Grossbard, 87 N.J. 512, 524 (1981). Therefore, it is critically important to note that, as to his opinions regarding satisfaction of the positive criteria in support of the requested c2 variances, Mr. Orlando clearly and cogently explained why various aspects of the application and existing conditions led him to his opinions. Accordingly, there can be no suggestion by G & I Properties after the fact that Mr. Orlando's opinions regarding

satisfaction of the positive criteria were net opinions having no bearing on this matter.

With respect to the issue of whether Mahalo satisfied the positive criteria in support of the requested c2 variances, there is no question that the evidence that was presented to the Board was substantial, credible, and overwhelmingly satisfied the positive criteria for the requested variances. In that regard, and as discussed in more detail in Point III.D below, a majority of the Board agreed.

Having presented substantial, credible, evidence in support of the positive criteria relative to the c2 variances, the focus shifts to the question of whether such evidence in support of the negative criteria also was presented. Once again, there can be no question that such evidence, indeed, was presented.

B. The Evidence that was Presented to the Board Satisfied the Predicate Negative Criteria for the c2 Variances.

As discussed in greater detail above, the MLUL indicates that “no variance may be granted . . . without a showing that such a variance . . . can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” N.J.S.A. 40:55D-70.

By its brief, G & I Properties would have this Court believe that the sole stated planning purpose and intent in the Borough's Master Plan and its reexaminations was preservation of "view corridors" to the Atlantic Ocean. Indeed, in its Preliminary Statement G & I Property states: "The Borough's clearly stated planning goal⁹ in the motel/hotel district is to maintain 'view corridors,' a term that refers to the unobstructed views of the ocean ..." Pb1. A review of the Borough's Master Plan and reexaminations reveals, however, that the assertion of G & I Properties is an oversimplification of the substance of those reports. While maintenance of view corridors was identified as an "issue," in the 2005 Land Use Plan (Pa281), the actual overall intent of that Plan was stated as: "The overall intent of this Land Use Plan is to preserve and enhance the character of Wildwood Crest by protecting its single-family residential areas and promoting resort tourism opportunities in appropriate locations within the Borough (emphasis added)." Pa283.

To be clear, the Borough's 2005 Land Use Plan (Pa282) identified a variety of issues which were faced by the hospitality industry within the Borough. Those issues included not only preservation of view corridors but the following as well:

⁹ Note the use of the singular "goal."

- Extent of building height permitted along beach [sic] and Ocean Avenue.
- Loss of motels; conversion of motels to condominiums; redevelopment of motel sites into condominiums has created nuisance between motels and condominiums.
- Need for more flexibility for motel owners; motel owners need to provide amenities (e.g. allow coffee shops, valet parking, fitness rooms).
- Lack of parking associated with motels.
- Historic designation of motel area (e.g. demolition vs. preservation).
- Need to create incentives for motels.
- Mismatch between construction of Wildwood Convention Center and support system (e.g. loss of motel rooms through demolition and condominium conversions).
- Balancing need to create incentives for motel owners with concerns regarding increased height. Pa284-Pa285.

The stated “vision” in the 2005 Land Use Plan not only pictured preservation of view corridors but that motels “particularly along the beachfront area” would maintain their “viability through investment and upgrades (emphasis added)” and that there would be a cessation of conversion of motel sites to condominium development. Pa286.

The negative criteria language In N.J.S.A. 40:55D-70 requires an accurate understanding of the “intent and the purpose of the zone plan and zoning ordinance.” N.J.S.A. 40:55D-70. Given the statutory language, a simple understanding of any one particular planning issue that might be identified in the zone plan, as repeatedly urged by G & I Properties throughout

its brief, is insufficient. Equally, and arguably more, important to having an accurate understanding of the purpose and intent of the zone plan is having an understanding of the purpose and intent of the zoning ordinance. The provisions of N.J.S.A. 40:55D-70 mandate such an understanding. Without it a land use board cannot properly evaluate whether a variance applicant has satisfied the negative criteria. Here, the Borough's Ordinance explicitly identifies the purpose of the Hotel, Motel and Multi-Family zoning district.

More particularly, §85-57 states: "The purpose of this district is to permit hotels, motels, condotels and multi-family development with access to the Atlantic Ocean and to preserve and promote the enhancement of hotel/motel-type facilities for service to the tourist industry (emphasis added)."

Pa360

The record indicates that the Board understood "the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70. In that regard, reference is made to paragraph 184 of the Board's memorializing Resolution which indicated: "The majority agreed that preserving an existing hotel within the Borough is consistent with the Master Plan and is vital to sustaining the Borough's tourism industry (emphasis)." Pa276. Further reference is made to Paragraph 186 of the Board's Resolution which provided: "The Board further found that the proposed Application would not impair the intent or purpose of

the City's zoning ordinance or zone plan and there are no substantial detriments to the public good or the surrounding community." In drawing those conclusions, the Board carefully considered all of the evidence that was presented to it.

In his testimony, Mr. Orlando not only testified as to the positive criteria, he also focused on the component parts of the negative criteria analysis; i.e., substantial detriment to the public good; and substantial impairment to the intent and purpose of the zone plan and zoning ordinance.

On the question of whether granting the requested setback variances would cause substantial detriment to the public good or would impair the purpose and intent of the zone plan and zoning ordinance, Mr. Orlando was of the opinion that granting the requested variances would not cause substantial detriment to the public good nor substantially impair the intent and purpose of the zone plan and zoning ordinance. In that regard, he testified:

So the key term is there any substantial detriment. Now, whenever you have a redevelopment of the hotel, there's always some detriment, you can't stop it. But the concern is, is there substantial detriment and the fact of the matter is -- the fact of the matter is, is there substantial detriment? And the case here is, I don't believe that to be the case. The variance relief that we're seeking I believe is consistent with the type of development that has occurred in the community, it provides for, I believe, a better alternative to taking a facility down and putting up residential units. 4T45-20 – 4T46-4.

With regard to the negative criteria relative to the requested parking variances, Mr. Orlando opined:

And with respect to the negative criteria, is any substantial detriment to the zone plan and is there any substantial detriment to the neighborhood? Again, my answer would be similar to what I gave for the setbacks. That there's no detriment -- there's no substantial detriment to the neighborhood. In fact, the general neighborhood is enhanced here by eliminating back out spaces onto Rosemary. That creates a better safety issue. It creates a better walkable community. It creates a safer environment for people who are walking down Rosemary. So I think the overall neighborhood is enhanced through the creation of the elimination of back out spaces. With respect to there's a substantial judgment [detriment] to the zone plan and zoning agreements [ordinances]. Again, I would rely on the fact that I believe 8 foot wide is kind of the norm now in parking standards. I think both parking plans give a better alternative to what was there and was previously approved. 4T49-21 – 4T50-11.

With regard to the negative criteria relative to the requested signage variances, Mr. Orlando opined:

I don't think there any substantial detriment to the zone plan, the zoning ordinance or the neighborhood in this case, given the fact that the signs are well proportion with the building facade and will not have any impact on any neighborhoods. There is not creating any offsite clear light or any infringement to the adjacent properties. 4T54-20-25.

By any reasonable measure, the expert testimony provided by Mahalo satisfied the requisite negative criteria supporting a grant of the requested c2 variances. As discussed below in Point III.D, a majority of the Board agreed that the evidence established and satisfied the negative criteria.

In light of the above discussion, the only reasonable conclusion that can be reached in this matter is that the evidence in the record amply supports the Board's decision to grant the requested c2 variances.

C. Site Plan Approval was Required Because No Waivers or Exceptions from the Site Plan Ordinance Were Requested and There Was No Evidence That the Application Failed to Conform to the Site Plan Ordinance.

With regard to Mahalo's application for site plan approval, the Board's authority was limited to determining whether the 2023 Application conformed to the Borough's site plan ordinance. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 228-229 (1994) (discussing the closely related issue of a subdivision application); Sartoga v. Borough of West Patterson, 346 N.J. Super. 569, 581-82 (App. Div.) certif. den. 172 N.J. 357 (2002) (citing Pizzo Mantin). If a site plan conforms to the site plan ordinance, then a denial of an application for approval must be grounded in statutory authorization. Shim v. Wash. Tp. Planning Bd., 298 N.J. Super. 395, 411 (App. Div. 1997). When a site plan application conforms to the site plan ordinance, a board has no authority to deny the application even if it views what otherwise is a permitted use as being inconsistent with the principles of sound planning. Wawa Food Market v. Planning Board, 227 N.J. Super. 29, 40 (App. Div.) certif. den. 114 N.J. 299 (1988). On the other hand, a site plan application may be denied if it

does not provide for safe and efficient ingress and egress and from the site.

See e.g., Lionel's Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 268-69 (Law. Div. 1978).

In its brief G&I Properties contends: “The Board Erroneously Approved Mahalo’s Site Plan.” Pb62. In support of that contention G&I Properties refers to Mr. Shropshire’s testimony where he testified that neither proposed parking plan complied with generally accepted traffic engineering standards. Pb62; 4T109-19 – 4T109-21. While Mr. Shopshire unquestionably discussed why the proposed parking plans did not comport with contemporary traffic engineering standards, at no time did he opine that a parking plan that does not comply with such standards by definition cannot provide for safe and efficient site ingress and egress. More importantly, while he did testify that on-site vehicular movement would not be efficient, he did not opine that the parking plans proposed by Mahalo would cause unsafe and inefficient site ingress and egress to and from Rosemary Road.

As noted in the Statement of Facts, in its 2023 Application Mahalo did not request any exceptions or deviation from the Borough’s site plan ordinances. That is to say, the 2023 Application did not include a request for relief per N.J.S.A. 40:55D-51b (a planning board shall have the power to grant exceptions from the requirements for site plan approval). While the overall

plan failed to conform to several bulk standards that were set forth in the zoning ordinance, those issues, as discussed above, appropriately were addressed by the variance application process. There was no evidence that the 2023 Application failed to conform to the site plan ordinance nor was there evidence that site ingress and egress would be unsafe. In such cases a planning board is without authority to deny an application for site plan approval. Accordingly, its grant of preliminary and final site plan approval was justified. Any argument to the contrary is without merit.

IV. THE BOARD’S RESOLUTION, PB-24-04, CLEARLY RELATED THE BOARD’S DECISION TO SUBSTANTIAL EVIDENCE IN THE RECORD.

At the conclusion of the February 13, 2024, hearing the Board, by a 5-2 vote, approved the application for preliminary and final major site plan approval, with the requested variances. At that juncture, the Board was obligated to memorialize its factual findings and conclusions of law. N.J.S.A. 40:55D-10(g). On March 6, 2024, the Board adopted Resolution PB-24-04. Pa244. An examination of that Resolution reveals that it absolutely satisfied the requirements of N.J.S.A. 40:55D-10(g).

The New Jersey Supreme Court has stated that “the key to sound decision-making is a clear statement of reasons for the grant or denial of a variance.” Kaufmann v. Planning Bd. for Twp. of Warren, 110 N.J. 551, 556

(1988). “Local boards and their counsel should take pains to memorialize their decisions in resolutions that explain fully the basis on which the Board had acted, with ample reference to the record and the pertinent statutory standards.” Commercial Realty & Res. Corp. v. First Atl. Props. Co., 122 N.J. 546, 556-67 (1991). In this case Resolution PB-24-04 did just that.

Resolution PB-24-04 included the following findings of fact:

175. During deliberations, a majority of the Board took no issue with the proposed 11 ft. setback along Rosemary Road. The Board indicated that the proposed setback was adequate and preserved a sufficient view corridor. Moreover, the Board acknowledged that there are hardly any existing hotels/motels within the Borough that comply with the 30 ft. view corridor setback requirement. Pa274

176. The Board agreed that the Master Plan calls for flexibility in relation to the renovation of existing motels in order to maintain and preserve same, and they disagreed that horizontal expansion would impair the intent or purpose of the zone plan in light of the goals and objectives identified to maintain and preserve existing hotels. Pa274.

177. The Board agreed that increasing the Ocean Avenue building addition setback from 0 ft. feet to 5 ft., consistent with the facade of the existing structure was an improvement and resolved a prior concern raised by the Board at its June 2023 meeting. Pa274-Pa275

178. The Board engaged in an additional discussion regarding the proposed parking arrangement. A majority of the Board acknowledged that proposed parking Plan B, while not perfect, is an improvement over what was presented back in June 2023, and resolved the majority of the board’s concerns in relation to one-way back-out drive aisles and back-out parking spaces. Pa275

* * *

181. A majority of the Board agreed that the modifications to the proposal that were made by the Applicant following the denial of the prior application in June 2023, significantly improved the overall project and addressed their prior concerns. Pa275

182. These Board Members recognized that nearly all adjacent hotels, and hotels throughout the Borough for that matter, contained parking spaces which are similar in size and consistent [sic] with the Applicant's proposal. Pa275

Having made those factual findings, the Board then made conclusions of law as follows:

183. The majority of board members agreed that a parking ratio of one (1) space to one (1) hotel room was appropriate for the site and presented no detriments to the public good, nor would it impair the intent or purpose of the zone plan and or zoning ordinance. Pa275.

184. The majority agreed that preserving an existing hotel within the Borough is consistent with the master plan and is vital to sustaining the Borough's tourism industry. Pa276.

185. A majority of the Board found that the approval of the Application, subject to the conditions of approval set forth herein, would be in the best interests of the Borough as the Applicant established that various purposes of zoning would be advanced in connection with this Application. Pa276.

186. The Board further found that the proposed application would not impair the intent or purpose of the City's zoning ordinance or zone plan and there are no substantial detriments to the public good or the surrounding community. Pa276.

187. Moreover, while the majority of the Board acknowledged that the Applicant's proposal is not a perfect/application, the benefits of granting the variance relief sought by the applicant outweighs any potential detriments. Pa276.

The Board's Resolution PB-24-04 made definitive factual findings that undeniably were based on the evidence presented during the hearing. The Board concluded that that evidence supported a finding that in granting the requested variances several purposes of the MLUL would be advanced and that the benefits to be derived from granting the variances would outweigh any "potential" detriment. Thus, the Board was satisfied that the evidence established the positive criteria for the requested variances.

The Board also was satisfied that the evidence demonstrated that a grant of the requested variances would not result in substantial detriment to the neighborhood, the community or the public good and that granting the variances would not substantially impair the intent and purpose of the zone plan and zoning ordinance. Indeed, the Board was satisfied that the 2023 Application was consistent with the articulated goals for the subject zoning district, as stated in the Borough's Master Plan. Therefore, the Board clearly was satisfied that the evidence established the negative criteria for the requested variances.

The Board's memorializing Resolution related its factual findings to its conclusions of law. It complied with the requirements of N.J.S.A. 40:55D-

10(g) in every respect. The arguments of G & I Properties to the contrary should be definitively rejected by this Court.

V. THE APPELLANT’S ARGUMENT REGARDING THE TRIAL COURT’S WRITTEN OPINION IS WITHOUT MERIT.

In its brief G & I Properties states that “The trial court’s opinion lacks evidence to support the affirmance of the Board’s Resolution.” Pb57. The argument then posited by G & I Properties fails to understand the role of the Law Division in an action in lieu of prerogative writs. The role of the Law Division was not to evaluate the sufficiency of the evidence that was presented to the Board by G & I Properties, as an objector and economic competitor of Mahalo. Similarly, the role of the Law Division was not to substitute its judgment for that of the Board’s. Furthermore, the role of the Law Division was “not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record.” Jock v. Zoning Bd. of Adj., of Law, 184 N.J. 562, 597 (2005). In other words, and as extensively discussed in Point I above, the role of the Law Division was to determine whether, in light of the evidence before it, the Board’s decisions were arbitrary, capricious and unreasonable. In executing that process, Judge Blee was required to “find the facts and state [his] conclusions of law thereon ...” Rule 1:7-4. That is precisely what Judge

Blee did in his February 13, 2025 Order and Opinion. Notwithstanding that undeniable fact, in its brief G & I Properties argued that Judge Blee failed to make findings of fact and conclusions of law meaning, G & I Properties asserts, that his decision is “fatally flawed” thereby requiring a reversal or remand. Pb57. G & I Properties then embarks upon a journey by which it essentially criticizes the trial court for not substituting its judgment for the Board’s and reaching a different decision than did the Board with respect to the variances that were granted. Again, in a theme that is repeated throughout its brief, G & I Properties fails to recognize that the issue with which the lower court was faced was not whether the lower court could reach a different decision than did the Board given the evidence that was presented. Rather, as noted throughout this brief, the issue before the lower court was whether the Board’s decisions, particularly its decisions on Mahalo’s variance requests, were based upon the evidence in the record. As particularly illustrated in Point II above, there can be no question that the Board’s decisions were manifestly based upon substantial, credible evidence. G & I Properties would have this Court substitute its judgment for that of the Board. Such an exercise of original jurisdiction is unnecessary because the trial court articulated and applied the correct standard of review. Pa013-P014; Pa017-Pa024. The

argument of G & I Properties concerning the trial court’s written opinion therefore is without merit.

VI. THE APPELLANT’S “REZONING” ARGUMENT IS WITHOUT MERIT.

In an argument that is related to the grant of Mahalo’s requested variances, G & I Properties argues that “[b]y granting so many variances the Board, in effect, rezoned the Property, contrary to the governing body’s specific requirements for ocean view corridors and functional parking.” Pb38-39. In response, Mahalo in its brief states:

This argument asks the Court to answer an irrelevant question. The relevant issue is not how many variances the project needs, or the individual benefits of each variance. Rather, the question is whether these variances, taken together, allow development of a project that fulfills the Borough’s vision for this zone. Db26.

Not only is the question posed by G & I Properties irrelevant but the statement that the Board’s decision amounted to a rezoning of Mahalo’s property is without merit because the Board’s conclusions that Mahalo’s application was entirely consistent with the purpose and intent of both the zone plan and zoning ordinance was based upon competent evidence. Moreover, no reasonable observer could conclude that the Board’s decision results in a change of the character of the M-1A zoning district. Rather, the Board’s

decision is entirely consistent with the governing body's stated goals for that district, as articulated in Ordinance §85-57. Pa360.

In deciding whether a variance application requests a land use board to engage in impermissible rezoning, the board must "Examine the master plan as well as the zoning ordinance and determine whether the proposed use and the scale of the use could be considered consistent with the plan for the particular district or whether the scope of the relief requested exceeds that which can reasonably be granted on the basis of a variance." Cox & Koenig, at §28-5.2. In Tp. of Dover v. Bd. of Adj. of Tp. of Dover, 158 N.J. Super. 401, 412-413 (App. Div. 1978), this Court stated:

The basic inquiry in each case must be whether the impact of the requested variance will be to substantially alter the character of the district as that character has been prescribed in the zoning ordinance. . . . The test of whether the board has been engaging in proscribed legislation must ultimately be one of both geographic and functional substantiality vis-a-vis the plan and scheme of the municipality's zoning ordinance.

In this matter, as discussed above, the Board was keenly aware of the substantive provisions of the Borough's zoning ordinance and its Master Plan. Not only did the Board find that granting the requested variances would not result in substantial detriment to either the Master Plan or the zoning ordinance, the Board, on the contrary was satisfied that granting the requested relief would advance the articulated goals of the Borough's Master Plan and

the zoning ordinance. In that regard, the Board's decision allows for Mahalo to fully renovate the former Ocean Holiday Motel, an old, vacant, non-operational 5-story hotel that has been closed for many years, into an upscale, contemporary resort hotel which is exactly what is envisioned by the Borough's Master Plan and its zoning ordinance. As discussed above in great detail, the Board's conclusions in that respect were based upon substantial, credible evidence. Thus, the rezoning argument of G & I Properties must be deemed to be without merit.

CONCLUSION

For all of the reasons expressed above, Respondent, Borough of Wildwood Crest Planning Board, requests that this Court affirm the Opinion and Order, dated February 13, 2025, in its entirety.

Respectfully Submitted,

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Board

By: *William J Kaufmann*
William J Kaufmann, Esquire

Dated: September 23, 2025

G & I PROPERTIES, LLC and :SUPERIOR COURT OF NEW JERSEY
GEORGE & I, INC., :APPELLATE DIVISION
:DOCKET NO. A-2199-24

Plaintiffs-Appellants, :

:ON APPEAL FROM:

v. :SUPERIOR COURT OF NEW JERSEY

BOROUGH OF WILDWOOD :LAW DIVISION

CREST PLANNING BOARD and :CAPE MAY COUNTY

MAHALO WILDWOOD CREST :DOCKET NO. CPM-L-175-24

LLC, :

:SAT BELOW

Defendants-Respondents.:HON. MICHAEL J. BLEE, A.J.S.C.

VIPER CORPORATION; :
FOREVER SUMMER, INC; :
B.A.F. CORP.; J.C. CREST INC; :
CLAUDIO AND CLAUDIA :
GARCIA; BERNARD BOLINSKI;:
GARY AND MARIAN MALEC; :
JOANNA LACAVITA; STEVEN :
EWANKOV; GRACE :
DEROBERTS; VANESSA PANEK;:
KENNETH STEPHANIDE; and :
ALETHEA PAWLOWSKI, :
Plaintiffs, :

CIVIL ACTION

**BRIEF ON BEHALF OF
DEFENDANT-RESPONDENT
MAHALO WILDWOOD CREST,
LLC**

v. :

BOROUGH OF WILDWOOD :

CREST PLANNING BOARD and :

MAHALO WILDWOOD CREST, :

LLC, :

Defendants. :

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I. PRELIMINARY STATEMENT

These are prerogative writ actions, consolidated by the trial court. R. 4:69-1. Both challenge the Wildwood Crest Planning Board’s grant of preliminary and final major site plan approval, with variances under N.J.S.A. 40:55D-70(c)(2), for property at 6501 Ocean Avenue in Wildwood Crest, owned by Mahalo Wildwood Crest, LLC.

The subject property is the site of the former Ocean Holiday Motel. Mahalo seeks to redevelop that property into an upscale resort hotel complex.

Plaintiffs in the G & I Properties case own the Compass Family Resort, a competitor motel located at 6501 Atlantic Avenue in the Crest, directly across the street from Mahalo’s property. Plaintiffs in the Viper Corporation case are a group of objectors to the Mahalo approval, several of whom own competing hotel or motel properties or are related to the owners of the Compass.

Because the two prerogative writ complaints raised identical claims, Judge Blee consolidated them. By order dated February 13, 2025, accompanied by a 22-page Memorandum of Decision, the judge rejected plaintiffs’ challenges in their entirety.

The matter is before this Court on G & I’s appeal of that decision. That appeal raises three claims. First, plaintiffs say res judicata prohibited the board from hearing Mahalo’s application because it was “identical” to a previously

denied application. Second, they say the board's variance approvals were – for several reasons – arbitrary, capricious, and unreasonable. Third, they say the board erroneously granted Mahalo site plan approval.

All three contentions lack merit. For the following reasons, this Court should affirm Judge Blee's determination.

First, Mahalo's application differed significantly from the application the board denied in 2023, particularly with respect to building size, parking arrangement, and Ocean Avenue setback. Both the board's determination that second application was not "substantially similar" to the first, and Judge Blee's affirmance thereof, are entitled to great deference, and this Court should find that those determinations are not arbitrary.

Second, both the board and Judge Blee correctly determined that Mahalo satisfied the positive and negative criteria for the (c)(2) variances it requested. Approval of those variances directly advances Wildwood Crest's master plan goal of preserving and enhancing the hotel-motel district that is the lifeblood of the borough's tourist-based economy, and does so in a way that impairs neither the surrounding neighborhood nor the borough's zoning scheme. Consequently, the benefits of those variances substantially outweigh any harm.

Again, these determinations are entitled to substantial deference from this Court; judged by that standard, they are not arbitrary, capricious, or unreasonable.

And as reflected in the board's comprehensive memorializing resolution, Mahalo presented the board with substantial credible evidence supporting the board's decision.

Third, plaintiffs' attack on the board's site plan approval simply reiterates, in another guise, their objection to Mahalo's parking variances. It should be rejected for the same reasons.

Plaintiffs' challenge to the approvals asks this Court to substitute its assessment of the evidence for the board's. But that approach contravenes the deferential standard for judicial review of land use board decisions, and for appellate review of those trial court decisions. Plaintiffs' brief adverts to those standards, but its analysis fails to apply them. This Court should reject plaintiffs' flawed approach and affirm the decision below.

II. PROCEDURAL HISTORY

Mahalo's property, 6501 Ocean Avenue, is located in Wildwood Crest's M-1-A zone. The zone permits hotels and motels. In fact, because the zone comprises the borough's principal tourism district, Wildwood Crest's master plan affirmatively encourages upscale hotel development there, both to protect the

borough's tourism-based economy and to discourage conversion of hotels and motels to condominiums. Pa281, 304, 314 (Exhibits M, N, and O).¹

The application that is the subject of this appeal is Mahalo's third to the planning board for this property.

Mahalo initially applied in September 2019 for approval of a 70-unit resort motel complex; the application proposed an extensive renovation of the existing site. The planning board heard and approved the application in March 2020 and memorialized that approval in April 2020. Pa32, 41 (Exhibits A and B).

G & I appealed that determination. The lower court affirmed the board's decision, and G & I appealed to this Court. During that appeal's pendency, CAFRA required modifications to the approved plan, and as a result the parties stipulated to the dismissal of G & I's appeal as moot. Id.

After satisfying CAFRA's modification requests, Mahalo submitted its second application on or about late September 2022, seeking site plan approval and variances for a renovated 66-unit resort motel complex. Pa53, 103 (Exhibits D and E). The board heard that application on April 5 and June 8, 2023, and denied it,

¹ Record references are as follows: Pb__ refers to Plaintiffs' brief. Pa__ refers to Plaintiffs' appendix. 1T refers to the April 5, 2023, planning board transcript; 2T, to the June 8, 2023, planning board transcript; 3T, to the December 6, 2023, planning board transcript; and 4T, to the February 13, 2024, planning board transcript.

principally because of dissatisfaction with the proposed parking and circulation plan. 2T 128-163; Pa112, 134 (Exhibit F, paragraphs 135-139).

Mahalo submitted its third application on August 23, 2023. This application sought approval for a renovated 64-unit motel and included substantially revised parking and circulation plans. Pa145, 218 (Exhibits H and I).

G & I objected to this application on the ground that res judicata barred the board's consideration of it. On December 6, 2023, the board heard and rejected G & I's res judicata claim, concluding instead that Mahalo's revised submission was not "substantially similar" to the previously denied application. 3T 24-25; Pa247-249.

The board heard Mahalo's application on February 13, 2024, and approved it by a 5-2 vote. 4T 189:18 to 193:14. The board memorialized that decision in Resolution PB-24-02, adopted March 6, 2024. Pa245-278.

On April 25, 2024, and April 26, 2024, respectively, G & I and Viper appealed that decision by action in lieu of prerogative writ. See Pa4. By order dated February 13, 2025, Judge Blee affirmed the planning board's denial of the res judicata claim and its approval of Mahalo's site plan and variance application. Pa1-2. He accompanied that order with a 22-page Memorandum of Decision. Pa3-24.

On March 26, 2025, G & I appealed Judge Blee's decision to this Court.

Pa381.

III. STATEMENT OF THE FACTS

Mahalo's property at 6501 Ocean Avenue is rectangular in shape and is bounded by Ocean Avenue to the west, Rosemary Road to the north, Beach Avenue to the east, and the Armada Motel to the south. The property is in the M-1-A zone, which permits hotels and motels.

Plaintiffs here – G & I Properties, LLC, and George & I, Inc. – own the Compass Family Resort, a competitor motel located at 6501 Atlantic Avenue, across the street from Mahalo's property. The principals of Compass are George Pawlowski Sr. and his sons George Jr. and Paul Pawlowski. Pa31, 41 (Exhibits A and B).

The multiple plaintiffs in the consolidated Viper appeal were a group of objectors to the Mahalo applications, several of whom own competing hotel or motel properties in Wildwood Crest or are related to the owners of the Compass.²

² Of those plaintiffs, the Viper Corporation (Roland and Melissa Roy) own the VIP Motel; Forever Summer owns the Imperial 500 Motel; BAF Corporation (the Lacavita family) owns the Adventurer Hotel; and J.C. Crest, Inc., owns the Sea Chest Motel. Alethea Pawlowski is Paul Pawlowski's wife and is the daughter of Roland and Melissa Roy, who own the VIP. The Viper plaintiffs did not appeal Judge Blee's decision.

Wildwood Crest adopted a master plan in 2005, and master plan re-examinations in 2012 and 2022. See N.J.S.A. 40:55D-28, -89. The 2005 master plan articulates the borough's desire to maintain and enhance hotels and motels and to discourage their conversion to condominiums. The plan recognized that Wildwood Crest's economy was tourism-dependent, and that preservation and enhancement of the borough's hotels and motels was essential to a robust tourism economy. Pa281, 283-285, 297 (Exhibit M, pages 1-3, 15)

The 2012 re-examination reiterated that concern; it further noted the need for "additional flexibility to remove barriers to the successful upgrade of motels and hotels." Pa304, 310 (Exhibit N, page 5). The 2022 re-examination noted the borough's success in achieving those objectives but stressed they "continue to be of concern, where the loss of marinas, hotels, and motels reduces visitor enjoyment and turnover." It further alluded to the problems posed by "the conversion of older properties to condominiums." Pa314, 334 (Exhibit O, page 17).

The master plan and re-examinations also articulate the borough's desire to preserve "view corridors" to the oceanfront. Accordingly, in 2003 and 2005, the borough amended its zoning ordinance to increase setback requirements in oceanfront zones; and as an incentive to adhere to the setback requirement, increased the height limits in those zones. Pa373, 375 (Exhibits S and T).

These master plan provisions create a conflict, or tension, among the borough's land use goals. On the one hand, the borough seeks to preserve a robust tourism-based economy by encouraging "flexibility" in the creation, development, and renovation of its hotels and motels. On the other, the borough seeks to preserve views by encouraging building "up" rather than "out." Balancing these two competing objectives lies at the heart of this case.

As noted in the Procedural History, in 2019 Mahalo sought site plan approval, with variances, for a 70-unit resort motel with no setback off Rosemary Road. The board approved that application, and G & I appealed that approval to this Court. G & I dismissed that appeal as moot after CAFRA required certain modifications to Mahalo's plans, including compliance with CAFRA's "view corridor" requirements. Pa31, 41 (Exhibits A and B).

Mahalo made those modifications, including an 11-foot setback on Rosemary Road that satisfied CAFRA's view corridor standards, and CAFRA accordingly issued a permit for the project. Pa244, 247 (Exhibit L, paragraphs 7-9).

In September 2022, Mahalo submitted a second application, seeking site plan approval with variances for a 66-unit resort motel complex. The proposal included a variance request for the 11-foot Rosemary Road setback (rather than the

30 feet required); a variance request for a zero-foot setback on Ocean Avenue; and a parking plan that required several variances. Pa53, 103 (Exhibits D and E).

The board heard this application on April 5 and June 8, 2023. Compass, represented by counsel, objected to the application, principally on the ground that the Rosemary Road setback would obstruct its view corridor, and that the proposed parking configuration was unworkable and would disserve the neighborhood. 1T 161 to 2T 44; Pa112 (Exhibit F, paragraphs 79-131).

At that hearing's conclusion, the board voted to deny Mahalo's application. Board members all expressed dissatisfaction with the parking proposal. Several board members expressed dissatisfaction with the zero-foot Ocean Avenue setback. However, a majority of the board members indicated that the 11-foot Rosemary Road setback was adequate and provided a sufficient view corridor. 2T 128-63; Pa134 (Exhibit F, paragraphs 135-139).

Mahalo submitted its third application – the subject of this appeal – on August 23, 2023. Mahalo sought site plan approval with variances for a 64-unit renovated resort motel. In addition to reducing the number of units (from 66 to 64), Mahalo's application decreased the building's size; preserved the 11-foot Rosemary Road setback; increased the Ocean Avenue setback from zero to five feet; and significantly revised its parking and circulation proposal – in fact presenting the board with two parking “options,” both of which addressed, and

ameliorated, the concerns board members expressed when they denied Mahalo's previous application. Pa145, 218 (Exhibits H and I).

Compass, again represented by counsel, initially opposed this application on the ground that it was "virtually identical" to the previous application and that res judicata barred it.

On December 6, 2023, the board held a hearing on the res judicata issue, at which it entertained argument from Mahalo's and Compass's counsel. The board then voted to reject Compass's res judicata argument, finding that the revisions to the parking plan and the increased Ocean Avenue setback established that the new application was not "substantially similar" to the previously denied application. Accordingly, the board determined to proceed with a hearing on the merits of the application. 3T 24-25; Pa247-249.

The board held that hearing on February 13, 2024. 4T. Mahalo presented testimony from Eustace Mita, Mahalo's principal; Stephen Tomasetti, a licensed N.J. architect; and Vincent Orlando, a licensed N.J. engineer and planner. It introduced seven exhibits into evidence. 4T 8; Pa227 (Exhibit J); Pa249-262 (Exhibit L, paragraphs 24, 33-34, 52).

Mahalo provided the board with substantial evidence from which it could rationally conclude that Mahalo was entitled to the setback, parking, and sign variances it sought.

Specifically, Mahalo's presentation established that it would renovate a deteriorating existing property into a first-class resort hotel, thereby advancing the borough's master plan goal of encouraging such development, discouraging condominium conversion, and strengthening the hotel-motel district that anchors the borough's tourism-based economy. 4T 10, 28-55. Pa256-258 (Exhibit L, paragraphs 63-75).

With respect to the setback and coverage variances it required, Mahalo's evidence made clear those variances advanced several purposes of zoning. They advanced the public welfare, proposed an appropriate use of the site, and promoted a desirable visual environment. 4T 43-44; Pa257 (Exhibit L, paragraph 69). See N.J.S.A. 40:55D-2(a), -2(g), and -2(i).

Mahalo's evidence further established that these variances preserved an adequate view corridor (one that satisfied CAFRA standards), conformed to the uses the borough wished to establish in the district, and were consistent with the setbacks and coverage of the existing motels in the zone. 4T 41-42, 155. Pa256 (Exhibit L, paragraphs 66-68).

In other words, the evidence provided the board with a more than sufficient basis to conclude that the benefits of the variances substantially outweighed their disadvantages and that granting them would not impair (and in fact would serve)

the public good and the borough's zoning scheme for the area. 4T 45-46; Pa257-259 (Exhibit L, paragraphs 72, 75, 80).

Mahalo also provided evidence from which the board could conclude that these variances were necessary if its project were to progress. In particular, Mahalo's witnesses indicated that the existing building structure would not support an additional floor, and that without the setback and coverage variances, the building would have to be demolished and a new building constructed. 4T 20, 26; Pa253, 257, 263 (Exhibit L, paragraphs 49, 71, 105).

In sum, because the variances served the public good and not merely Mahalo's interest, the board had a basis to rationally conclude that the proposed renovation constituted a "better zoning alternative" for the site. 4T 46; Pa258 (Exhibit L, paragraphs 75).

The same is true for Mahalo's parking variances. Mahalo provided the board with two parking alternatives; the board selected Option B.

Mahalo presented evidence that this option – although concededly not "perfect" – addressed and ameliorated many of the board's parking concerns; functioned satisfactorily to provide safe and adequate parking for the renovated hotel; and provided a parking ratio that met or exceeded the ratio at most, if not all, of the surrounding motel properties (including some of the objectors' motels). 4T 47-52; Pa258-260 (Exhibit L, paragraphs 76-84).

On that basis, Mahalo's experts testified that the requested parking variances promoted the public welfare by facilitating construction of the first-class hotel development the borough wants; enhanced traffic circulation and safety; encouraged the appropriate use of the site; and used creative development techniques to improve the aesthetics of the proposed renovation. Id. See N.J.S.A. 40:55D-2(a), -2(g), -2(h), and -2(i). And that evidence – again as Mahalo's presentation made clear – permitted the board rationally to conclude that the benefits of the parking variances substantially outweighed any detriment, and that they could be granted without impairing the public good or the borough's zoning scheme. Id.; Pa259 (Exhibit L, paragraph 79).³

Mahalo's presentation stressed that a (c)(2) variance application essentially requires a board to balance the advantages and disadvantages of the requested variance. And its evidence persuaded that board that in this instance the balance favored Mahalo. 4T44, 154-55, 160. Pa274-276 (Exhibit L, paragraphs 175-187).

The Compass plaintiffs, represented by counsel, appeared at the February 13 hearing and presented lay and expert testimony disputing Mahalo's entitlement to variance relief. 4T 92-115; Pa267-273 (Exhibit L, paragraphs 132-160).

³ Mahalo also sought several sign variances, which the board granted. G & I does not contest those variances on appeal, and in any event, Mahalo established their validity under the (c)(2) criteria. 4T 52-58; Pa253, 260-261 (Exhibit L, paragraphs 50-51, 85-90).

At the conclusion of the testimony, the board's counsel set forth detailed findings of fact, which the board adopted unanimously. 4T 160-180; Pa274 (Exhibit L paragraph 173). The board then voted 5-2 to approve Mahalo's application, including both the site plan and the variances. At board counsel's direction, board members stated the reasons for their vote. 4T 181-193; Pa274-276 (Exhibit L, paragraphs 174-187).

All seven board members approved of the setback and coverage variances, and affirmatively indicated that they agreed with Mahalo's justifications for those variances, including the adequacy of the 11-foot Rosemary Road setback to preserve a view corridor. Five board members expressed their satisfaction with Mahalo's parking plan (Option B); they indicated that while not perfect, the plan addressed the board's circulation and safety concerns in a manner that justified the variance relief requested. The two dissenting board members disagreed with that assessment. Id.

G & I subsequently filed the prerogative writ action whose determination is the subject of this appeal.

IV. ARGUMENT

In its review of the matter, and in evaluating the decision of the planning board, this Court applies the same standard as the trial court. It therefore accords "substantial deference" to the decisions of the municipal board. D. Lobi

Enterprises, Inc. v. Planning/Zoning Bd. of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009), citing N.Y. SMSA, L.P. v. Bd of Adj. of Weehauken, 370 N.J. Super. 319, 331 (App. Div. 2004).

Thus, when a local land use board grants a variance, that decision “is presumptively valid, and is reversible only if it is arbitrary, capricious, and unreasonable.” Smart SMR v. Bor. of Fair Lawn Bd. of Adj., 152 N.J. 309, 327 (1998)(internal quotation omitted). The reviewing court must determine whether the decision is supported by the record and does not constitute “a clear abuse of discretion.” Cell S. of N.J., Inc. v. Zoning Bd. of Adj., 172 N.J. 75, 82 (2002). A “clear abuse of discretion” exists only “when a decision is made without a rational explanation, inexplicably depart[s] from established practices, or rest[s] on an impermissible basis.” US Bank Nat. Ass’n v. Guillaume, 209 N.J. 449, 467-68 (2012).

As this Court has made clear:

The purpose of judicial review is for the court to determine whether or not the board acted within the statutory guidelines and properly exercised its discretion. The reviewing court is not permitted to substitute its judgment for that of the board’s. A reviewing court is not to “suggest a decision that may be better than the one made by the board of adjustment or planning board, but to determine whether the board could reasonably have reached its decision.”

Fallone Properties, LLC v. Bethlehem Tp. Plan. Bd., 369 N.J. Super. 552, 561 (App. Div. 2004)(multiple citations omitted).

Furthermore, local boards are presumed to have “a peculiar knowledge of local conditions.” Kramer v. Bd. of Adj. of Sea Girt, 45 N.J. 268, 296-97 (1965). Board members are “local citizens familiar with a community’s characteristics and interests” and are therefore “best equipped to assess the merits of variance applications.” Medical Ctr. at Princeton v. Princeton Tp. ZBA, 343 N.J. Super. 177, 198 (App. Div. 2001). This fact heightens the degree of judicial deference a court must give to a board’s variance approval.

Applied to the record below, this highly deferential standard establishes that the board acted reasonably, and did not abuse its discretion, both when it denied G & I’s res judicata claim and when it affirmed the board’s site plan and variance approvals. The same is true for Judge Blee’s decision affirming those board determinations.

G & I’s brief cites this standard of review, Pb30-31, but its analysis fails to apply it. Instead, G & I asks this Court to reject the board’s and Judge Blee’s evaluation of the evidence and to substitute its own. This approach is legally and factually flawed, and the Court should reject it.

A. Judge Blee Correctly Held That Res Judicata
Does Not Bar Mahalo’s Application (Pa2, 15, 249).

G & I says Mahalo’s application is “virtually identical” to its previously denied 2023 application and that res judicata prohibited the board from hearing it.

Pb31. Both the board and Judge Blee rejected that claim, and this Court should do so as well.

Mahalo's 2024 application differed significantly from its previous one; res judicata therefore does not bar it. G & I's contrary argument ignores both the applicable law and the pertinent facts.

Res judicata applies to adjudicative actions of a land use board. Bressman v. Gash, 131 N.J. 517, 526 (1993). The burden of proving the doctrine's applicability lies with the party that seeks to invoke it. Russell v. Bd. of Adj. of Tenafly, 31 N.J. 64, 65 (1959).

In determining whether res judicata applies, the relevant question is whether the second application is "substantially similar" to the first. Russell, supra at 65; accord, Bressman, supra, 131 N.J. at 527.

The board must determine that issue in the first instance; its decision, once made, "will be overturned on review only if it shown to be unreasonable, arbitrary, or capricious." Russell, supra, 31 N.J. at 67. "[T]he question is not whether a reviewing court would have reached a different conclusion if it had initially decided the matter, but whether the Planning Board was arbitrary, capricious, or unreasonable" in reaching its conclusion. Bressman, supra, citing Kaufmann v. Planning Bd. for Warren Tp., 110 N.J. 551, 558 (1998).

When applied, this standard establishes that neither the board nor Judge Blee acted arbitrarily in denying G & I's claim.

Mahalo's current application differed from its previous application in the following significant ways:

- Mahalo completely revised its internal parking plan, submitting two alternatives and inviting the board to choose between them. The parking plan in the earlier application was a principal reason for the board's denial.
- Mahalo also revised its plan to reduce the amount of back-out parking onto Rosemary Road, thereby addressing another board concern.
- Mahalo increased the building setback off Ocean Avenue from zero feet to five feet, again addressing a significant concern the board had with the prior application.
- Mahalo reduced the number of hotel units (from 66 to 64) and the size of the building.

These facts are not disputed. Furthermore, as both the December 6, 2023, transcript and Planning Board Resolution 24-04 make clear, the board was fully aware of these substantial changes and relied on them in rejecting the res judicata claim. See 3T 24-25; Pa247-249.

On this record, therefore, it cannot be said that the board acted arbitrarily when it rejected the res judicata claim. Nor can it be said that Judge Blee's

affirmance of that determination, which carefully reviewed the board’s findings and the applicable law, was arbitrary or in any way legally defective. See Pa15-17.

Other than asserting “similarity” or “identity” – based almost exclusively on counting the number of variances in each application – G & I provides no concrete evidence of “substantial similarity.” But as the board’s counsel pointed out, “substantial similarity” involves a qualitative, not a quantitative, comparison of applications. The board understood that distinction, accepted it, and applied it. See 3T 13, 17-18, 24-25; Pa248-249.

One of Mahalo’s revisions increased the need for a parking variance. Relying on Pieretti v. Bloomfield, 35 N.J. 382, 388 (1961), G & I says the Court cannot consider this change in its res judicata analysis. Pb35-36.

Pieretti does not stand for that proposition. The case simply finds that a second application was “much more objectionable” than the first and therefore subject to a res judicata bar. See 35 N.J. at 389. But the governing principle here is that the substantiality of the change must be considered in the context of the entire parking revision – which in this case addresses and ameliorates the board’s overall concerns about parking. See Allied Realty v. Upper Saddle River, 221 N.J. Super. 407, 415 (App. Div. 1987). And in any event, even if one discounts this particular revision, Mahalo’s other proposed changes are sufficient to defeat a res judicata claim.

Furthermore, the principal cases on which G & I relies do not support – and in fact contradict – its argument. Bressman v. Gash involved a second application that increased a setback by four feet (from 28 to 32 feet) and added a landscape buffer. The Court found those changes – less extensive than the changes here – significant enough to overcome a res judicata claim, and it upheld the board’s decision as non-arbitrary.

Similarly, Russell v. Tenafly B.O.A. involved a five-foot setback increase and a six percent building coverage increase. The Court found the board did not act arbitrarily when it found these relatively modest changes – again less significant than the ones at issue here – substantial enough to avoid res judicata.

In sum, Judge Blee correctly determined that the Board reasonably rejected G & I’s res judicata claim. That determination was not arbitrary, capricious, or unreasonable, and this Court should affirm it.

B. The Record Fully Supports Judge Blee’s Affirmance Of Mahalo’s (c)(2) Variances, and Therefore That Determination Was Not Arbitrary, Capricious, Or Unreasonable (Pa2, 17, 274-278). _____

The planning board granted Mahalo a series of variances under N.J.S.A. 40:55D-70(c)(2). The requested variances fell generally into three categories: setbacks, parking, and signs. As noted above, this appeal focuses on the setback and parking variances.

To obtain a (c)(2) variance, an applicant must show that, applied to its property, 1) the variance advances a purpose of zoning; 2) its benefits substantially outweigh its detriments; 3) the variance will not substantially impair the public good; and 4) it will not substantially impair the intent or purpose of the zone plan or the zoning ordinance. Lang v. Zoning Bd. of Adj., 160 N.J. 41, 56-57 (1998); Wilson v. Brick Twp. Zon. Bd. of Adj., 405 N.J. Super. 189, 198 (App. Div. 2009). The variance must not simply advance the property owner's interests; it must represent "a better zoning alternative" for the property. Kaufmann, supra, 110 N.J. at 563.

G & I says Mahalo failed to satisfy these criteria, and that consequently the board's approvals were arbitrary, capricious, and unreasonable. Both the board and Judge Blee held otherwise, and – under the highly deferential standard of review applicable here – this Court should affirm those determinations.

1. Judge Blee Correctly Concluded That Mahalo Satisfied the Positive and Negative Variance Criteria.

The record in this case, reflected in both the February 13, 2024, transcript and the board's detailed memorializing resolution, establishes that Mahalo fully satisfied the (c)(2) variance standards. Mahalo's witnesses presented evidence establishing that the setback and coverage variances allowed Mahalo to renovate a deteriorating existing property into an upscale resort hotel, with an expanded pool deck and upgraded, first-class hotel facilities.

This is precisely the sort of new construction, located in the heart of its hotel-motel district, that Wildwood Crest seeks to encourage, and that prior to Mahalo's application it had not been able to generate.

Accordingly, as Mahalo's witnesses testified, these variances served several key purposes of zoning: consistently with the borough's master plan they promoted the public welfare – that is, the borough's tourism-based economy – and allowed appropriate, aesthetically pleasing development precisely where the borough desired it. See N.J.S.A. 40:55D-2(a), -2(g), and -2(i).

The record also establishes that these variances had no substantial detrimental effect on the public good, the surrounding neighborhood, or the overall zoning plan for the area. To the contrary, as Mahalo's witnesses pointed out and the board recognized, Mahalo's proposed development is in the zone specifically designated for hotel/motel projects, conforms to the existing development in the zone, and provides setbacks that not only satisfy the CAFRA view corridor standards but exceed the view corridors provided by much existing development in the zone.

The board's careful evaluation of this application (based on its knowledge of the area), combined with Mahalo's willingness to modify its plans in response to board members' concerns, significantly ameliorated any detrimental effects the variances might have had. Indeed, given the nature of the proposed development

and its location, the record establishes, and the board correctly concluded, that the advantage of granting the setback variances substantially outweighed any disadvantages.

The same is true of the parking variances. Given the board's expressed concerns with Mahalo's prior parking proposal, Mahalo substantially revised its parking scheme, and in fact presented the board with two parking options to choose from. "Option B," which the board selected, addressed and ameliorated the board's concerns: it improved traffic circulation and safety, decreased the amount of back-out parking, and provided a one-to-one parking-space-to-room ratio exceeding that of many existing facilities.

In other words, as Mahalo's witnesses testified, the parking variances also served several purposes of zoning: they advanced the general welfare by allowing the sort of upscale, tourist-friendly development the borough seeks to generate, in the area the borough desires to have such development; improved traffic circulation and safety; and enhanced the overall aesthetics of both the development and the surrounding area by using a creative approach to parking and traffic circulation. See N.J.S.A. 40:55D-2(a), -2(g), -2(h), and -2(i).

Again as Mahalo's witnesses testified, granting these variances causes no substantial detriment to either the surrounding neighborhood or the borough's zoning scheme. To the contrary, as with the setback and coverage variances, they

are consistent with the borough's vision for this zone and further the borough's goal of preserving its tourism-based economy through the development of upscale, first-class hotel/motel facilities. To put it another way, the advantages of granting these variances substantially outweigh any disadvantage.

In sum, the board's consideration of these variances reflected the "balancing" inherent in the (c)(2) variance process, and thereby ensured that the project as approved represented "a better zoning alternative for the property." Kaufmann, supra, 110 N.J. at 563. This record contains ample evidence to support the board's variance approvals, and establishes that the board did not act arbitrarily when it did so.

G & I's arguments to the contrary lack force and merit.

First, as noted above, G & I's opposition consists primarily of its own evaluation of the evidence. It claims, in other words, that its evaluation of the evidence is correct, and the board's was not.

But that is not the question before this Court. The issue on appeal is whether the board acted arbitrarily in granting the variances – that is, whether the record contains evidence from which the board could reasonably conclude the variances were appropriate.

The answer to that question is "yes." In that connection, the Court should review the statement of facts in G & I's brief. That statement simply recapitulates

Mahalo's presentation, recites its witnesses' countervailing testimony, and invites the Court to adopt the latter. The underlying premise of that approach is that the board should have accepted G & I's evidence and rejected Mahalo's.

But the board was not required to accept G & I's presentation merely because it contradicted Mahalo's. See, e.g., Wilson, supra, 405 N.J. Super. at 197 (court not bound to accept expert testimony). See also Kramer, supra, 45 N.J. at 288 (board "has the choice of accepting or rejecting the testimony of witnesses").

Indeed, as a matter of law, this Court cannot do so. So long as the board acted rationally on the record before it, this Court cannot accept G & I's demand that it substitute its evaluation of the evidence for the board's.

G & I says the variance approvals benefit only Mahalo and not the community, and that therefore the approved project does not constitute "a better zoning alternative" for the property. The premise of this argument is flawed.

The approvals directly benefit Wildwood Crest by allowing construction of a first-class resort motel in the borough's principal hotel-motel district, thereby satisfying the borough's vision for this area, as evidenced by its master plan. Because the proposed development accomplishes this goal, approval of the variances constitutes, by definition, a better zoning alternative for the property. See Kaufmann, supra, 110 N.J. at 563 (variance's benefit to the community supersedes owner's sole interest). Compare Cicchino v. Twp. of Berkeley Heights

Plan. Bd., 237 N.J. Super. 175, 182-83 (App. Div. 1989)(variance provided monetary gain to owner but no benefit to community).

G & I focuses on the borough's 2005 zoning ordinance amendment, which increased setback requirements but allowed increased height in the hotel-motel zone. It argues that granting so large a number of variances subverts that amendment and effectively "rezones" the property.

This argument asks the Court to answer an irrelevant question. The relevant issue is not how many variances the project needs, or the individual benefits of each variance. Rather, the question is whether these variances, taken together, allow development of a project that fulfills the borough's vision for this zone. See Pullen v. Tp. of S. Plainfield Plan. Bd., 291 N.J. Super. 1, 8 (App. Div. 1996)(board's focus should be on the entire proposal, not "the benefits derived solely from the requested deviation").

The board answered that question in the affirmative, and the record below supports that determination. Accordingly, this is not a "rezoning" of the property; to the contrary, it is a reasonable, non-arbitrary variance decision that advances the borough's vision for its tourism zone.

To put it another way, Mahalo's application involved a specific piece of property and sought to apply well-established variance standards to that property.

Accordingly, Mahalo did not seek “rezoning” of the site, and the board’s variance decision did not accomplish such a “rezoning.”

In a related argument, G & I suggests the board’s decision is inconsistent with the borough’s 2005 master plan and its 2012 and 2022 master plan re-examinations. That argument is incorrect; it ignores the “tension” (referred to above at Page 8 of this brief) between two competing land use goals: the borough’s desire to preserve view corridors and its goal of maintaining a viable tourism district.

Both the 2005 master plan and the two re-examinations make clear that the borough wishes to encourage upscale hotel/motel development in the M-1-A zone and to discourage the conversion of motel properties into condominium or other residential uses, so that the borough retains a robust tourism economy.

The 2005 master plan specifically articulated this goal. The 2012 re-examination reaffirmed that goal, and further stressed the borough’s need for zoning and planning “flexibility” to achieve it. The 2022 re-examination noted the borough’s success in satisfying that goal, but also called for continued concern by the borough that this critical issue be addressed.

G & I seems to think that the 2022 acknowledgment of success renders the goal irrelevant. But that is not the case. Both re-examinations make clear that the

borough continues to seek upscale hotel/motel development that discourages condominium and residential conversion in its central tourism district.

G & I makes much of the master plan's call for "view corridors" on the beach block. It suggests this master plan objective – the subject of the borough's 2005 zoning ordinance amendment – somehow undermines the board's approval of the setback variances.

Again, this argument begs the relevant question. The master plan is not an ordinance; it is a statement, or "guide," to land development in a municipality and has no operative effect. N.J.S.A 40:55D-28; see Manalapan Realty, L.P. v. Township Committee of Manalapan, 140 N.J. 366, 381 (1995),

Furthermore, although it is true that, consistently with the master plan the borough's zoning ordinance establishes setbacks in the beach block, the variance process exists precisely to afford "flexible" relief on those occasions – like this one – when deviation from the ordinance's standards provides a "better alternative" use of the property.

At its essence, the propriety of a (c)(2) variance turns on a favorable balance between the variance's benefits and its harms. A grant must be upheld "if, after adequate proofs are presented, the board without arbitrariness concludes that the harms, if any, are substantially outweighed by the benefits." Kaufmann, *supra*, 110 N.J. at 565. See also, Price v. Himeji, LLC, 214 N.J. 263, 297 (2013); Lang v.

Zoning Bd, of Adj., *supra*, 160 N.J. at 57; Bressman v. Gash, *supra*, 133 N.J. at 523.

This record makes clear that the planning board carefully assessed the adequacy of Mahalo's presentation, performed the necessary balance of benefits and harms, and rationally concluded that the former substantially outweighed the latter.

In other words, the board did what N.J.S.A. 40:55D-70(c)(2) required it to do. This Court should affirm that determination.

2. Resolution PB-24-04 Fully Satisfies
The Applicable Legal Standards.

G & I says the board's memorializing resolution is deficient. See Pb52. One look at the 35-page, 187-paragraph resolution dispels that claim. The resolution carefully reviews Mahalo's presentation, the objector's presentation, and the public comment. It specifically describes the testimony and how that testimony related to, and satisfied, the elements of the various (c)(2) variances Mahalo requested.

Furthermore, the resolution refers to, and accurately summarizes, the testimony provided by both Mahalo and the objectors at the February 13, 2024, hearing.

In other words, the resolution contains precisely what the Municipal Land Use Law requires. See Lincoln Hts. v. Cranford Plan. Bd., 314 N.J. Super. 366, 386 (Law Div. 1998), aff'd on opinion below, 321 N.J. Super. 355 (App. Div.), certif. denied, 162 N.J. 131 (1999).

3. Plaintiffs' Attack on Judge Blee's Opinion Fails Factually and Legally.

G & I attacks Judge Blee's opinion on the grounds that it lacks an adequate articulated basis for affirming the planning board's decision granting Mahalo its requested variances. Pb57-61.

This attack is fundamentally misguided. As is the case with its objection to the board's variance decision, G & I faults Judge Blee for not accepting G & I's own evaluation of the evidence instead of the planning board's.

But as noted above, Judge Blee's task under the law was to review the board's determination and to determine whether it was arbitrary. That is what he did in this case.

Judge Blee's opinion reviews the evidence before the board – particularly that presented by Mahalo – and concludes that this evidence provided the board with a reasonable basis to conclude that Mahalo satisfied both the positive and negative criteria for a (c)(2) variance, and that the balance of benefits and

detriments tipped in Mahalo’s favor. That approach conforms to his responsibility under the appropriate legal standard of review.

G & I cites Zalinsky v. Zoning Bd. of Adj. of Verona, 105 N.J. 363 (1987), and Cohen v. Borough of Rumson, 396 N.J. Super. 608 (App. Div. 2007), to buttress its claim that Judge Blee’s opinion is defective.

Neither case supports that claim. At best, both cases simply say, in dicta, that a trial court should “set forth reasons in support of its ruling.” Zalinsky, supra, 105 N.J. at 372; see Cohen, supra, 396 N.J. Super. at 620. But, contrary to what G & I apparently believes, that uncontroversial proposition – to which Judge Blee’s opinion fully adheres – does not translate into a requirement that a trial court must expressly refute each claim a party makes that a board’s evidential evaluation is defective.

In other words, correctly analyzed, G & I’s position reduces to a claim that Judge Blee should have accepted its characterization of the evidence before the board, and should have rejected the board’s analysis and decision. But that approach is simply not the law, and accordingly this Court should reject G&I’s flawed attack on Judge Blee’s opinion.

C. Plaintiffs' Objection to Mahalo's Site Plan Approval
Simply Restates Their Objection to the Parking Variances,
And Fails For the Same Reasons (Pa2, 23, 277).

Finally, G & I says the planning board erroneously approved Mahalo's site plan because that site plan ostensibly did not adequately address the safety issues raised by its parking, ingress and egress provisions. In support, G & I cites Lionel's Appliance Center, Inc. v. Citta, 156 N.J. Super. 257 (Law Div. 1978).

Citta does require a site plan to adequately address traffic safety and circulation issues. Id. at 268-69. But in the opinion of the planning board, Mahalo's site plan did just that, by satisfying the (c)(2) variance criteria. Accordingly, the board granted Mahalo the parking variances it requested.

In other words, G & I's attack on Mahalo's site plan approval is simply a disguised restatement of its objection to the board's approval of the parking variances. As did Judge Blee, this Court should reject G & I's site plan objection for the same reasons it rejected G & I's objection to the parking variances.

V. CONCLUSION

This Court should affirm Judge Blee's decision in its entirety.

DATED: 9/23/2025

Respectfully Submitted,

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FILE NO. 62629

October 20, 2025

G & I Properties, LLC and George & I, Inc.,

Plaintiffs-Appellants,

v.

Borough of Wildwood Crest
Planning Board and Mahalo
Wildwood Crest, LLC,

Defendants-Respondents.

Superior Court Of New Jersey
Appellate Division

Docket No. A-2199-24

On Appeal From:

Superior Court of New Jersey
Law Division, Cape May County
Docket No. CPM-L-175-24

Sat Below: Michael J. Blee, A.J.S.C.
Civil Action

Re: Plaintiffs-Appellants’ Reply Letter brief
Jennifer B. Barr (NJ 021091998) on the brief, submitted 10/20/25

Honorable Judges:

This firm represents Plaintiffs-Appellants G&I Properties, LLC and George & I, Inc. (collectively “Compass”) in the above-referenced appeal. Please accept this letter brief in lieu of a more formal reply brief.

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PRELIMINARY STATEMENT

Wildwood Crest’s Planning Board (the “Board”) went rogue. Twenty years ago, the Board’s Master Plan (“MP”) envisioned a community with taller motels that would preserve the ocean view corridor. The Borough of Wildwood Crest (the “Borough”) adopted the Board’s recommendation by enacting ordinances requiring setbacks to preserve the view corridor, while allowing greater height for renovated motels. The Borough also enacted ordinances to ensure adequate parking. The Board flagrantly disregarded the municipal zoning ordinances and approved Mahalo’s site plan application that blocks the view corridor, fails to provide adequate parking, and most importantly, fails to advance any planning goal of the Borough.

The Board is comprised of appointed community members who are responsible for applying the elected governing body’s ordinances to site plan applications. While courts may defer to a planning board’s understanding of the community’s characteristics and interests, there are limits. Here, the Board exceeded the limits, in order to appease one developer.

The Borough hadn’t seen a new hotel/motel in 50 years when Mahalo submitted its application. Mahalo’s developer, already well-established in the

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region, proposed upgrades with horizontal expansion, promising a first-class, upscale, aesthetically-pleasing motel. And the Board got snookered. The Board wanted this new project so badly that it put on blinders and approved the site plan. The Mayor stated that Mahalo's encroachment on the view corridor was a problem. But the Board approved the project anyway.

The Board has no authority to approve site plans willy-nilly, just because the project is shiny and new. Mahalo's project grossly violates the Borough's ordinances, which represent the elected officials' planning goals. Mahalo's proposed oversized motel does not advance the Borough's planning goal and therefore does not advance any purpose of the Municipal Land Use Law ("MLUL"). Instead, Mahalo's project advances the developer's bottom line.

What's worse is that the Board rationalized its site plan approval by noting that other motels in the area are non-conforming. Some ocean view corridors have already been blocked. Some of the other older motels have small parking spaces. While the zoning ordinance permits certain non-conformities to be grandfathered, new development or upgrades must conform to the code. It does not matter that there already has been encroachment on certain view corridors, or that some other older motels have smaller parking spaces. The Borough's intent was to prevent

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future projects from further compromising existing view corridors, and to require functional parking spaces – which will, in turn, help to sustain the tourism industry.

Mahalo claims that its project is exactly what the Borough envisioned: an upscale motel, which is better than condo conversion. Nothing is preventing Mahalo from building an upscale motel that conforms to the Borough's ordinances. And Mahalo never proposed condominiums, so it is of no moment that this project is somehow better than a hypothetical alternative.

Mahalo argues that this litigation illustrates the tension between the Borough's land use goals: preserving tourism by permitting motel upgrades versus preserving the view corridor. However, the Borough's elected officials already resolved that tension. In order to encourage renovation within the hotel/motel district which will help tourism, vertical expansion is allowed for existing motels. The tradeoff for increased height is the preservation of the view corridor.

The real tension here is between the Borough and the Board. The Borough set planning goals. The Board ignored them. The community, including Compass, is paying the price. The Board's site plan approval must be overturned.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Compass incorporate the combined procedural history and statement of facts set forth in its principal brief, as well as the previously-noted citations to the record.¹

Compass relies on arguments expressed in its principal brief in reply to any other arguments made by Mahalo or the Board not specifically addressed in this reply brief.

LEGAL ARGUMENT

**POINT I
RES JUDICATA**

Mahalo and the Board included no meaningful response to Compass’s argument that the 2023 Application proposed a project that further deviates from the zone plan than the previously-denied 2022 Application. Instead, they accuse Compass of merely counting the number of variances requested and they claim that the second Application is significantly different. The variances requested in the 2023 Application are substantially similar to the 2022 Application, but the

¹ In addition, “Db” refers to Mahalo’s responding brief, and “Bb” refers to the Board’s responding brief.

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parking variances relief increased in the 2023 Application. In other words, the variances requested in the 2023 Application are worse for the Borough.

Compass admits that there were some negligible changes to the 2023 Application, but overall the Application was substantially similar to the previous one. Reducing the Ocean Avenue setback by five feet will simply place the addition in line with the existing non-conforming structure along Ocean Avenue – it does nothing to improve the view corridor on Rosemary Road. Compass acknowledges that there were changes to parking flow for which no variance is needed.

However, the 2023 Application requested parking lot variances that were more non-conforming than the 2022 Application. Rather than returning to the Board with an Application that was more aligned with the planning goals, the 2023 Application further deviated from the planning goals regarding parking space size, number of parking spaces, and drive aisle width.

Mahalo states that the opinions cited by Compass do not directly support the *res judicata* argument. The Supreme Court's opinions in both Bressman v. Gash, 131 N.J. 517 (1993), and in Russell v. Board of Adjustment of Tenafly, 31 N.J. 58 (1959), illustrate what is properly considered in a second application:

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variance relief that more closely conforms with the zoning ordinance, *not* variance relief that even further deviates from the zoning requirements than what was previously denied. In Bressman and Russell, the Court determined that the second application was more aligned with the zoning ordinances because the newly-requested variances increased the proposed setback, which in turn decreased the deficiency from the ordinances. As such, in Bressman and Russell, the second applications were closer to the zoning requirements than the previously-denied applications; therefore, *res judicata* did not bar the second applications because they brought the project closer to the governing body's zoning plans. Those opinions describe conditions where a second application is allowed – which are markedly different than the instant matter.

Notably, the Court also opined in Pieretti v. Bloomfield, 35 N.J. 382, 388 (1961), also cited by Compass, that *res judicata* bars a second application that is “clearly much more objectionable” than the first. That opinion is controlling in the instant matter.

Here, Mahalo's second application moved the project further away from the zoning requirements. Mahalo's 2023 Application proposed a motel with 2 fewer rooms (for which no variance was needed), but then requested variances

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that decreased, rather than increased, the ratio of motel rooms to parking space, the size of the parking spaces, and the size of the drive aisle width. The variances related to parking requested in the 2023 Application were worse than the previously-denied 2022 Application and therefore was “clearly much more objectionable.” Pieretti, supra, at 388.

Accordingly, Mahalo’s 2023 Application should be barred because of *res judicata*.

POINT II VARIANCES

The Board granted variances that do not comport with the Borough’s zone plan. The Borough requires, for this site, a 30-foot setback on Rosemary Road (the view corridor street); the Board approved only 11 feet. The Borough requires 1.2 parking spaces per hotel room; the Board approved only 1 parking space for every room, and all parking spaces are undersized. The Borough requires drive aisle width of 20 feet; the Board approved 15.75 feet. In addition, the Board approved multiple significant variances for setbacks and lot coverage, contrary to what the Borough requires. The variances granted to Mahalo do not advance the Borough’s planning goals, and therefore do not advance the purpose of the MLUL.

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The Board heard testimony from Mahalo’s experts, Vince Orlando, an engineer and planner, and Stephen Tomassetti, an architect, neither of whom are parking experts. Neither expert provided meaningful testimony to satisfy the positive or negative criteria for c(2) variance relief.

Mr. Orlando testified that Mahalo’s project would advance the purpose of zoning as set forth in the MLUL at N.J.S.A. 40:55D-2. Mr. Orlando specifically cited three of those purposes, but failed to state why the project satisfied the purposes of zoning, let alone any of the Borough’s planning goals. He cited N.J.S.A. 40:55D-2(a), which requires a showing that the variances will “encourage municipal action to guide the appropriate use of development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare.” Since motels are already a permitted use, a site plan application for motel use does not advance this propose of zoning, and does not advance a specific planning goal of the Borough. When pressed during cross-examination, Mr. Orlando’s testimony never addressed why the setback variances would promote the general welfare, or more specifically, how the requested setbacks effectuate the planning goals of the Borough. Nor did he reconcile the

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setback variance with the impact on the view corridor. Instead, he threatened that Mahalo's project would not move forward unless variance relief was granted.

The same is true for N.J.S.A. 40:55D-2(g), which requires proof that the variances will "provide sufficient space in appropriate locations for a variety of...residential...uses and open space...in order to meet the needs of all New Jersey citizens," and N.J.S.A. 40:55D-2(i), which requires a showing that the requested variance relief will "promote a desirable visual environment." After cross-examination, Mr. Orlando's testimony fell short regarding how the setback variances and the parking variances would actually advance the purposes of the MLUL and the Borough's planning goals for the community. It is clear that encroaching on the view corridor negatively impacts a "desirable visual environment" for the community that would otherwise benefit from the ocean view. Notably, Compass's expert Mr. Peter Steck testified that a desirable visual environment includes the view corridor. (4T103-6 to 9).

Mr. Tomasetti's only contribution was to proffer hearsay about whether the existing motel could be vertically expanded.

Ultimately, the Mahalo's proof fell short because the requested variance relief does not "effectuate the goals of the community as expressed through its

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zoning and planning ordinances” and does not “actually benefit the community in that it represents a better zoning alternative for the property.” Kaufmann v. Planning Board for Warren Twp., 110 N.J. 551, 563-64 (1988).

The elected officials in the Borough clearly indicated in the zoning ordinance that the planning goals for this district are to allow vertical expansion in order to preserve the view corridor. The elected officials made it plain that the Borough’s goal was to provide numerous, larger parking spaces in the hotel/motel zone, as parking anywhere at the shore during the summer is typically problematic. Importantly, the elected officials amended the zoning ordinances in 2005, signifying a change to the planning goals so that in the future the view corridors would be preserved and motel upgrades could include vertical expansion. Since this litigation began in 2020, none of the at-issue zoning ordinances have been amended, and the 2022 MP Reexamination made no recommendations to change the requirement to preserve view corridors.

The Board’s reasoning for granting Mahalo’s variances are baseless. The Board was required to show why the requested variance relief was somehow better than what the zoning ordinance requires. The Board’s first error was pointing to other non-conforming development to justify deviating from the

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ordinances, claiming Mahalo’s proposed project is not significantly worse than some other motels in the district. This reasoning is circular. The ordinance amendment that increased setbacks along with height, increased the room-to-parking-space ratio, and increased parking space size, signify a change to the Borough’s planning goals. The Board cannot justify its decision by claiming that other existing, older structures also do not conform to the zoning ordinance amendments. This faulty logic is unsupportable.

The Board also erred in claiming that the MP called for the Board’s flexibility to grant variances. Mahalo emphasizes the Board’s rationale throughout its responsive brief. However, the Board misunderstood its role. The 2012 MP Reexamination noted that the Borough was reviewing the height limitations in the hotel/motel zone “to permit additional flexibility for motel and hotel owners” to upgrade. (Pa310). The 2012 MP Reexamination did not, nor could it, recommend that the Board become more flexible in granting variances to non-conforming motels so that they can be upgraded. Rather, the 2012 MP Reexamination recommended zoning changes to allow for more flexibility. The MP and Reexaminations do not, and cannot, grant to the Board any greater flexibility to grant a c(2) variance than what is established in the MLUL and

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decisional caselaw, which require a showing that the requested variances actually advance a municipality's planning goals.

The trial court's perfunctory approval of the Board's decision is even more troubling, as prerogative writ actions rely on an objective review by the Law Division. The court below hit wide of that mark. The trial court agreed with the Board that a mere 11-foot view corridor, where 30 feet is required, is somehow sufficient, without providing any reasoning as to why such an enormous encroachment on the view is acceptable in lieu of building up. The trial court thought fewer, smaller parking spaces in a cramped lot were no problem, without explaining how such an inadequate parking scheme would be better than what the zone plan requires. The trial court failed to indicate why Mahalo's project is a better zoning alternative than what the Borough envisioned for this Property.

One fact must be clarified. The Property is now vacant because Mahalo jumped the gun and started demolition before securing any approvals. The trial court claimed that Mahalo's project is an improvement to the "unoccupiable, deteriorating motel that is currently at the Property." (Pa22). Mahalo's brief echoed this sentiment (Db11, Db21 (calling the Property "deteriorating")), as did the Board (Bb2, BB50 (referring to the Property as "an old, vacant, non-operation

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al 5-story hotel that has been closed for many years’’)). When Mahalo purchased the Property, it was an operating, functional motel, but Mahalo closed the motel and immediately began demolition. The Property has been vacant because of Mahalo’s premature demolition. Any citation to the Property’s condition is Mahalo’s own fault, and cannot inure to Mahalo’s benefit.

Another fact requiring elaboration: this litigation is not about maintaining the motel industry in the Borough. The zone in which Mahalo’s Property stands is a thriving zone, and was never identified by the Board or the Borough as being at-risk with regard to tourism, or for condominium conversion either. Yet the Board justified Mahalo’s site plan approval by stating that this project will help the goal of maintaining the motel industry in the Borough. The trial court noted the same. (Pa22). Throughout its brief, Mahalo claims that this project will help maintain a viable tourism district. (Db26 to Db28). This is a red herring. Mahalo’s project seeks to renovate an existing motel in a thriving district. Any motel upgrade will do, as long as it conforms with the Borough’s zone plan or provides a better zoning alternative. The Borough requires a smaller footprint than that proposed by Mahalo – which setbacks will ensure that other tourists and visitors will have an open view of the ocean. The Borough also requires adequate parking

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– so that Mahalo’s guests won’t be forced to park on the street, taking up street parking from other tourists. Mahalo’s project helps Mahalo alone, not the tourism industry.

And another one: nowhere does the MP, Reexaminations, or the zoning ordinances “affirmatively encourage upscale hotel development,” despite Mahalo’s multiple claims otherwise (Db3, Db23, Db24, Db27, Db28). The word “upscale” is never mentioned anywhere in the Borough’s ordinance, or in the MP and Reexaminations. Mahalo peppers the brief with the term “upscale” and “first-class,” as it did in its site plan application. (Pa68 to Pa69; Pa159 to Pa160). The Borough’s land use plan does not require upscale development. Moreover, the variances granted to Mahalo are not necessary for the development of an upscale motel. But what the Borough does, in fact, require is a 30-foot setback and adequate parking. Mahalo’s emphasis on the project’s swank is another red herring.

The Board responded to Mahalo’s threat that “this project doesn’t move forward unless relief is granted” (4T87-5 to 6) by giving the developer exactly what he wanted: a motel that is simply too large for the lot. A motel with inadequate parking. A motel that keeps the ocean view to itself. This is not what

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the Borough planned. This does not benefit the Borough. The only one who will benefit from this project is Mahalo's developer. This court cannot abide such favoritism by the Board.

CONCLUSION

For the reasons set forth above and in Compass's principal brief, the Board's egregious decision to approve Mahalo's site plan, and the trial court's erroneous opinion affirming the same, cannot stand. The Board wholly disregarded the Borough's zone plan in favor of Mahalo's plan to overbuild this lot. The trial court, which should have recognized the error, simply rubber-stamped the Board. It is now up to this court to reign in the Board and overturn the decisions below.

Compass respectfully requests that this court reverse the trial court's opinion that affirmed the Board's site plan approval, and remand to the Board for entry of a Resolution denying Mahalo's 2023 Application.

Respectfully submitted,



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