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GARDEN STATE OUTDOOR LLC, Plaintiff- Appellant, v. ZONING BOARD OF ADJUSTMENT OF MIDDLE TOWNSHIP AND THE TOWNSHIP OF MIDDLE TOWNSHIP, Defendant - Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3622-23 ON APPEAL FROM: NEW JERSEY SUPERIOR COURT LAW DIVISION CAPE MAY COUNTY VICINAGE DOCKET NO.: CPM-L-000304-22 SAT BELOW: Hon. Michael Blee, J.S.C.
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APPELLANT GARDEN STATE OUTDOOR LLC'S MERITS BRIEF

Dated: January 30, 2025 (amended February 4, 2025)

On the brief: Justin D. Santagata, Esq.
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INTRODUCTION

This is Garden State Outdoor LLC’s (“**Garden State**”) appeal of the trial court’s order(s) upholding an absolute ban on permanent off-premises speech in Appellee Middle Township (“**Middle**”) and denial of related variance relief for a billboard in a heavily commercial zone. The same ban was struck down in Bell v. Stafford, 110 N.J. 384, 395-96 (1988), which the trial court disregarded. Middle’s ban attempts to foreclose an entire form of media— billboards— by banning *any* permanent off-premises sign. This includes not just concededly commercial speech, but *any speech*, such as permanent political speech, support for causes, or support for the local high school football team. This violates the New Jersey Constitution, as recently reiterated in E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 584–585 (2016), where the New Jersey Supreme Court stated that municipalities cannot “ban an entire form of media,” and violates the First Amendment. Id.

Even if Middle were to overcome the facial unconstitutionality of its ban, the ban still fails the time/place/manner test for regulation of speech because Middle has no factual record justifying the ban and it is both over and underinclusive. A total ban on all off-premises speech is inconsistent with the applicable uses in the underlying zone— which is heavily commercial— and leaves no reasonably equivalent alternative means of communicating the message to a large audience.

For similar reasons, the variance relief was wrongly denied by Appellee Middle Township Zoning Board (“**Zoning Board**”). The Zoning Board’s denial was entirely circular, asserting a billboard is a “principal use” but then holding a billboard to a different height limitation than for *a principal use*.

FACTUAL AND PROCEDURAL BACKGROUND¹

Garden State is a New Jersey limited liability company. (Pa84.) Garden State is in the business of erecting, owning, and operating outdoor advertising structures. (Id.) Middle is a municipality in the State of New Jersey with the authority to enact ordinances pursuant to N.J.S.A. §40:49-2 and the New Jersey Municipal Land Use Law, N.J.S.A. §40:55D-1 et seq. (Id.) The Zoning Board is the duly constituted zoning board of adjustment for Middle Township, authorized, empowered, and required to perform the functions and powers delegated to it pursuant to the MLUL. (Id.)

In an application to the Zoning Board in May 2022, Garden State, as lessee, proposed to erect and operate a double-sided outdoor advertising sign of 378 square feet (10.5ft by 36ft per side) with a height of 45 feet (“**Billboard**”) at 1410 Route 47 South, Middle Township, Cape May County, New Jersey (“**Property**”), where there is an existing motel. The Property is shown on the municipal tax rolls of Middle Township as Block 1503, Lot 2. (Pa119-121.)

¹ Combined for brevity.

The Property on which the Billboard is to be located is within Middle's "Town Center Zoning District." (Id.; Pa86, 96.) The Town Center Zoning District limits permitted sign square footage to a maximum of 150 square feet for a wall sign and maximum 400 square feet for a freestanding sign (depending on the "retail square footage"). (Pa138-140.) Middle has an absolute sign height limitation of 25 feet, no matter the type of sign. (Pa131.)

The Billboard is to be a light emitting diode billboard capable of displaying commercial and non-commercial messages, including advertisements and matters of public importance, such as weather alerts, traffic alerts, municipal events, and other public service messages. (Pa96; 1T:5.)² The Billboard would not display any unlawful activity or misleading speech. (Pa84.)

The Property currently consists of a motel use. The Billboard would be in addition to that use. (Pa96.) The uses and signs surrounding the Property currently consist of a gas station, a Taco Bell, a car wash, a diner, and a multi-use shopping center. (1T:5, 10-16.) A view of current uses and signs from the Property is at Pa171. (Pa171.) Many of the signs (i.e. more than half) in the photograph exceed both the maximum height and permitted square footage for a freestanding sign in the Town

² 1T = 7/4/22 transcript of Zoning Board hearing; 2T = 10/23/23 transcript of trial court hearing; 3T = 4/26/24 transcript of trial court hearing.

Center Zoning District, including the US Gas sign and the Taco Bell sign. (1T:57; infra at 4-7.)

I. Middle’s ban on permanent off-premises speech and billboards

Chapter 218 of Middle’s code is “The Subdivision and Site Plan Chapter and the Planning Board and Zoning Board Chapter of the Land Development Ordinance of Middle.” Chapter 218-83 regulates signs, along with Chapter 210. (Pa131, 134.)

Pursuant to Chapter 218-83(a), the purposes of the signage regulations are allegedly (“**Purposes**”):

1. To “[e]nsure the proposed signage is compatible with surrounding land uses.”
2. To “[c]reate a more attractive economic and business climate within the commercial areas of the Township.”
3. To “[p]rotect and enhance the physical appearance of all areas.”
4. To “[r]educe the distractions, obstructions and hazards to pedestrian and auto traffic caused by the indiscriminate placement and use of signs.”
5. To “protect the historic character of the Cape May Court House Overlay District by ensuring that signage is aesthetically compatible.”
6. To “[e]ffectuate the Master Plan goal to Update sign standards that promote safety while discouraging sign proliferation.”

(Pa133.) Chapter 218-83B(2) prohibits “[a]ny signs not permitted in this article.”

(Id.) “Billboards” is one of the fifteen categories of prohibited signs pursuant to Chapter 218-83E(12). (Pa135.) Chapter 218-5(B) defines “Sign, Billboard” as “[a] sign which directs attention to a business, commodity, service or entertainment conducted,

sold or offered at a location other than the premises on which the sign is located.” (Pa76 ¶ 20; Pa238 ¶ 20.)

Chapter 218-83C(8) requires all signs to “be located on the same property with the use, firm, facility, business, product, service or organization they advertise, unless otherwise provided.” (Pa134.) So Middle bans all permanent off-premises advertising— i.e. speech— anywhere within its borders. There is no factual record or legislative history evidencing that the Purposes are advanced by permitting on-premises speech while banning all permanent off-premises speech, without any regard to individual zones or changing characteristics. See 1T:17-21, 61-62 (safety studies do not support the Purposes); infra at 5-6 (master plan and re-examination do not require total ban on permanent off-premises speech).

Middle’s ban on permanent off-premises speech, including billboards, has existed since at least 1969. (Pa246, 349.) No less than four major precedents occurred on billboards between 1969 and today: Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981); State v. Miller, 83 N.J. 402, 416 (1980); Bell; and E&J Equities. Middle’s ban on permanent off-premises speech, however, still exists as though it were 1969, both legally and in terms of the zoning and development of Middle.

Middle has conducted numerous re-examinations of its zoning since 1969, but has never once re-examined “changes in...assumptions...policies” for the ban on

permanent off-premises speech. N.J.S.A. §40:55-89. In 2016, the New Jersey Supreme Court decided E&J Equities, which reiterated that a municipality may not “foreclos[e] an entire form of media...” 226 N.J. at 577. In 2020, Middle undertook a periodic re-examination without addressing E&J Equities or the ban on permanent off-premises speech. (Pa178.) Middle’s 2020 re-examination stated among its goals was to “update sign standards that promote safety while discouraging sign proliferation.” (Pa182-183.) Middle’s 2020 re-examination stated that this goal “was accomplished through updated sign standards.” (Id.) Middle’s 2020 re-examination does not provide any continued support for the ban on permanent off-premises speech; indeed, it implicitly contradicts it by declining to differentiate between on-and-off-premises speech. (Id.) Middle’s prior re-examination in 2010 does not provide any support for the ban on permanent off-premises speech; the “recommended changes” do not mention any ban on permanent off-premises speech. (Pa220-223.) None of the re-examinations contain any actual evidence about “safety” for signage (other than using the word).

Middle submitted an extensive zoning history to the trial court. (Pa240-270.) The extent of that zoning history was mostly meant to obscure the lack of any continuing factual basis for a ban on permanent off-premises speech. But it actually is self-defeating. Middle has changed a lot since 1969. The most distinct change is there is clear commercial development and commercial zoning that is utterly

inconsistent with Middle’s reasons for the ban on permanent off-premises speech in 1969. As Middle so ably explained, the Town Center Zoning District was once “Suburban Residential.” (Pa249 ¶ 22.) But it was changed to the Town Center Zoning District, which has extensive commercial use and signage everywhere. (Pa258 ¶ 50; Pa81 ¶ 35; Pa240 ¶ 35.) As Middle put it: “lands within the environs *outside of the Center* reflect the extensive natural resources within the Township” [emphasis added]. (Pa258 ¶ 50.)

Middle concedes that the Town Center Zoning District has been allowed to develop for extensive signage, admitting that many signs near to the Property “exceed both the maximum height and permitted square footage for a freestanding sign...” (Pa74 ¶ 14; 237 ¶ 14.) The Town Center Zoning District is described in Middle’s 2020 re-examination as an area to “encourage redevelopment...that supports higher density mixed uses...commercial uses within the Center core areas...” (Pa184.) The 2020 re-examination states that the Town Center Zoning District should be an area for re-institution of “light industrial uses” (previously banned in Middle). (Pa199.) This is the most relevant example of change from 1969, but there are others, such as the “Town Business District,” “Village Commercial,” and “Community Business.” (Pa191.) The point being: whatever Middle looked like in 1969, it does not look like that now. There are certainly *zones* that have maintained or tried to maintain that character, but the whole of Middle does not look like Middle

in 1969. This is not to say that Middle is now an urban landscape, but the assumptions of 1969 are certainly long outdated.

Consistent with the purpose of the Town Center Zoning District, Chapter 218-83J establishes the signs permitted in that zone. (Pa138.) Pursuant to Chapter 218-83J(1)(a), each business within the Town Center Zoning District may have one wall sign of two square feet of sign area for each linear foot of building width, but shall not exceed 150 square feet. (Id.) Chapter 218-83J(2) allows each property one freestanding sign “calling attention to the shopping center and/or the business(es) located therein,” with the sign’s area being based on the total square footage as stated below:

Minimum Retail Square Footage (square feet)	Permitted Sign Area (square feet)	Setback of Sign Edge From Right-of-Way/Property Line (feet)
	2 per 10 linear foot of width of building, not to exceed 40 square feet	
0 to 5,000		10
5,001 to 10,000	40	10
10,001 to 20,000	60	15
20,001 to 50,000	100	20
50,001 to 100,000	250	25
100,001 and over	400	30

(Id.) With the exception of temporary signs for the promotion of a public function or charitable fund-raising events, the Town Center Zoning District does not permit permanent off-premises speech, but it allows indistinguishable on-premises speech.

(Id.)

Chapter 210-5 sets forth additional general design standards for signs. (Pa131.) Chapter 210-5C provides: “No sign or any part thereof shall be located closer than 10 feet to any lot line and no greater in height than 25 feet.” (Id.) Chapter 210-5F provides: “All signs shall be of a character and composition harmonious with the area of the township in which the sign is located.” (Id.)

Chapter 210-7A prohibits “[a]nimated or moving signs or signs using blinking, flashing, vibrating, revolving, flickering, tracer and/or sequential lighting, except clocks and temperature gauges,” which effectively bans any digital sign with a changing message. (Id.)

II. Garden State’s application to the Zoning Board

On or about May 2, 2022, Garden State submitted its application for the Billboard (“**Application**”) and accompanying plans to the Zoning Board seeking permission to install and operate the Billboard. (Pa86.) The Application was heard on July 14, 2022. (Pa119.) Garden State holds a valid “New Jersey Department of Transportation Outdoor Advertising Permit” for the Billboard. (Pa90.) The permit establishes Garden State’s compliance with the requirements of both the Federal

Highway Beautification Act, §23 U.S.C. 131 et seq., and the State of New Jersey’s Roadside Sign Control and Outdoor Advertising Act, N.J.S.A. §27:5-5 et. seq. and all regulations promulgated thereunder. (Id.; 1T:4.) Garden State submitted a rendering of the Billboard to the Zoning Board as part of the Application. (Pa224.)³

The Zoning Board determined that the Billboard is a “principal use”⁴ in the Town Center Zoning District, necessitating a use variance for two principal uses on the Property. (Pa119.) If the Billboard were a principal use, as the Zoning Board required, *its height limitation would be fifty feet.* (1T:75.) Thus, the Billboard would be lower in height than all permitted principal uses in the Town Center Zoning District. (Pa169.) Other variances included by the Zoning Board were: maximum sign height (twenty feet permitted), maximum number of freestanding signs (one permitted), and maximum sign area (forty square foot permitted). (Pa125.)

The Billboard’s height is consistent with the height of signs in the surrounding area and with the maximum permitted sign height for on-premises speech, as Garden State’s planner testified, the Zoning Board’s planner conceded, and at least one Zoning Board member acknowledged [emphasis added]:

23 [do we] know the width of the Lowe's or ShopRite by chance?
 24 MR. ORLANDO [Zoning board planner]: **They're about 400**
square feet.

³ The rendering was not specific to the Property but simply showed the Billboard in a general sense.

⁴ This does not make sense. A principal use is “the main purpose for which a lot or building is used.” (Pa159.) The main purpose of the Property is a motel.

25 **Those signs, they're big.** That Walmart one is big.
1 It's probably about 25 to 30 foot in width and probably
2 35 feet in height. Again, just so the record is clear,
3 it's based off of close to 300,000 square foot of retail
4 space...

(1T:48-49.)

20 [to] their point, the Lowe's sign and the ShopRite sign, I --
21 granted you can't have a billboard that goes top to
22 bottom and read it that way, **but by square footage**
23 **purposes, it's not an ugly duckling.** There is others,
24 that it's just that the US Gas, Burger King, Taco Bell
25 and the others are normal sizes and and we kind of need to
1 meet halfway in the middle. I would think, 176 is
2 pretty, I think you're pretty close. Alicia or Chris,
3 any discussions, Steve, with the comments about square
4 footage or raw square footage.
5 UNKNOWN SPEAKER 2 [Zoning Board member]: **I'm okay with**
6 **what they**
7 **have proposed here, to tell you the truth.**
8 UNKNOWN SPEAKER [Zoning Board member]: Which one?
Because
8 there's been four at 30ft.

(1T:64-65.)

23 That's considered distraction. So,
24 like, when you see the (unsure) sign that I mentioned,
25 the Grand, where the Lowe's is, the Grand Plaza or
1 whatever, that's an enormous overall area. **But it's,**
2 **perspective wise, it's on the ground, but it's very tall**
3 **and not really wider. It's not wider than as tall.**
4 **That's not permitted in billboards. They also have to**
5 **be at the height they are because they don't want**
6 **anybody looking at ground level distracted. Because if**
7 **it's in your view field, at ground level, that distracts**
8 **your eye.** But if you have to purposely look up at it,
9 like when you're driving on the expressway we were
10 joking about this. There's a section of the expressway

11 that doesn't have billboards and people fall asleep on
12 it because it's so dark.

...

19 permitted in the TC zone and other sections and already
20 exists, as I mentioned, down the street of the Lowe's
21 center. For the bulk variances, there are three. They
22 are from 218 83 C 4, where a maximum sign height of 20
23 feet is permitted and now 35 feet is proposed.

(1T:18-21, 33.) The Billboard would not be visible from any residential property.

(1T:25.)

During the Application, Garden State proposed to reduce the size of the Billboard to twelve feet by twenty-five feet, an approximately “20 something percent reduction.” (Tr. at 44.) The Zoning Board’s resolution of denial says that this “would still significantly exceed the size of all existing signs located in the surrounding neighborhood.” (Pa125.) This is false, as explained above. Regardless, a reduction to twenty-five feet in height clearly complies with the height permitted for on-premises speech.

Garden State’s planner testified that “there’s really not a lot of places in the township that a billboard would be appropriate. We feel this is one because of that location between the Parkway and Route 9. It’s heavily developed. The position of the sign is such that it won’t be visible from the...neighboring residential...”

(1T:25.)

On July 14, 2022, the Zoning Board voted to deny the Application. (Pa119.)

In its resolution of denial, the Zoning Board cited “safety,” among other reasons. (*Id.*) Regardless, as Garden State’s planner testified, the Federal Highway Administration procured a study in 2014 determining that billboards were safe for drivers because attract attention for no more than “0.4 seconds.” (1T:18.) Middle’s ban on permanent off-premises speech was enacted before the 2014 study. The study is the type of change in facts referenced in E&J Equities, LLC where the New Jersey Supreme Court held that “safety” or “aesthetics” could not be established by “supposition” and merely mouthing those words. E&J Equities, LLC, 226 N.J. at 585.

III. The trial court’s relevant orders and opinions

On August 19, 2022 Garden State sued Middle and the Board, challenging the ban on permanent off-premises speech and the denial of the Application. (Pa38.)

On August 15, 2023, Garden State moved for partial summary judgment to declare the ban on permanent off-premises speech unconstitutional. (Pa70.) Middle cross-moved. (Pa229.)

On December 1, 2023, the trial court upheld Middle’s ban on permanent off-premises speech, disregarding E&J Equities and relying on Interstate Outdoor Adv. V. Zoning Bd. of Mt. Laurel, 706 F.3d 527, 535 (3d Cir. 2013), a federal precedent that is in conflict with E&J Equities and Bell (among others). Federal precedent is decidedly less strict in this area than New Jersey precedent, as explained below. As

likewise explained below, the test used by the Third Circuit in Interstate Outdoor Adv. is a jurisprudential “Frankenstein” of multiple tests and cannot be squared with E&J Equities, which expressly sought “precision” in this area. E&J Equities, *supra* at 582. The trial court held, without *any evidence at all*, that there were reasonably equivalent alternative means of communication to a billboard (Pa31); the only competent evidence before the trial court was Garden State’s evidence that there were not such means. (Pa956.)

On December 1, 2023, the parties entered a consent order dismissing various redundant and duplicative claims in Garden State’s complaint, leaving only the challenge to the Zoning Board’s denial of the Application. (Pa1101.)

After briefing, the trial court upheld the Zoning Board’s denial on June 20, 2024. (Pa2.) The trial court conceded the Billboard was “consistent with height limitations in the surrounding area.” Trial court held, however, that the Billboard would be a detriment to the surrounding commercial community. (Pa15.)

On July 21, 2024, Garden State appealed. (Pa33.)

STANDARD OF REVIEW

The trial court’s holding on the constitutionality of the permanent ban on off-premises speech is subject to a de novo review. E&J Equities, 226 N.J. at 565. The trial court’s affirmation of the Zoning Board’s denial is reviewed by the same standard applied by the trial court: whether the Board’s denial is based in substantial

evidence and is not arbitrary, capricious, and unreasonable. Effectively, this Court reviews the denial anew as if it were the trial court. Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 89 (2002).

LEGAL ARGUMENT

The trial court's order upholding the permanent ban on off-premises speech is plainly in conflict with Bell and E&J Equities and fails the test set forth in the latter. Neither this Court nor the New Jersey Supreme Court has ever upheld a ban of this nature or anything similar. Municipalities have leeway to enact many forms of signage regulation that may pass constitutional muster, but this is certainly not one of them.

I. Middle's ban on permanent off-premises speech is unconstitutional on its face and was clearly struck down in Bell and the trial court erred in upholding it (Pa31)

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

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

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

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

Bell struck down this *exact* ban. This appeal already happened. The municipality lost at the New Jersey Supreme Court: "The controversy arose from the Township of Stafford's enactment and enforcement of an ordinance declaring that "[b]illboards, signboards, and off-premises advertising signs and devices are prohibited within any zoning district of the Township." Bell, 110 N.J. at 387. "Township of Stafford has not presented adequate evidence that demonstrates its ordinance furthers a particular, substantial government interest, and that its ordinance is sufficiently narrow to further only that interest without unnecessarily restricting freedom of expression. Consequently, it has failed to demonstrate a basis for upholding the constitutionality of the ordinance." Id. at 397-398.

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

II. Middle’s ban on off-premises speech is a not valid time/place/manner regulation and the trial court erred in upholding it (Pa31)

If Middle overcomes facial unconstitutionality, against all precedent to the contrary, its ban on permanent off-premises speech is still unconstitutional time, place, and manner regulation. In determining the constitutionality of an ordinance regulating speech, courts afford different types of speech different levels of protection. E & J Equities, 226 N.J. at 568. Middle’s ban on permanent off-premises speech is content neutral, so it is reviewed under the time, place, and manner test. Id.; see City of Austin v. Reagan Nat’l Adver. of Austin, LLC, 142 S.Ct. 1464, 1475 (2022); Miller, 83 N.J. at 416 (content neutrality).

The time, place, and manner test is known as the “Clark/Ward test,” named after Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289 (1984), and Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989). E & J Equities, 226 N.J. at 580-81. The test applies to content-neutral regulations of signs of any form, including billboards, affecting commercial and noncommercial speech equally. E&J Equities, 226 N.J. at 580; see also City of Austin, 142 S.Ct. at 1476; Miller, 83 N.J. at 416.

Under the Clark/Ward test, Middle “must demonstrate that the prohibition...is content neutral, that it is narrowly tailored to serve a recognized and identified government interest, and that reasonable alternative channels of communication exist to disseminate the information sought to be distributed. In assessing whether an ordinance is narrowly tailored, the inquiry is whether it promotes a substantial

government interest that would be achieved less effectively absent the regulation.”⁵ E&J Equities, LLC, 226 N.J. at 582 [cites omitted]; see also State v. DeAngelo, 197 N.J. 478, 486 (2009). As Bell put it: the enactment must be “sufficiently narrow to further only that interest without unnecessarily restricting freedom of expression.” Bell, supra at 397-398.

Middle fails the Clark/Ward test because (1) the ban on permanent off-premises speech is not narrowly tailored to serve the Purposes; and (2) Middle simply does not permit any reasonably equivalent alternative means of communication for permanent off-premises speech, let alone a reasonable equivalent to a billboard.

A. Purposes 4 and 5 lack any modicum of support

Preliminarily, Purposes 4 and 5 cannot be considered here. Purpose 4 deals with safety concerns and Purpose 5 references the historic character of “Cape May Courthouse Overlay District.” The latter clearly does not apply and the former has been rejected by the New Jersey Supreme Court as “supposition” in the context of billboards. E&J Equities, 226 N.J. at 557. Such “safety” concerns are outdated after E&J Equities, in the absence of concrete evidence. Id. Nothing in Middle’s extensive

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

historical presentation to the trial court remotely touched on the “safety” of billboards in the competent manner contemplated by E&J Equities.

For a municipality to constitutionally rely upon a purported government interest to restrict speech, it must do more than invoke an allegedly substantial interest. See E&J Equities, 226 N.J. at 557 (“[s]imply invoking aesthetics and public safety to ban a type of sign, without more, does not carry the day”). The substantial interest must be established with competent evidence. Id. There are various methods of proving this, such as “reference to studies pertaining to other jurisdictions, legislative history, consensus, and even common sense,” Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 271 (1998), but none apply here.⁶

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

The ordinance fails to reveal either its particular governmental objectives or its factual underpinnings. As the Appellate Division noted, the record is almost completely devoid of any evidence concerning what interests of Stafford are served by the ordinance and the extent to which the ordinance has advanced those interests. Because

⁶ Twp. of Cinnaminson v. Bertino, 405 N.J.Super. 521, 536 (App. Div. 2009), rejects “common sense” or hypothesis as a replacement for competent evidence.

the exercise of first amendment rights and freedom of speech are at stake, the municipality cannot seek refuge in a presumption of validity. It clearly had the burden to present and confirm those compelling legitimate governmental interests and a reasonable factual basis for its regulatory scheme in order to validate its legislative action. Its failure to do so is fatal.

Id. at 396.

E&J Equities further established that “safety” and “aesthetic” concerns must be grounded in real evidence, not “supposition.” E&J Equities, LLC, 226 N.J. at 585. At hearings before the Zoning Board, Garden State established, without rebuttal, that the Billboard was “safe” for traffic and that there was no competent evidence to the contrary. In E&J Equities the New Jersey Supreme Court instructed municipalities to actually consider the safety studies on billboards because there was no competent evidence they were unsafe:

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

E&J Equities, *supra* at 584.

B. Purposes 1-3 and 6 are not narrowly tailored

When Purposes 4 and 5 are removed from the analysis, the Court is left with Purposes 1-3 and 6— essentially aesthetics phrased different ways. Assuming that these are substantial interests to satisfy Clark/Ward, Middle’s ban on permanent off-premises speech fails narrow tailoring because these Purposes do not support or require a total ban.

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

The Court in Bell explained:

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

110 N.J. at 396-397. “A restriction on speech may not substantially burden more speech than necessary to further the government interest, but identification of another alternative that might be less restrictive of speech to achieve the desired end does not render the ordinance invalid.” E&J Equities, 226 N.J. at 572 (citing Ward, 491 U.S. at 799). Government “may *not* regulate expression in such a manner that a

substantial portion of the burden on speech does not serve to advance its goals.” Ward, 491 U.S. at 799 [emphasis added]. A complete ban on speech can be narrowly tailored *only* “if each activity within the proscription’s scope is an appropriately targeted evil.” Frisby v. Schultz, 487 U.S. 481, 485 (1983).

“A governing body seeking to restrict expression cannot simply invoke those [substantial] interests with scant factual support informing its decision-making and expect to withstand a constitutional challenge.” E&J Equities involved a ban on a particular form of billboard— digital billboards with changing signs— capable of relaying commercial and non-commercial messages. The New Jersey Supreme Court held that the municipality failed to provide an explanation of the qualitative differences between the billboards permitted and the digital billboards prohibited. See id. at 583 (“The record provides no basis to discern how three static billboards are more aesthetically palatable than a single digital billboard”). This is the same analysis as Miller: “[t]o withstand the strict constitutional scrutiny required here, the restriction on signs must be tied to a *compelling municipal interest as well as to the uses permitted in a given zone*.” 83 N.J. at 414 [emphasis added]. E&J Equities, too, focused on the underlying uses in a given zone, not just “billboards” in a vacuum:

To be sure, the record demonstrates that the Township has labored to preserve the bucolic character of sections of the municipality and to minimize the impact on a residential neighborhood across the highway. The Township Council also cited safety concerns. The Township, however, permits industrial and corporate development and has directed that static billboards may be erected in the M-2 zone. In fact,

three static billboards can be erected along I-287 in the M-2 zone. The record provides no basis to discern how three static billboards are more aesthetically palatable than a single digital billboard.

Clearly, the action by the governing body was informed by the work of the Planning Board and the advice of the Township Planner. That official informed the governing body that there was an absence of research upon which he could recommend standards to address those concerns.

E&J Equities, *supra* at 583-584.

As in E&J Equities, Middle’s re-examination reports do not support or recommend a total ban on all permanent off-premises speech *in 2025*. The Court is required to “carefully examine the factual bases of the municipality’s conclusion[s]” and how they reconcile with the actual uses in the Town Center Zoning District. Miller, 83 N.J. at 415.

Like in Bell and E&J Equities, Middle’s ban on permanent off-premises speech is more extensive than necessary to serve any substantial interest set forth in Purposes 1-3 and 6. Notably, these four Purposes all deal— effectively— with aesthetics, which was the reason cited by the Zoning Board for denying the Application. While aesthetics is generally considered to be a substantial interest in the context of sign regulations, Miller, *supra*, Middle must nonetheless prove there is support for the invoked interest and narrow tailoring to serve that interest. In other words: what is a substantial interest in a general sense in other constitutional contexts is not sufficient

here unless the underlying zoning supports it. Miller, supra at 414-415. But it does not. Middle cannot just cry “aesthetics.” E&J Equities, LLC, supra at 584.

As to Purpose 1, “ensuring . . . proposed signage is compatible with surrounding land uses,” this does not require and is not reasonably related to a ban on permanent all off-premises speech because the Town Center Zoning District is a high-intensity commercial zone. There are signs and flashing lights almost everywhere. The permitted uses are entirely compatible with the Billboard and Garden State proposed to comply with Chapter 283-10’s absolute height limitation:

The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable....The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time...Thus, the initial question in determining the validity of the exclusion as a time, place, and manner restriction is whether [banned speech] is basically incompatible with the normal activity [in the commercial zones].

Schad v. Mount Ephraim, 452 U.S. 61, 75 (1981). Middle fails that “initial question.”

Again, and dispositively, the Zoning Board deemed the Billboard a “principal use,” but held it to a height limitation different than for a “principal use.” That contradiction alone shows that the Billboard is “compatible with the normal activity,” which is cemented by all the intensive uses in the surrounding area that have flashing lights and colors similar to the Billboard.

As to Purpose 2, “creat[ing] a more attractive economic and business climate within the commercial areas” is anathema to a ban on all permanent off-premises

speech. Businesses in Middle cannot advertise anywhere but on their own property. Business are precluded from “cross-promoting” via signs for one another, a now fairly common business practice; they are precluded from showing any “permanent” political support or advocating for a cause no on the property. Under the strict language of Middle’s permanent ban on off-premises speech, businesses cannot even put up a sign that says “Go Panthers,” to support Middle’s high school. (Pa134.)⁷

As to Purpose 3, “protect[ing] and enhanc[ing] the physical appearance of all areas” is advanced not by a ban on all permanent off-premises speech, while leaving on-premises signage to be appalling, but by regulating *permanent off-premises speech to be consistent with Middle’s chosen aesthetics, i.e. height, lighting, etc.* See e.g. Prime Media, Inc. v. City of Brentwood, Tenn., 398 F.3d 814, 822 (6th Cir. 2005); Get Outdoors II, LLC v. City of San Diego, Cal., 506 F.3d 886, 894 (9th Cir. 2007) (upholding dimensional regulation of billboards as narrowly tailored). This is what the New Jersey Supreme Court suggested in E&J Equities, LLC, which Middle has ignored.

The Town Center Zoning District, through Chapter 283-10, already permits on-premises speech as big as the Billboard. The trial court conceded this. Middle’s

⁷ Chapter 218-83(C)(8) refers to any “organization” not on the property. (Pa134.) There is nothing in “signs permitted without a permit” (Pa135) or “signs permitted in the TC Town Center Zone” (Pa138) that rationally exempts basic human communication like rooting for a local sports team or similar messages. In Middle, a sign simply cannot communicate *anything that is not based on-premises*.

ban on permanent off-premises speech invalidly fails to distinguish between large permanent off-premises speech and on-premises speech of the same size. This is one of the reasons the New Jersey Supreme Court struck down the prohibition in Bell: the overall zoning did not support the municipality's focus on aesthetics *for billboards alone* and the municipality "itself arguably [had] shown that a much more narrow ordinance could have been tailored." Bell, 110 N.J. at 397 n.7.

As to Purpose 6, "discouraging sign proliferation" does not remotely require, and is not reasonably related to, an absolute ban on all permanent off-premises speech. Quite obviously, "proliferation" can be addressed by distancing requirements (for example). See e.g. Elray Outdoor Corp. v. Bd. of Adjustment of Englewood, 2009 N.J. Super.Unpub.LEXIS 2378 at *22 (App. Div. Sep. 8, 2009) [Pa1511].

C. Middle's ban on permanent off-premises speech leaves no reasonably equivalent alternative means of communication and the trial court erred in holding otherwise (Pa31)

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

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

communicating the message that is conveyed by a...sign....The alternatives, then, are far from satisfactory.

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

Following Linmark, the New Jersey Supreme Court invalidated an ordinance in DeAngelo that prohibited all but a few exempted signs, and expressly prohibited “portable signs[,] balloon signs or other inflated signs (excepting grand opening signs).” 197 N.J. at 481. Because the ordinance “almost completely foreclosed a venerable means of communication that is both unique and important,” it was unconstitutional. Id. at 490. DeAngelo relied upon City of Ladue v. Gilleo, where the Supreme Court declared overbroad an ordinance essentially banning residential signs with limited exceptions, while permitting commercial, religious, and non-profit establishments to erect signs not allowed at residences. 512 U.S. 43, 45 (1994).

There, the Supreme Court held:

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

Id. at 54-55, 58-59.

In sum: “[t]here is a special solicitude for forms of expression that are much less expensive than feasible alternatives, and so an alternative must be more than merely theoretically available...[] an adequate alternative cannot totally foreclose a speaker's ability to reach one audience even if it allows the speaker to reach other

groups.” Gresham v. Peterson, 225 F.3d 899, 906–907 (7th Cir. 2000) [cites/quotes omitted]. Middle has the burden of establishing a reasonably equivalent alternative to a billboard, Bell, supra at 397-398, which is impossible here *because no sign can have permanent off-premises speech*.

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

Here, although wall and freestanding signs are permitted within the Town Center Zoning District, and might arguably be reasonably equivalent alternatives to a billboard, the total ban on permanent off-premises speech renders their availability meaningless— they are equally banned for Garden State’s speech. There are no ample alternative channels for communicating the type of information typically found on billboards generally to a billboard’s typical audience— travelers on major roadways moving at relatively high speeds. The only possible alternative channel is a wall sign or freestanding sign on the premises of any commercial establishment. But those signs do not broadly disseminate information the same way billboards do and they cannot change their messaging as billboards do, *which is banned in Middle*.

As Garden State’s planner testified, the Town Center Zoning District, and this Property in particular, is the only location that is both conducive to the means of

communication presented by the Billboard— drivers at relatively high speed— and compatible with the underlying zoning/uses.

In the record below, the Court will see no attempt by Middle to satisfy its burden of reasonably equivalent alternatives. *Garden State* submitted evidence of lack of reasonable alternatives— that radio, buses, and the internet (to name just a few) cost far more than billboards and were not tailored to or triggered by nearby locales and events. (Pa956.) Middle simply cited Interstate Outdoor Adv. The trial court then assumed and hypothesized that various reasonably equivalent alternatives existed, citing “mail, internet, on-premises advertising, radio, etc.” (Pa31.) With due respect to the trial court, this list makes no constitutional sense. Mail takes days and has never been construed, in this context, as a reasonably equivalent alternative. It is not clear what the trial court meant by “internet,” which appears just to be a general reference to anything anyone can see online at any time. “On-premises advertising” *is literally the opposite of off-premises*;⁸ it cannot, as a matter of common sense, be reasonably equivalent. Radio is not locale-specific or triggered by passing through an area. The list is entirely random and bears no relation to “Clark/Ward.”

⁸ This example is particularly absurd. Taken literally, it requires an advertiser to buy or lease property in Middle, open a business, and then advertise only for that business. It is beyond circular logic, ignoring that the cost is clearly beyond a billboard.

“Reasonable equival[ence]” is required; “equival[ence]” means “the audience that was reached by the medium that is prohibited,” Bell, 110 N.J. at 397, not just random examples of any kind of other communication on Planet Earth. See Elray, supra at *22 (rejecting hypothesized alternatives without evidence).

If there was a dispute on reasonable equivalence, the Court should have held a hearing, Twp. of Cinnaminson, 405 N.J.Super. at 536, to allow Middle to satisfy its burden. Inventing false equivalents was not the evidential or constitutional answer.

D. The trial court’s reliance on Interstate Outdoor Adv. was plainly wrong (Pa31)

The trial court’s holding for Middle is really just a recitation of Interstate Outdoor Adv. But there are massive jurisprudential errors with such reliance.

First, the trial court was bound by Bell and E&J, not Interstate Outdoor Adv. Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 79 (1990).

Second, Interstate Outdoor Advertising did not involve a claim under the New Jersey Constitution, which is more protective of free speech, as is clear from Bell and its progeny. Indeed, Interstate Outdoor Adv. *does not cite a single New Jersey precedent.*

Third, the bulk of Interstate Outdoor Adv. is based on “safety” evidence that is wholly lacking here. Interstate Outdoor Adv., supra at 533.

Fourth, and most importantly, Interstate Outdoor Advs. involved what can only be called an amalgamation of “rational basis review” and “Central Hudson.” Id. at 534. Interstate Outdoor Advertising Adv. relies essentially only on Metromedia, but Metromedia was a “Central Hudson” test. Metromedia, 453 U.S. at 507. None of it is consistent with E&J Equities. As the New Jersey Supreme Court held in E&J Equities, the “Central Hudson” test is not the one that this Court is bound to apply in this situation.⁹ This Court must apply the “Clark/Ward” test. “Government regulation of speech deserves precision.” E&J Equities, *supra* at 582. “Clark/Ward” applies because Middle’s ban on permanent off-premises speech is content-neutral ban and purports to regulate an entire form of communication, permanent off-premises speech. Id.

At best, Interstate Outdoor Adv. only applies the “Clark/Ward” test to “non-commercial speech,” essentially splitting a billboard ban in half between commercial and non-commercial speech. 706 F.3d at 534. This is odd and doctrinally very incorrect under E&J Equities. If non-commercial speech were analyzed separately,

⁹ While it may seem counterintuitive that the content-neutral test, “Clark/Ward,” is more rigorous than the content-based test, “Central Hudson,” this is because “Central Hudson” addresses *commercial speech*, which is given less protection under the First Amendment. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553 (2001). Unlike “Central Hudson,” “Clark/Ward” requires narrow tailoring, not merely “reasonable fit,” and it requires a showing of “reasonable alternative channels of communication...” De’Angelo, *supra*; E&J Equities, *supra*.

as the Third Circuit does, **that would be a far more exacting inquiry subject to “strict scrutiny” because the analysis is no longer “content neutral”** and it involves more than commercial speech (a lower scrutiny). See Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015). As explained in City of Austin, 142 S. Ct. at 1464, a ban on all off-premises speech is content neutral *because it affects all types of speech equally and that is why such a ban is analyzed under less than “strict scrutiny.”* But under Interstate Outdoor Adv., a ban on all off-premises speech is somehow broken apart, *made content-specific— including as to non-commercial speech— but still not subject to “strict scrutiny.”* Interstate Outdoor Adv. clearly conflicts with City of Austin and should simply be regarded as a jurisprudential outlier. It is wrong, at least in New Jersey before this Court.

It is thus unsurprising that Interstate Outdoor Adv. was not cited in E&J Equities because, similarly, it is doctrinally anomalous to New Jersey under Bell and its progeny.

III. Because Middle’s ban on permanent off-premises speech is unconstitutional, the Application should be reviewed as a permitted “sign” and subject to only those variances for a “sign” (Pa31)

Because the unconstitutionality of Middle’s ban on permanent off-premises speech, the Application is subject only to the remaining, valid portions of Middle’s regulation of signs. Intervine Outdoor Advert. v. City of Gloucester City Zoning Bd. of Adjustment, 290 N.J.Super. 78, 87 (App. Div. 1996). This means that the

Application is for a permitted use and only “bulk” variance relief (if any) is required. The Court should therefore enter an order immediately remanding the Application to be so analyzed.

IV. The trial court erred in upholding the Zoning Board’s denial (Pa10)

If the Court must reach the Zoning Board’s denial of the Application, Garden State still prevails.

A local land use board’s factual determination must be based on substantial evidence. Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013). The Zoning Board lacked substantial evidence to deny the Application.

A. Garden State is entitled to a use variance

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

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

promotes the general welfare because the proposed site is particularly suitable for the proposed use.” Id.

Particular suitability is a “site-specific analysis.” Id. “A [d]etailed factual [record] that distinguish[es] the property from surrounding sites and demonstrate[s] a need for the proposed use may help to establish that the property is particularly suitable...” Id. However, an applicant need not establish a property as the *only possible* property for the use. Price, supra at 293. “It is long settled law in this state that” the “special reasons” does “not require that the particular premises cannot feasibly be used for a permitted use or that other hardship exists. Special reasons is a flexible concept; broadly speaking, it may be defined by the purposes of zoning set forth in *N.J.S.A. 40:55-32*.” De Simone v. Greater Englewood Hous. Corp., 56 N.J. 428, 440 (1970).

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

It may be that the proposed use was one, like a health club, that was uncommon when the ordinance was last revised, but has since gained currency. Competent proofs to this effect could dispel the concern that exclusion of the use was deliberate rather than inadvertent. Likewise, a variance application to permit a commercial use to be established on residentially-zoned property might also be supported by proofs

demonstrating substantial changes in the character of the neighborhood surrounding the subject property since the adoption of the ordinance, in order to reconcile the apparent conflict between the ordinance and the proposed variance. Similarly, the needs and character of an entire community may be altered by extrinsic factors, such as the proximity of major highway construction or commercial development in adjoining municipalities. Such circumstances may create a demand for uses, such as hotels, that were not anticipated when the ordinance was last revised. These examples are offered merely to illustrate, and not to exhaust, the nature of the proofs that could be offered to reconcile a proposed use variance with the provisions of the zoning ordinance.

Id. at 22 n.11.

Here, Garden State established that the Property is particularly suited for the Billboard and that its location will mitigate the purported negative effects normally associated with it. As Garden State’s planner testified, the Property is particularly suited for the Billboard because “that location between the Parkway and Route 9...[is] heavily developed. The position of the sign is such that it won’t be visible from the...neighboring residential...” (1T:25.) As the Zoning Board’s own planner conceded, the Billboard is consistent with larger signs for on-premises speech, such as Walmart’s and Lowe’s. (1T:48-49.) The trial court agreed that Garden State satisfied the positive criteria. (Pa13.)

Similarly, Garden State satisfied the negative criteria by “enhanced quality of proof” because the surrounding uses and signs establish reconciliation with the zoning. See Price, 214 N.J. at 275, 293 (affirming use variance for same reasons).

First, the zoning effect of on-premises versus off-premises speech is the same; a commercial sign advertising for a business on-premises can be just as bright and deleterious as a commercial sign for off-premises speech. So the zoning itself acknowledges the ability of the zone to accommodate a Billboard because it already permits on-premises speech.

Second, as testified to by Garden State’s planner, digital billboards were not in use when Middle enacted its absolute ban on billboards. Digital billboards now allow dimming and other technological features to address the purported “problems” of static billboards. (1T:14-18.) Similarly, the “safety” concerns that existed in decades prior were rejected in E&J Equities and rejected in unrebutted testimony by Garden State’s planner. Garden State thus satisfied the “enhanced quality of proof” set forth in Medici through various methods showing that the zoning can accommodate the Billboard and is consistent with the signs/uses in the surrounding area. See Medici, supra at 22 n.11 (explaining the outdated assumptions may justify use variance).

Third, the Billboard is consistent with the height limitation for principal uses in the zone.

B. Garden State is entitled to a variance for two principal uses, if such variance is required

The Zoning Board’s resolution provides no explanation as to why the Billboard is a second principal use requiring a use variance. The Zoning Board’s

interpretation is of course reviewed de novo, with no deference. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin, 233 N.J. 546, 559 (2018).

New Jersey courts have long construed “customarily and incidental” in defining “accessory use” to mean the “proposed use is of minor significance and a use commonly, habitually, and by long-standing practice established as reasonably associated with the permitted principal use.” Fin. Servs., L.L.C. v. Zoning Bd. of Adjustment of Borough of Little Ferry, 326 N.J.Super. 265, 274 (App. Div. 1999).

Businesses have signs. Some businesses have large signs. It is utterly absurd to say that a billboard is a principal use but any other sign is an accessory use, at least, where, as here *Middle has not actually legislated that result*. The Zoning Board just made it up. But the Billboard does not “alter the character of the property” so as to remove it from the meaning of “customarily and incidental.” Columbro v. Lebanon Tp. Zoning Bd. of Adjustment, 424 N.J.Super. 501, 511-512 (App. Div. 2012). The height limitation problem below likewise supports that the Billboard is simply not a principal use because the Zoning Board did not apply the principal use height limitation to the Billboard.

This was precisely the holding in Outfront Media, LLC v. Planning/Zoning Bd. of Borough of Bogota, 2019 N.J. Super. Unpub.LEXIS 1657 at *5 (App. Div. July 19, 2019). There, the relevant zoning prohibited a billboard from being “above the height of the principal building” and defined “principal building” as “situated on

a lot in which the principal use is conducted.” The board argued that there were two principal uses on the subject property. This Court held that was true, but, under the language of the zoning, the billboard was “the principal use” and therefore the height was *permitted*.

Regardless, Garden State is entitled to a use variance for two principal uses, if one is required, for the same reasons it is entitled to a use variance for the Billboard.

C. Garden State is entitled to a height variance, if one is required

If a billboard is a principal use, then the Zoning Board applied the wrong height standard, an error that is, again, reviewed de novo.

The height limitation for a principal use in the Town Center Zoning District is fifty feet. It is the only height limitation, applied without distinction to any particular principal use. Thus, once the Zoning Board said the Billboard is a principal use, it had to apply the fifty foot height imitation. The fact that a billboard is a prohibited use is irrelevant in this context because the zoning simply contains one height limitation *for any principal use in the zone*— fifty feet.

Regardless, Garden State was entitled to a height variance for the Billboard.

There are two forms of height variances, a “(d)(6)” heigh variance where the height “exceeds 10 feet or 10% the maximum height permitted,” or a bulk variance for height where the deviation is less than that. See N.J.S.A. §40:55D-70(d)(6);

Grasso v. Borough of Spring Lake Heights, 375 N.J.Super. 41, 53-54 (App. Div. 2004). A “(d)(6)” height variance is not a use variance and does not require that level of proof. Id. Garden State “could prove special reasons for a height variance if...a taller structure than permitted by ordinance would nonetheless be consistent with the surrounding neighborhood. To establish special reasons, [Garden State] would need to demonstrate that [height] would not offend any of the purposes of the...height limitation.” Id. at 53.

The Zoning Board apparently construed Garden State’s proposal of a reduced height of twenty-five feet as a bulk variance, not a “(d)(6)” height variance, even though the resolution still lists a proposed height of forty-five feet. If the height variance is merely a bulk variance, it is addressed below. If it is a “(d)(6)” height variance, Garden State established that: (i) the Billboard was no higher than it needed to be to serve its purpose; (ii) that it was consistent with the height of similar signage in the zone and indeed only half the height for principal uses; and (iii) that the technology of a digital billboard was able to ameliorate purported negative effects of a billboard, such as automatic dimming and angling to make the billboard barely discernible when viewed from the side.

D. Garden State is entitled any remaining bulk variances, including height (if applicable)

Where a use variance is sought, as here, a bulk variance is subsumed in the analysis of the use variance. Puleio v. N. Brunswick Tp. Bd. of Adjustment, 375 N.J. Super. 613, 621 (App. Div. 2005). Accordingly, for the reasons already set forth, Garden State was entitled to bulk variances for maximum number of free-standing signs, sign area, and height (if applicable).

E. The Zoning Board's denial lacked factual basis generally

In terms of the overall record before the Zoning Board, all expert testimony supported the Application. The Zoning Board made no finding that “[Garden State’s] testimony was unbelievable, incompetent, or conflicting. While a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs.” Id. at 338. The resolution does not even try to argue that it did so, or that the Zoning Board’s “decision” was “predicated on substantial evidence.” See Cell S. of N.J., 172 N.J. at 89.

The Board obviously relied on “safety” as a justification for denial. But the Board failed to address the lack of competent evidence for “safety,” as required by E&J Equities. Once safety is rightfully set aside as an impermissible consideration, for lack of evidence, the Court is left with the principal use problem and the lack of evidence that the Billboard would be out of character with the Town Center Zoning

District. The Board's denial therefore lacks substantial evidence and should be reversed.

CONCLUSION

There is no doubt that Middle's goal here is laudable, but the goal was laudable in E&J Equities and Bell too. That is simply not enough. There is nothing in the record that justifies a full-on ban on permanent off-premises speech. For all the history relied upon by Middle below, there actually is not that much *factual connection to the ban on permanent off-premises speech itself*. As for the Application, the Zoning Board's denial was basically circular.

Respectfully submitted,

/S/

JUSTIN D. SANTAGATA

GARDEN STATE OUTDOOR, LLC, Plaintiff-Appellant, v. ZONING BOARD OF ADJUSTMENT OF MIDDLE TOWNSHIP AND THE TOWNSHIP OF MIDDLE TOWNSHIP Defendants-Respondents.	SUPERIOR COURT OF N.J. APPELLATE DIVISION CIVIL APPEAL DOCKET NO. A-3622-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-304-22 SAT BELOW: HON. MICHAEL J. BLEE, A.J.S.C.
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**BRIEF ON BEHALF OF RESPONDENTS,
ZONING BOARD OF ADJUSTMENT OF MIDDLE TOWNSHIP AND
THE TOWNSHIP OF MIDDLE TOWNSHIP**

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Date of Submission: April 9, 2025 (amended April 10, 2025)

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PRELIMINARY STATEMENT

Defendants/Appellees, Zoning Board of Adjustment of Middle Township (hereinafter the “Board”) and the Township of Middle Township (hereinafter “Middle” or the “Township”) (hereinafter collectively the “Defendants”), submit this brief in opposition to Plaintiff/Appellant, Garden State Outdoor LLC’s (hereinafter “Plaintiff”), appeal of the trial court’s Orders which properly upheld the constitutionality of Middle’s billboard prohibition and the Board’s denial of Plaintiff’s application for variance relief to erect a 378 square foot, 45-foot high, “light emitting diode billboard” on Rt. 47 in the Township.

Middle’s concern for the unique aesthetics of the Township, and the Cape May peninsula as a whole, has permeated the history of their land development ordinances since 1964, as evidenced by the Township’s Initial Master Plan and its subsequent reexaminations. Indeed, the planning goals of preserving aesthetics, maintaining open space, and preserving scenic landscapes is infused throughout the planning documents guiding both the Township and Cape May County at large. It is with these considerations in mind that Middle has maintained a town-wide ban of off-premises advertising signs for over half a century. The Township’s 2020 Master Plan Reexamination Report reiterated its continued land use goals of addressing the negative impacts of commercial and

industrial development through appropriate performance standards and updating sign standards that promote safety while discouraging sign proliferation.

Considering Middle's characteristics and location adjacent to the Delaware Bay and the New Jersey shore, billboards simply do not fit the Township's aesthetic, would fail to advance any purposes of the Municipal Land Use Law, and would irreversibly impact the scenic landscapes which make the Jersey Shore a worldwide tourist destination. Stated simply, there are no locations in Middle appropriate for billboard uses. To mandate that billboards be a permitted use would permanently, and irreversibly, alter Middle's landscape, character, and feel thereby negatively impacting the general welfare of the Township, its citizens, and the adjacent municipalities.

Considering these facts, the trial court's determination that Middle's blanket ban on billboard's was constitutionally valid is proper because it advances the significant and legitimate government objectives set forth within the Township's Master Plan, the Cape May County Plan, and the Municipal Land Use Law itself and is narrowly tailored to advance those interests. Thus, Defendants submit the Township's billboard ban is constitutional and should be upheld.

The trial court also correctly held that Middle's content-neutral billboard prohibition is a valid time/place/manner regulation of speech because it is

narrowly tailored to promote the Township's substantial and well-documented government interest in maintaining the Township's aesthetics. The Township's overarching interest in aesthetics is still implicated and achieved by the ban, perhaps even more so, despite the fact Plaintiff proposes to erect its 300-plus square foot, double-sided, "light emitting diode billboard" on Rt. 47 in the Township's Town Center Zoning District, which is a developed area. As the trial court aptly noted, numerous alternative channels of communication exist despite the ban and maximizing Plaintiff's profit at the expense of Middle's significant longstanding interests is not the concern of the First Amendment.

Finally, there is no basis to disturb the trial court's Order which upheld the Board's denial of Plaintiff's application for variance relief to erect and operate a billboard which, even at a reduced height and size, was almost double the maximum permitted sign height and was almost eight (8) times larger than the 40-square foot maximum size area for the proposed location.

As set forth below, the trial court properly upheld the Township's prohibition on off-premises advertising and billboards as constitutional and correctly found that the Board's denial of Plaintiff's zoning application was not arbitrary, capricious and unreasonable. Accordingly, there is no basis to disturb the trial court's rulings and Plaintiff's appeal should be denied.

STATEMENT OF FACTS

Plaintiff is a New Jersey limited liability company in the business of erecting, owning and operating outdoor advertising structures. (Compl., ¶¶1-2, Pa38). Middle is municipality in New Jersey and the Board is Township’s zoning board. (Id. at ¶¶3-4).

I. The Application and Proposal.

Plaintiff sought use variance relief, bulk variance relief and waivers from the Board in connection with its proposal, as lessee, to erect and operate a double-sided, digital (LED) billboard measuring 45 feet tall, with each face of the billboard having dimensions of 378 square feet (hereinafter the “Application”). (Compl., ¶4, Pa38; Application, Pa86). The property proposed as the site for the billboard is located at 1410 Route 47 South, Middle Township, Cape May County, New Jersey (hereinafter the “Property”), which is in the Township’s Town Center (“TC”) Zoning District. (Compl., ¶5, Pa38). The Property consists of a motel use, and the proposed billboard would be in addition to that use. (Application, Pa86).

The Township Ordinance permits each property in the TC Zoning District to have one “freestanding sign calling attention to the shopping center and/or business(es) located therein,” the size of which “shall be based on total square footage” of the property. (Ordinance §218-83 (J), Pa1157).

Plaintiff's Application sought use variance relief in accordance with N.J.S.A. 40:55D-70(d)(1) from Ordinance §218-83(E), which prohibits fifteen (15) types of signs, including "billboards." See §218-83(E)(12). Billboards are defined in §218-5(B) as "[a] sign which directs attention to a business, commodity, service or entertainment conducted, sold or offered at a location other than the premises," or off-site advertising signs. (Ordinance § 218-83(E) and 218-5, Pa1153-1163). Pursuant to the site plan submitted with the Application, the proposed billboard sign would have dimensions ten and one-half feet high by thirty-six feet wide and an overall height of forty-five feet (10.5' x 36' x 45'). (Site Plan, Pa1164). According to the Review Letter prepared by Board Professional Engineer/Professional Planner, Vincent C. Orlando, P.E., P.P., L.L.A., Plaintiff sought two aspects of relief pursuant to N.J.S.A. 40:55D-70(d); first, to permit the use of an electronic message billboard where, per § 218-83E (12), the use is not permitted; and second, to operate a second use on the same lot as the owner's existing motel business where, per § 250-409 (B), only one use is permitted. (Review letter, Pa1166).

The Review Letter clarified that, in addition to the bulk variance relief sought for the height of the billboard, plaintiff additionally sought bulk variance relief to permit two (2) signs on the Property where only one (1) is permitted, and to permit a sign area for each side of the billboard of three hundred and

seventy eight (378) square feet where a maximum of forty (40) square feet per side is permitted. (Id.) Use variance relief for the erection of the billboard was required due to the prohibition on billboards as codified in Township Ordinance § 218-83(12), which lists the prohibited signs in Middle Township and specifies that billboards are prohibited. (Review Letter, Pa1166; Ordinance § 218-83(E)(12), Pa1157).

Bulk variance relief for the height of the proposed billboard was required considering the Township Ordinance which provides, in pertinent part, that “no sign or any part thereof shall be . . . greater in height than 20 feet (unless otherwise noted).” (Ordinance § 218-83(C)(4), Pa1152). Additional bulk variance relief was required for (a) the overall number of freestanding signs on the Property and (b) the area of the proposed billboard due to Township Ordinance § 218-83 (J)(2) which provides, in pertinent part, as follows:

J. Signs permitted in the TC Town Center Zone.

* * *

(2) Freestanding sign. Each property shall be permitted one freestanding sign calling attention to the shopping center and/or the business(es) located therein. The area of the freestanding sign shall be based on total square footage as stated below:

* * *

Minimum Retail Square Footage (square feet)	Permitted Sign Area (square feet)
---	--

* * *

5,001 to 10,000 40

(Ordinance § 218-83(J)(2), Pa1157) (emphasis added).

The TC Zoning District only permits freestanding sign square footage up to a maximum of 400 square feet for property having a minimum retail square footage of 100,001 square feet. (Id.) Based on the size of the Property where plaintiff proposed to install the billboard, the maximum permitted sign area is 40 square feet. (Id.) Plaintiff, however, proposed a double-sided digital billboard with an area of 378 square feet. (Review Letter, Pa1166). Plaintiff's Application proposed a sign height of 45 feet where the maximum permitted sign height is 20 feet. (Id.)

Plaintiff's Professional Planner confirmed the three (3) separate facets of bulk variance relief. (1T 33:21-34:3). Even at the reduced height of 35 feet proposed during the hearing, Plaintiff still proposed to erect a billboard which was almost double the 20-foot height permitted and over nine times the overall sign area permitted by Township Ordinance. (Id.) Plaintiff's Professional Planner further confirmed that they "technically have two use variances requested and required as part of this application: (1) for installation of a billboard where billboards are prohibited in the entirety of the township per §218.83E(12); and (2) to allow two principal uses on the same property where only one is permitted, per § 281.409B. (1T 21:18-25).

II. The Zoning Board Hearing.

Plaintiff presented the Application to the Board at the July 14, 2022 public Board hearing. (1T). During the hearing, Plaintiff proposed a “20 something percent reduction in the footprint, or the size of the sign” from 378 square feet to 315 square feet, which still exceeded the maximum size of 40 square feet. (1T 44:3-19). Plaintiff’s counsel clarified that the concessions were made for the purposes of seeking approval and they would return to the original application if approval was not granted. (1T 74:23-75:1).

Plaintiff’s counsel presented testimony from Jason Sciullo, P.E., P.P. with respect to the engineering of the project. (1T 3:20-64:8). Mr. Sciullo testified that based upon the size of the proposed billboard site, the TC Zoning standards allow a maximum sign size of 40 square feet:

It's going to look similar to many other signs and although it sounds large, 378 square feet, I want to point out that the TC zoning standards allow signs up to 400 square feet when you have larger centers. **This site clearly is not one of those large centers, and it's governed by the square foot, or sorry, the footprint of the buildings on the site that regulate how large a sign can be. And because the building is small, the maximum permitted site area is 40 square feet.**

(1T 23:7-16) (emphasis added).

Regarding Plaintiff’s request for a use variance to allow two (2) principal uses on the same site, Mr. Sciullo acknowledged that the billboard was proposed to be “located on a site that has a use already on it” and acknowledged that the

billboard would be a second principal use. (1T 26:11-27:14). Mr. Sciullo testified that the size of the motel's sign located on the Property was a 4 foot by 8 foot (4' x 8') panel (32 square feet) with a height of 15 or 16 feet. (1T 38:20-39:5).

Mr. Sciullo testified he believed that the first prong of the negative criteria, which requires plaintiff to show that the variance can be granted without substantial detriment to the public good, was met based on the size of the billboard and choice of location which would not have a visual impact on neighboring properties. (1T 32:1-12). Mr. Sciullo also testified he believed the second prong of the negative criteria, ensuring that the governing body's statutory authority is not usurped, was satisfied since he presumed the ordinance's billboard ban was concerned with "appearance and impact to the neighborhood" which Mr. Sciullo believed was achieved because the Property was in a corridor Plaintiff felt was appropriate for a billboard. (1T 32:12-33:12).

The Board's Professional Engineer/Professional Planner, Vincent Orlando, P.E., P.P., L.L.A., also testified. Mr. Orlando expressed concern regarding the size of the proposed billboard, noting that the locations where the TC Zoning ordinance permits a sign of 400 square feet are in shopping centers which are "500,000 square feet" in size and "on 6, 8, 10 acres." (1T 40:6-16). Mr. Orlando further testified that on a one-acre site such as the Property, "having

a sign that large is just going to be out of character in this [corridor] tremendously.” (Id.) Mr. Orlando explained his concern with the size of the proposed billboard, which would be ten (10) times the size of the motel sign it would be installed above and stated that he was “not convinced the size was appropriate.” (1T 43:6-17).

Board members also expressed concerns regarding the large size of the proposed billboard during the hearing. (1T 42:3-15). Two Board members noted concerns that the size “can’t be intrusive for the area” and that “[t]his is a little bit too big.” (1T 49:19-52:7). Township citizen Arthur Hall testified at the hearing that he is the owner of the Cape May Herald which is located on the block immediately adjacent to the Property. (1T 70:15-25). Mr. Hall stated it would be “extremely detrimental having this large sign,” that the area in which it is proposed had made “considerable improvement” and that “the signs like you’re talking about here are appropriate in certain places but to put them right in the middle of our business district, it’s just totally out of keeping with what we do on those few blocks, with what we’re trying to create on those blocks.” (1T 70:25-T71:18).

The Board denied plaintiff's request for use variance relief by a vote of four in favor and three opposed (4 – 3)¹. (1T 77:8-78:20). The Board members cited their rationale during the vote on the application as follows:

UNKNOWN SPEAKER 3: I first want to say just thanks for the applicant for trying to compromise with us. It's always easier that way. I don't think the compromise went far enough for me. **I think if we were closer to 150, 160 square foot, I would approve the application.** But in this situation, I don't think it's suitable, that size for the lot it's going on. So my answer is -- my vote is no.

UNKNOWN SPEAKER 2: I'm going to vote no as well for the same reasons about the size. **I would even go up a little more than Mike, up to 8 by 22, which is 176 square feet. But I'm not comfortable with any size sign bigger than that.**

UNKNOWN SPEAKER 3: I'd vote no.

(1T 77:11-78:7) (emphasis added).

Following the application hearing on July 14, 2022, the Board passed Resolution #222310 memorializing the denial of Plaintiff's Application (hereinafter the "Resolution"). (Pa1174). The Resolution established the Board's findings of fact and conclusions of law that Plaintiff failed to satisfy both the positive and negative criteria as follows:

Board Members agreed that the subject property is not particularly suited to accommodate the proposed use as the size of the billboard

¹ At least five (5) Board members must vote affirmatively for a use variance to be granted. N.J.S.A. 40:55D-70d.

proposed by the Applicant is significantly larger than the size of permitted and existing signs in the surrounding TC zone.

Board Members expressed concerns in relation to the height of the proposed billboard and the overall size of same and the impact that it would have on neighboring properties and vehicle traffic in the neighborhood.

Board Members expressed additional concerns in relation to public safety and the impact that the rotating advertisements would have on vehicle safety and the general public.

With respect to the variances sought by the Applicant, the Board finds that the purposes of zoning identified by the Applicant would not be advanced in connection with this application and same do not support the relief requested by the Applicant.

Board Members agreed that the proposed billboard would impair the intent and purpose of the zone plan and zoning ordinance as same presents a substantial detriment to the aesthetics of the neighborhood.

Board Members determined that the proposed development would be detrimental to the surrounding neighborhood. A majority of the Board found that the project and the requested variances were not appropriate and were contrary to the Township's Master Plan, its Zoning Ordinance, and the TC Zone Plan.

(Resolution, ¶¶15-18, Pa1181-82).

III. The Township's Longstanding Interest In Preserving Aesthetics.

The Township subdivision and site plan ordinances in which signage regulations are codified sets forth the following purpose:

The purpose of this chapter shall be to provide rules, regulations and standards to guide land subdivision and site development in the Township of Middle in order to promote the public health, safety, convenience and general welfare of the municipality. It shall be

administered to ensure orderly growth and development, the conservation, protection and proper use of land and adequate provision for circulation, utilities and services.

(Ordinance § 218-2, Pa267). Among the purposes of the signage regulations are those purposes set forth within the Ordinance itself. Section 218-83(A) of the Township Ordinances provides as follows:

A. Purpose:

The regulation of signs under this article is intended to:

- (1) Ensure that the proposed signage is compatible with surrounding land uses.
- (2) Create a more attractive economic and business climate within the commercial areas of the Township.
- (3) Protect and enhance the physical appearance of all areas.
- (4) Reduce the distractions, obstructions and hazards to pedestrian and auto traffic caused by the indiscriminate placement and use of signs.
- (5) Protect the historic character of the Cape May Court House Overlay District by ensuring that signage is aesthetically compatible.
- (6) Effectuate the Master Plan goal to "Update sign standards that promote safety while discouraging sign proliferation."

(Ordinance § 218-83 (A), Pa1151). The purposes of zoning set forth within the Township's Zoning Ordinance, Section 250-101, include the provision of "adequate light, air and open space," to discourage transportation routes which

will result in “blight,” and to “provide a desirable visual environment through creative development techniques and good civic design and arrangements.” (Ordinance § 250-101, Pa1160). The Township’s governing zoning policy documents have continually and consistently noted the unique aesthetic nature of Middle Township and the Cape May peninsula as a whole. (See generally Pa272-922).

A. 1964 Master Plan Series Reports – July, October & December 1964.

The July 1964 Report set forth the goal of preserving the natural beauty of the Township. (Pa280). The 1964 Report notes that over 80% of the Rio Grande area, which is the area where plaintiff intends to construct a billboard, was still covered with fields and woodlands, making it difficult to determine the direction future development will take but assuming “that it will be along Route #9 to the North and Route #47 to the West.” (Da45)².

The October 1964 Report notes the importance of the resort industry to Cape May County and notes that “[t]he basis for this type of economy is found in the physical assets of the region.” (Pa302). The December 1964 Report cites the importance of the preservation of causeways for health, safety and “aesthetic

² A review of Plaintiff’s Appendix indicates it included only a portion of the 1964 Master Plan Series Report Number 1 (Pa272) and 1964 Master Plan Series Report Number 2 (Pa302). Accordingly, Defendants’ Appendix submitted herewith includes a complete version of these documents. (Da1 and Da60).

considerations.” (Pa327). The report also notes the “flavor of resort business” in the Rio Grande area with several hotels, a large regional shopping center and other seasonal facilities and notes that the Rio Grande Center will have to be “better looking” with planting and shrubbery to compete with Wildwood. (Pa328-329).

B. 1969 Ordinance.

As early as 1969, the Township prohibited off-premises advertising signs as set forth in Section 4 of the 1969 Ordinance. (1969 Ordinance, Article XVIII, Signs, Pa349). The purpose of the 1969 Ordinance is set forth in the “Interpretation”:

In their interpretation and application the provisions of this Ordinance shall be held to be the minimum requirements adopted for the promotion of the public health, safety and welfare. To protect the public, among other purposes, such provisions are intended to provide for the lessening of traffic congestion; the securing of safety from fire, panic and other dangers; the protection of health, morals and the general welfare; the securing of adequate light and air; the prevention of overcrowding of land and buildings; the avoidance of undue concentration of population; the conservation of property values and the encouragement of the most appropriate use of land throughout the Township. (Pa350).

With respect to signs, Article XVIII, Section 1, subsection (a)(1) of the 1969 Ordinance provides as follows: “All signs shall be located on the same property with the use, firm, facility, business, product, service or organization they advertise, unless otherwise provided in this Ordinance. . .” (Pa360). The

prohibition on billboards and mandate for the discontinuation of existing billboards was included within Article XVIII, Section 4 of the 1969 Ordinance as follows:

Non-Conforming Signs

Signs, billboards and all forms of outdoor advertising existing at the time of adoption of this Ordinance which are not in conformance with its requirements shall not be continued, replaced, repainted, or rehung in any district except as hereinafter provided. (Pa362).

C. 1991 Master Plan – September 10, 1991.

The goals of the Township’s 1991 Master Plan included preserving and enhancing “the visual environment of the Township.” (Pa377). The Plan specifically identified Rio Grande, the location of Plaintiff’s proposed billboard, as a specific planning area that needs prepared direction for future development and expansion, including standards for signage. (Pa382). The 1991 Plan also designated the subject property as being in a “Suburban Residential” area. (Pa404). Among the 1991 Master Plan’s recommendations was the need to establish distinct commercial districts to avoid adverse impacts resulting from intense commercial development near residential areas. (Pa406-407). Despite not being required by the Municipal Land Use Law, the 1991 Master Plan also includes a design element for the stated purpose of better preserving and enhancing the Township’s “visual environment.” (Pa465).

D. 1995 Ordinance Amendments.

The 1995 amendments to the subdivision and site plan ordinance continued to prohibit Billboards while continuing to permit political signs and on-site business signs among other forms of signage. (Ordinance Amendments, Section 218.83.D., Pa472).

E. 1996 Master Plan Re-Examination Report – July 1996.

The 1996 Master Plan Reexamination Report (the “1996 Report”) notes that the goals and objectives of the 1991 Master Plan “are still relevant and remain important” and included the goal of preserving and enhancing the “visual environment of the Township.” (Pa509). Due to Rio Grande’s “commercial nature,” the 1996 Report noted the importance of the objectives outlined in the 1991 Master Plan and specifically noted:

Recent commercial developments within the Rio Grande Aea have been required to adhere to stringent standards regarding signage. Establishment of additional standards which will direct the future growth of this area remains a continuing goal for this portion of the municipality. (Pa517) (emphasis added).

F. 2002 Ordinance Amendments.

The signage ordinance was amended via Ordinance No. 1113-02, adopted on September 16, 2002. (Pa525). The amendments specified that:

The regulation of signs under this Article is intended to ensure that proposed signage is compatible with current surrounding land uses, *creates a more attractive economic and business climate within the commercial and industrial areas of the Township*, protects and enhances the physical appearance of all areas and reduces the distractions, obstructions and hazards to

pedestrian and auto traffic caused by the indiscriminate placement and use of signs.

(Id. at Section 2, Pa527) (emphasis added).

G. 2003 Master Plan – August 12, 2003.

The 2003 Master Plan reiterated the prior goals of, among other things, preserving and enhancing the “visual environment of the Township.” (Pa529).

The 2003 Master Plan identifies Route 47 in Rio Grande, where the subject property is located, as a “Traffic Problem Area” and notes it is a “major retail and commercial core, and the stated objectives aim to alleviate the traffic congestion created by intense development and to encourage the orderly development of this area.” (Pa536, Pa564-565).

H. 2010 Master Plan Reexamination Report and Land Use Plan.

In reviewing the 2003 Master Plan, the 2010 Reexamination Report noted the continuing conservation plan recommendations. (Pa611). Middle also adopted an update in 2010 to the Land Use Plan included within their Master Plan. The 2010 Land Use Plan noted that “Middle Township is almost completely encompassed within the NJDEP Coastal Zone,” approximately 10,200 acres of the Township lie within the Pinelands National Reserve, and the Township is classified by the 2001 New Jersey State Development and Redevelopment Plan into Fringe, Rural, Environmentally Sensitive Planning Areas and Environmentally Sensitive Barrier Island Planning Areas.” (Pa638).

The 2010 Land Use Plan established goal and objectives for land use which included “ensur[ing] that negative impacts of commercial and industrial development are addressed through appropriate performance standards” as well as goals for historic, cultural and aesthetic resources. (Pa642).

With respect to designated Town Center areas within the Township, the Plan called for ensuring “design compatibility with existing development that considers building height, materials, colors, landscaping and signage, sharing off-street parking and stormwater detention opportunities, providing off-street parking that is well screened from public view.” (Pa694).

I. 2010 Natural Resources Inventory – Revised May 2010.

The unique aesthetic value of the Township is expressly noted in the 2010 Natural Resources Inventory. (Pa753).

J. 2012 Ordinance Amendments.

The ordinance pertaining to signage was amended via Ordinance No. 1423-12 and adopted on September 5, 2012 with the specified intent to advance to goals of the 2010 Master Plan to “[u]pdate sign standards that promote safety while discouraging sign proliferation.” (Pa849).

K. 2020 Master Plan Reexamination Report.

The 2020 Master Plan Reexamination Report identifies continuing land use goals to “(p)romote a balanced land use pattern compatible with the natural

environment,” (Pa857) and to ensure “that negative impacts of commercial and industrial development are addressed through appropriate performance standards to minimize residential impacts.” (Pa853). Included among the goals of the 2010 Master Plan as recognized by the 2020 Report is the goal to “update sign standards that promote safety while discouraging sign proliferation” with the 2020 Report noting that this goal was accomplished through updated sign standards. (Pa864). The Plan also noted the Township’s continuing historic, cultural and aesthetic resources goals including preserving and enhancing the “visual environment of the Township.” (Pa868).

L. The Cape May County Plan.

Among the purposes of the Township’s Zoning Ordinance is to ensure that the development of the Township does not conflict with the development and general welfare of neighboring municipalities, the county and the state. (Ordinance § 250-101, Pa1160). The County Plan notes the importance to Middle’s “resort economy” of preserving the environment and open atmosphere of the mainlands. (Pa882). The Cape May County Comprehensive Plan was revised in 2022, and its message remained the same: “Cape May County will build upon its strengths and grow in an environmentally and economically sustainable manner, while inspiring actions that preserve what makes it a special place to live, work, and play.” (Pa923).

PROCEDURAL HISTORY

On August 19, 2022, Plaintiff filed a Complaint in Lieu of Prerogative Writ challenging the constitutionality of Middle's ban on permanent off-premises advertising signs and billboards and the Board's denial of Plaintiff's Application. (Pa38). On August 15, 2023, Plaintiff moved for partial summary judgment to declare Middle's ban on permanent off-premises signs unconstitutional. (Pa229). On September 26, 2023, Middle cross-moved for summary judgment. (Pa232).

On October 30, 2023, the Honorable Michael J. Blee, A.J.S.C., held oral argument on the motions. On December 1, 2023, Judge Blee issued an Order and Memorandum of Decision in which he upheld Middle's ordinances prohibiting off premises advertising as constitutional and granted partial summary judgment in favor of the Defendants. (Pa18). In his well-reasoned Memorandum of Decision, Judge Blee noted that, unlike in E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 584 (2016), Middle had demonstrated its "strong need to maintain its governmental interests through its longstanding town-wide ban of all billboards that has been established and consistently updated since 1969." (Pa29).

The trial court also properly found that Middle's ban was a valid time/place/manner regulation under Clark/Ward because it was content neutral,

narrowly tailored to a recognized and legitimate government interest and left open alternative channels of communication including mail, internet, on-premises advertising and radio. (Pa30). On February 14, 2024, the parties entered a consent order which amended the trial court's December 1, 2023 order granting partial summary judgment to Defendants to reflect that the only count remaining in Plaintiff's Complaint was Count I which challenged the Board's denial of Plaintiff's Application. (Pa1101).

On June 20, 2024, following briefing and oral argument, Judge Blee entered an Order and Memorandum of Decision upholding the Board's denial of Plaintiff's Application which the trial court found was supported by substantial credible evidence in the record and was not arbitrary, capricious or unreasonable. (Pa13). Judge Blee noted that the Board's record reflected that even at a reduced size of 300 square feet, the proposed billboard was at odds with the Township's ordinance and zoning interests. (Pa15). Since Plaintiff failed to satisfy the negative criteria, the trial court concluded that the Board's denial of the Application was not arbitrary, capricious or unreasonable. (Id.).

On July 21, 2024, Plaintiff filed its notice of appeal. (Pa33).

STANDARD OF REVIEW

The trial court correctly determined that Middle's Ordinance banning off-premises advertising is constitutionally valid and, therefore, partial summary

judgment was properly entered in favor of Defendants, pursuant to R. 4:46-2. (Pa18, Pa20). The review of the entry of summary judgment is *de novo* and this Court applies the same standard as the trial court. Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021).

This Court also conducts a *de novo* review of the trial court's order affirming the Board's denial of Plaintiff's Application for variance relief. Cohen v. Bd. of Adjustment, 396 N.J. Super. 608, 614-15 (App. Div. 2007). As an applicant challenging a zoning board's denial of a variance, Plaintiff bears the "heavy burden of proving that the evidence presented to the board was so overwhelming in favor of the applicant that the board's action can be said to be arbitrary, capricious and unreasonable." Medical Realty Assoc. v. Bd. of Adjustment of Summit, 228 N.J. Super. 226, 233 (App. Div. 1988).

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY UPHELD THE CONSTITUTIONALITY OF MIDDLE'S ORDINANCE PROHIBITING OFF-PREMISES SIGNS AND BILLBOARDS AND THE TRIAL COURT'S RULING SHOULD NOT BE DISTURBED. (Pa18; Pa20).

The trial court correctly determined that Middle's prohibition on off-premises advertising signs and billboards is narrowly tailored to serve the Township's longstanding and well-documented legitimate interest in maintaining the aesthetics of the Township and Cape May County. As a result,

the trial court properly upheld the Ordinance as constitutional. (Pa18, Pa20). The fact that Plaintiff proposes to erect its electronic billboard in a “developed” area does not mitigate, and indeed only enhances, the Township’s interest and concern with preserving aesthetics Township wide. Indeed, as the United States Supreme Court noted in Metromedia, Inc. v. City of San Diego, “[i]t is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as ‘esthetic harm.’” 453 U.S. 490, 510. Middle has a well-documented interest in maintaining the Township’s aesthetics and its prohibition on off-premises advertising signs and billboards does not burden any more speech than necessary to achieve its legitimate governmental goals.

A. The Trial Court Properly Upheld The Township’s Billboard Ban As Constitutionally Valid. (Pa29)

The trial court properly held that Middle’s “content-neutral blanket prohibition on billboards is constitutional because it serves an important government interest and does not burden any more speech than necessary to achieve its goal.” (Pa30).

Plaintiff cites Bell v. Stafford Township, 110 N.J. 384 (1988) and Metromedia v. City of San Diego, 453 U.S. 490 (1981), in asserting that the Township’s prohibition on off-premises advertising signs constitutes a *per se* constitutional violation. Plaintiff’s argument is misplaced and ignores the fact

that Bell specifically noted that the fact that a town-wide ban on billboards was in place was not determinative of the constitutionality of the prohibition. Rather, our Supreme Court noted that “(i)t is not the scope of a ban, or even the fact that it may be municipal-wide, that is determinative of its validity, but rather the existence of a demonstrable legitimate governmental objective genuinely served by such a ban.” Bell, 110 N.J. at 396. Further, while Metromedia stated that San Diego could not place a greater value on commercial speech than on noncommercial speech, here the Township’s billboard prohibition applies to both commercial and noncommercial billboards and, therefore, does not prioritize commercial speech over noncommercial speech.

In Bell, the New Jersey Supreme Court considered whether Stafford Township’s enactment of an ordinance declaring “[b]illboards, signboards, and off-premises advertising signs and devices are prohibited within any zoning district of the Township,” was unconstitutional. 110 N.J. at 386. The Bell Court noted that “legislative enactments are ordinarily presumed to be valid and the burden to prove invalidity is a heavy one,” however, “if an enactment directly impinges on a constitutionally protected right, the presumption in favor of its validity disappears.” Id. at 394-95 (citations omitted). In such case, the municipality has the burden “to present and confirm those compelling legitimate governmental interests and a reasonable factual basis for its regulatory scheme

in order to validate its legislative action.” Id. at 396.

“Courts are far more demanding of clarity, specificity and restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights.” Id. (citing State v. Cameron, 100 N.J. 586, 592 (1985) and Paton v. LaPrade, 469 F. Supp. 773, 778 (D.N.J.1978)). However, it is not necessary that the ordinance itself articulate the legitimate government interests to be served by the ordinance and the municipality is permitted to supplement the record to aid the Court’s determination concerning the constitutionality of the Ordinance. 110 N.J. at 395.

In Bell, the New Jersey Supreme Court invalidated Stafford’s billboard ban not because of its scope but because Stafford had not demonstrated the “factual basis” for the “total municipal-wide ban.” Id. at 396. Unlike Middle which has maintained its billboard ban since 1969, Stafford enacted its ordinance prohibiting off-premises advertising in any zoning district following litigation with the plaintiff over his efforts to construct and maintain billboards in the township which he had done dating back to the 1960’s. Id. at 388. The Court noted that the “record is almost completely devoid of any evidence concerning what interests of Stafford are served by the ordinance and the extent to which the ordinance advanced those interests.” Id. at 396.

Given that absence, the Bell Court was left to “hypothesize” as to the

ordinance’s potential objectives. Ibid. While the Court noted that interests in aesthetics and traffic safety could constitute a legitimate government interest, Stafford had not demonstrated any factual basis for either. Ibid. It was that abject failure, and not the township-wide scope of the ban, which doomed Stafford’s billboard ordinance.

Our jurisprudence makes clear that aesthetic concerns implicate the general welfare and can constitute a legitimate government objective which justifies a town-wide ban on billboards. See State v. Miller, 83 N.J. 402, 409-10 (1980)(holding that aesthetics are an appropriate consideration for allowing a town to exercise its police powers by adopting particular signage regulations without violating the First Amendment); Metromedia, 453 U.S. at 508 (noting there is no “substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals.”)

Here, the trial court properly determined that “unlike the record in E & J Equities, this Court accepts the Township’s strong need to maintain its governmental interests through its longstanding town-wide ban of all billboards that has been established and consistently updated since 1969.” (Pa29). In that regard, the trial court noted that Middle’s “Master Plan has a longstanding concern for preserving the aesthetic nature of its community dating back to

1964,” and “the goals of the Township have been re-examined on numerous occasions” as Defendants documented. (Pa28). The stated goal in the Township’s 2020 Master Plan Reexamination is to “(p)romote a balanced land use pattern compatible with the natural environment,” noting that “(t)he promotion (of) balanced land use patterns compatible with the natural environment remains as a planning goal.” (Id.; Pa857).

The 2020 Report referred to one goal of the 2010 Master Plan, which was to “update sign standards that promote safety while discouraging sign proliferation” and which was noted to have been accomplished through updated sign standards. (Id.; Pa864). The trial court also noted that the Cape May County Comprehensive Plan, revised in 2022, maintained the same message to “build upon its strengths and grow in an environmentally and economically sustainable manner, while inspiring actions that preserve what makes it a special place to live, work, and play.” (Pa28; Pa923).

Considering the extensive record documenting Middle’s long standing interest in aesthetics, set forth more fully above, the trial court correctly held that Middle established its “substantial government interest” underlying the Ordinance. (Pa29). The trial court further correctly determined that Middle’s ban did not burden more speech than necessary to achieve its goal. (Id.). The trial court rejected Plaintiff’s contention that Middle’s substantial interest was less

protected on Rt. 47 due to its “industrial nature” and noted that, in accordance with Metromedia, “billboards, by their very nature, can be perceived as aesthetic harm and do not purport to challenge the Township’s authority and longstanding interest in preserving its local interests.” (Pa29-30).

Here, the trial court correctly held there is ample support in the record that the Township’s prohibition on off-premises advertising signs was narrowly tailored to advance its longstanding and well-documented interest in the preservation of the aesthetics of the Township’s and County’s landscapes which has permeated the history of Middle’s land development ordinances. (Pa267-992). Accordingly, the trial court properly upheld the constitutionality of the challenged Ordinances. For these reasons, plaintiff’s appeal should be denied.

II. THE TOWNSHIP’S BILLBOARD PROHIBITION IS A VALID TIME/PLACE/MANNER REGULATION. (Pa30).

The Township’s billboard ordinance is a constitutional regulation of speech under the time/place/manner “Clark/Ward” test employed pursuant to the holdings in Ward v. Rock Against Racism, 491 U.S. 781 (1989) and Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). Specifically, Middle’s ban on off-premises advertising and billboards is content-neutral, narrowly tailored to serve its legitimate governmental interest and alternative means of communication exist.

A. The Township's Ordinance's Purposes Are Met By the Billboard Ban Which is Narrowly Tailored to the Township's Interests. (Pa30).

Middle's billboard ban ordinance is narrowly tailored because it promotes the Township's "substantial government interest" in aesthetics which "would be achieved less effectively absent the regulation." E & J Equities, 226 N.J. at 572 (quoting Ward, 491 U.S. at 801). As set forth in Middle's sign ordinance, §218-83(a), the purposes of its signage regulations encompass the preservation of aesthetics in the Township (Purposes 1-3), safety concerns (Purpose 4), promoting the historical character of the Cape May Court House Overlay District by ensuring aesthetically compatible signage (Purpose 5),³ and effectuating the goal of the Master Plan to update sign standards that promote safety while discouraging sign proliferation (Purpose 6)⁴. (Pa133). Middle's overriding concern for aesthetics throughout the Township is clearly documented and its off-premises advertising and billboard ban is narrowly tailored to advance that objective.

³ While the Property is not located in the Cape May Courthouse Overlay District, the Ordinance's purpose of promoting aesthetically compatible signage in that area is certainly served by the township-wide prohibition on off-premises advertising and billboards.

⁴ The goal of promoting safety while discouraging sign proliferation was included in both the 2010 and 2020 Master Plans which also noted the Township's continuing historic, cultural and aesthetic resources goals including preserving and enhancing the "visual environment of the Township." (Pa868).

In E & J Equities, the Court noted that Franklin Township’s asserted interests in “aesthetics and the safety of motorists traveling on I-287 – *have long been recognized as legitimate and substantial government interests, particularly related to billboards*,” however, the Court determined the record in that matter provided “no basis to discern how three static billboards [which Franklin permitted] are more aesthetically palatable than a single digital billboard [which Franklin prohibited].” 226 N.J. at 642-43. Thus, under those specific facts, the Court noted that “simply invoking aesthetics and public safety to ban a type of sign, without more, does not carry the day.” 226 N.J. at 642-43.

The case herein is distinguishable. As the trial court aptly noted, unlike the record in E & J, Middle has demonstrated a “strong need to maintain its governmental interests through its longstanding town-wide ban of all billboards that has been established and consistently updated since 1969.” (Pa29). Unlike Franklin Township which claimed that it “seeks to protect or advance” its goals by restricting digital billboards yet *permitting* other billboards proximate to the interstate, the Township’s goals “have been re-examined on numerous occasions” and the “need to maintain its unique aesthetic and open landscape has remained as part of its most recent 2020 Master Plan Reexamination Report...” (Id.) Indeed, unlike Franklin, Middle has maintained its town-wide ban of *all* billboards since 1969. In short, Middle has done much more than simply “cry aesthetics.”

Further, the trial court properly determined that Middle's substantial and over-arching interest in aesthetics is still implicated and achieved even though Plaintiff proposes to erect its electronic billboard on Rt. 47 in the Township's Town Center Zoning District, which is a developed area that contains on-site premises signs with "lights" and colors supposedly similar to the proposed electronic billboard. (Pa29). If anything, the Township's interest in preserving aesthetics is even greater in this zone and the trial court correctly noted that the "location of the billboard on Rt. 47 is not afforded less protection because of its location in an industrial location." (Pa29).

For instance, in Interstate Outdoor Advert., L.P. v. Zoning Bd. of Mt. Laurel, 706 F.3d 527, 532 (3d Cir. 2013), wherein the Third Circuit upheld Mt. Laurel's billboard ban, the Court disagreed with plaintiff's argument that since the billboards were proposed to be erected on I-295, outside any residential or scenic views, Mt. Laurel's "interest in preserving the appearance and preventing the aesthetic deterioration of the highway should weigh less heavily on the constitutional balance." Id. at 532. To the contrary, the Court stated that "[t]he industrial nature of the highway does not mitigate Mount Laurel's concerns about the aesthetics of the highway. In fact, it may well suggest an even greater need to guard against the deterioration of the Township's character and evoke a greater concern for safety." Id. at 532.

The Third Circuit noted that in Metromedia, despite San Diego presenting no evidence that its ban on off-site advertising directly advanced its stated goals of aesthetics and safety, the Supreme Court “recognized that ‘billboards by their very nature, wherever located and however constructed, can be perceived as aesthetic harm,’” and noted that the “force of deference the Court afforded San Diego’s judgment regarding aesthetics and safety is controlling here.” Id. at 532.

The Third Circuit also rejected plaintiff’s argument that Mt. Laurel’s ordinance is “excessive because it goes too far and institutes a total prohibition on billboards,” and that the township’s “goals of traffic safety and aesthetics could be achieved with a less restrictive ordinance that allows billboards in certain areas and under particular conditions.” Id. at 534. Rather, the Court stated:

However, as we have already explained, **in *Metromedia*, the Court reasoned: “[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. *Metromedia*, 453 U.S. at 508, 101 S.Ct. 2882. Thus, the Township took what was “perhaps the only effective approach” to addressing its concerns for the aesthetics and safety of its highways—a Township-wide ban on billboards.**

Id. at 534 (emphasis added).

Similarly, in E & J, our Supreme Court noted that Franklin Township’s interests in “aesthetics and the safety of motorists traveling on I-287,” hardly a

bucolic roadway, “*have long been recognized as legitimate and substantial government interests, particularly related to billboards.*” 226 N.J. at 642-43 (emphasis added). What the Court could not reconcile in that matter, however, was the lack of a basis in the record to explain “how three static billboards are more aesthetically palatable than a single digital billboard.” Ibid. Under that scenario, the Court found that Franklin’s “simply invoking aesthetics and public safety to ban a type of sign, without more, does not carry the day.” Ibid.

As the Supreme Court noted in Metromedia, “whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the objectives of traffic safety and esthetics” which “is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising.” 453 U.S. 490, 511. In that regard, it bears repeating that the TC Zoning District only permits freestanding on-premises sign square footage up to a maximum of 400 square feet for property having a *minimum* retail square footage of 100,001 square feet. (Ordinance § 218-83J (2), Pa1011) (emphasis added). Based on the small size of the Property at issue here, the *maximum* permitted sign area is 40 square feet; however, Plaintiff proposed a double-sided digital billboard with an area of 378 square feet. (Review Letter, Pa1166). Given the Supreme Court’s recognition in Metromedia that “*billboards by their very nature, wherever located and however constructed, can be perceived as aesthetic harm,*” the trial court properly

determined that the Township’s ban is narrowly tailored to achieve its legitimate government goal of preserving its aesthetics. 453 U.S. at 510 (emphasis added) (Pa30).

B. Alternate Means of Communication Exist. (Pa31).

The trial court also properly found that “ample forms of alternative means of communication were available to the Plaintiff” despite Middle’s ban, as required by the Clark/Ward test. (Pa31). Specifically, the “potential alternative channels of communication include on-premises signs, internet advertising, direct mail, radio, newspapers, television, advertising circulars, advertising flyers, commercial vehicle sign advertising, and public transportation advertising.” (Pa31).

The trial court correctly rejected Plaintiff’s argument that these alternatives are inadequate because they do not reach travelers on the roadways. (Pa31). As the trial court aptly noted, “maximizing” Plaintiff’s profits from its proposed 378 square foot, double-sided “light emitting diode” billboard is not the “animating concern of the First Amendment.” (Pa31). See, e.g. Interstate Outdoor Advertis., 706 F.3d at 535 (noting “[p]otential alternative channels of communication include on-premises signs, internet advertising, direct mail, radio, newspapers, television, advertising circulars, advertising flyers, commercial vehicle sign advertising, and public transportation advertising” and rejecting plaintiff’s argument that these alternatives are inadequate because they miss the target

audience of drivers on I-295). The fact that restrictions prohibit a form of speech attractive to plaintiff does not mean that no reasonable alternative channels of communication are available.” Id. (quoting, Naser Jewelers, Inc. v. City of Concord, N.H., 513 F.3d 27, 37 (1st Cir.2008)).

Unlike in this matter, the ordinance at issue in Linmark Associates, Inc. v. Willingboro, cited in Plaintiff’s Brief at page 27, prohibited the posting of “for sale” signs at residences to stem what the township perceived as “white flight.” 431 U.S. 85 (1977). In considering whether the ordinance “leave[s] open ample channels for communication,” the Court noted that “in practice *realty* is not marketed through leaflets, sound trucks, demonstrations, or the like.” Id. at 93 (emphasis added). The Court then noted that Willingboro had not banned all lawn signs or signs of a certain size or shape “in order to promote aesthetic values or any other value ‘unrelated to the suppression of free expression.’” Ibid. (citation omitted). Rather, since Willingboro was only concerned with the “signs based on their content because it fears their ‘primary’ effect,” the Court found that the proscription “does not transform this into a ‘time, place, or manner’ case.” Id. at 94 (emphasis added). The Court invalidated the ordinance not due to the lack of alternative channels of communication but, rather, due to the basic “constitutional defect” resulting from Willingboro’s use of the ordinance to restrict the dissemination of information to its residents. Id. at 95.

State v. DeAngelo, 197 N.J. 478 (2009), also fails to support Plaintiff's contention regarding the adequacy of alternate channels of communication herein. DeAngelo held that an ordinance which prohibited a union from displaying a large inflatable rat as a symbol of labor unrest while allowing similar displays at grand opening events was "content-based, does not fairly advance any compelling governmental interests, and is not 'narrowly tailored' to prevent 'no more than the exact source of the 'evil' it seeks to remedy.'" Id. at 489. Relying on City of LeDue v. Gilleo, 521 U.S. 43 (1994), the DeAngelo Court also found that the content-based ordinance was overbroad because it "virtually eliminates all signs except for grand openings of businesses and other minor exceptions." Id. at 491.

In invalidating a virtual ban on residential signs, the LeDue Court found inadequate alternative means existed given the special significance attached to a resident's ability to display a sign at their own home. City of LeDue, 521 U.S. at 57. The Court also noted that a "special respect for individual liberty in the home has long been a part of our culture and our law," and "that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." Id. at 58 (citations omitted) (emphasis in original).

Concerns related to labor protests and individual liberty in the home are not pertinent to the determination of the adequacy of alternate channels of communication of the matter herein. Plaintiff's financial interest in profiting from

its proposed 378 square foot, double-sided, “light emitting diode” billboard is not the “animating concern of the First Amendment,” and “the fact that restrictions prohibit a form of speech attractive to plaintiff does not mean that no reasonable alternative channels of communication are available.” (Pa31). For this reason, plaintiff’s appeal should be denied.

C. The Trial Court’s Ruling Complies With Bell and E & J Regardless Of Its Reliance On Interstate Outdoor Adv. (Pa25).

As set forth above, the trial court properly determined that Middle’s content-neutral ban on off-premises advertising and billboards was narrowly tailored to achieve the Township’s documented legitimate interest in aesthetics. To the extent the trial court relied in part upon Interstate Outdoor Adv., its ruling still fully complies with the holdings in Bell and E & J. Indeed, in E & J, the New Jersey Supreme Court cited Interstate Outdoor Adv. with regard to the Third Circuit’s holding on the issue of alternative means of communication. 226 N.J. at 573. Any perceived deficiencies Plaintiff raises as to the Third Circuit’s analysis have no bearing on the trial court’s proper determination that Middle’s Ordinance satisfied the Clark/Ward test and does not provide any basis to disturb the trial court’s ruling.

III. THE TRIAL COURT CORRECTLY AFFIRMED THE BOARD’S DECISION, WHICH SHOULD BE UPHELD AS IT WAS NOT ARBITRARY, CAPRICIOUS AND UNREASONABLE. (Pa1; Pa13).

The Board’s findings of fact and conclusions of law support its determination that Plaintiff failed to satisfy the positive or negative criteria

which guided the Board's consideration of plaintiff's variance requests. The trial court correctly found that the record supported the Board's determination that Plaintiff failed to demonstrate that the requested relief could be granted without substantially impairing the intent and purpose of the Township's ordinance and zoning plan. (Pa14). The trial court noted that the Board expressed concern that the Property was not particularly suitable for the proposed billboard since, even at a reduced size of 300 square feet, the billboard would still significantly burden the Property which had a maximum sign size of 40 square feet. (Id.)

The trial court also correctly determined that the Board's Resolution provides sufficient finding of fact and conclusions of law to support its denial. (Pa15). Considering the scope of relief sought, Plaintiff's failure to provide the necessary proofs, the significant and irreversible negative visual impact of the billboard, and the corresponding negative impact on the public good and detriment to the zone plan and zoning ordinance, the trial court correctly found that the Board's denial was not arbitrary, capricious or unreasonable.

A. Plaintiff Is Not Entitled To A Use Variance.

Variance determinations are entrusted to the sound discretion of the municipal zoning board hearing the application. Kaufmann v. Planning Bd. of Warren, 110 N.J. 551, 558 (1988). The Municipal Land Use Law, N.J.S.A. 40:55D-70, requires an applicant to prove both the positive and negative criteria

to obtain a use variance. The positive criteria require the applicant establish “special reasons” for granting the variance. Sica v. Bd. of Adjustment, 127 N.J. 152, 156 (1992). The negative criteria require proof that the variance “can be granted without substantial detriment to the public good” and “will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” Ibid. Here, there is ample support in the record for the Board’s determination that Plaintiff failed to establish the proposed site was “particularly suited” for the proposed use, *i.e.*, the positive criteria or that the proposed use would not operate as a substantial detriment to the zoning ordinance and zone plan, *i.e.*, the negative criteria. (Resolution, Pa958).

Contrary to Plaintiff’s contention that the Property was particularly suited for the proposed billboard, the Board members who voted against the use variance noted their concerns with the size of the proposed billboard which, even at the reduced size of 317 square feet, was almost *eight times larger* than the 40 square feet allowed. (1T 42:3-5; 49:19-51:4; 52:2-7). The Township’s Engineer also noted the proposed billboard’s size was “huge” and much larger than many of the existing signs on Rt. 47, “specifically in this stretch between Route 9 and the Parkway. There are not a lot of big signs. I mean, the Burger King across the street is 40 square feet. This [the motel] is 32 square feet. So there's not a lot of huge signs from the Route 9 coming east.” (1T 49:19-51:4). Two of the

three Board members indicated they were voting “no” because, even at a reduced size of 300 square feet, they were uncomfortable and unwilling to approve a billboard size over “150, 160 square foot” or even “up to 8 x 22, which is 176 square feet.” (1T 77:11-78:7).

Although the TC Zoning District allows signs up to 400 square feet, such a large sign is only permitted in shopping centers with a minimum of 100,001 retail square footage. (Ordinance § 218-83J (2), Pa1011). Even Plaintiff’s Planning Professional acknowledged during the Board hearing that unlike “one of those large [shopping] centers,” based upon the small size of the proposed site, the TC Zoning standards only allow a maximum sign size of 40 square feet. (1T 23:7-16).

The Resolution sets forth the findings discussed during the hearing and establishes the Board’s findings of fact and conclusions of law that Plaintiff failed to satisfy the positive and negative criteria, in pertinent part, as follows: (i) “the subject property is *not* particularly suited to accommodate the proposed use as the size of the billboard . . . is significantly larger than the size of permitted signs in the TC Zone . . . and significantly larger than the signs that currently exist in the surrounding neighborhood”; (ii) “Board Members expressed concerns in relation to the height of the proposed billboard and the overall size of same and the impact that it would have on neighboring

properties...”; (iii) “. . . the proposed billboard would impair the intent and purpose of the zone plan and zoning ordinance as same would present a substantial detriment to the aesthetics of the neighborhood”; and (iv) “Board members expressed additional concerns in relation to public safety and the impact that the rotating advertisements would have on vehicle traffic and the general public.” (Pa958) (emphasis added).

The Board’s deliberations and findings precisely reflect the concerns echoed throughout the Township’s and County’s Master Plans, the preservation of the unique aesthetic atmosphere, and the visual environment of the Cape May peninsula - even in its developed areas where the need for protection may well be the greatest. Considering the valid concerns expressed by the Board in the Resolution and during the hearing and coupled with the broad deference granted to the Board with respect to the denial of a use variance, a reversal of the Board’s denial would constitute an injustice. Accordingly, the trial court’s Order affirming the Board’s denial of Plaintiff’s Application must be upheld.

B. Plaintiff Is Not Entitled To A Variance for Two Principle Uses.

The Board properly interpreted that the proposed billboard did not meet the Ordinance’s definition of an “accessory use” and instead constituted a second principal use requiring a use variance. Since billboards are not a permitted use under the Township’s Ordinance, the Board properly considered

Plaintiff's application to be a "principal use variance" under N.J.S.A. 40:55D-70(d)(1).

Far from taking issue with the Board's interpretation that the billboard constituted a principal use, Plaintiff's counsel acknowledged during the Board's meeting that *"[i]t's a principal use, right, as a billboard...[w]e're treating this, and they are treated, as a principal use everywhere. It's a different business."* 1T 76:7-14 (emphasis added). The same result was reached by the Board in Idon Media-Nj v. Borough of Eatontown Zoning Bd., wherein the Appellate Division noted the Board had "previously considered an application by another company to erect a billboard as the primary use of other property located along State Highway 35," and because billboards were not a permitted use at that time under the zoning ordinance, "the application was considered a principal use variance." 2021 N.J. Super. Unpub. Lexis 2503 at *19 n. 1 (App.Div. Oct. 18, 2021).⁵

Financial Servs., L.L.C. v. Zoning Bd. of Adjust. of Borough of Little Ferry, 326 N.J. Super. 265, 274 (App.Div. 1999), cited in Plaintiff's Brief at page 38, involved an appeal from the trial court's decision affirming the Board's denial of plaintiffs' application for a use variance to permit a check-cashing

⁵ A copy of this unpublished opinion is included in Defendants' Appendix filed herewith (Da102).

business at the site of a gas station. Little Ferry’s Ordinance defined “accessory use” as “a use which is *customarily incidental and subordinate to the principal use* of a lot or a building and which is located on the same lot.” Id. at 268 (emphasis added). Middle’s Ordinance almost identically defines an “accessory use” as “[a] use of land or of a building or portion thereof *customarily incidental and subordinate to the principal use* of the land or building and located on the same lot with such principal use.” (Ordinance 250-201, Pa269) (emphasis added). The Appellate Division noted that the terms “customarily incidental and subordinate, entail proof a proposed use is of minor significance and a use commonly, habitually, and by long-standing practice established as reasonably associated with the principal use.” Id. at 274. The Appellate Division upheld the trial court’s affirmance of the Board’s denial of the use variance, holding as follows:

We find no proof to satisfy a conclusion a check-cashing business is a use accessory to a gas station operation. The proposed commercial operation is not only not subordinate to the gas station use and is not of minor significance, but it is also not a use that has any common, habitual, or long-standing association with a gas station. **Its failure to qualify as an accessory makes it a principal use.**

Id. at 274 (emphasis added).

The same holds true herein. The billboard Plaintiff proposed to erect as lessee on the same Property as the motel is a digital billboard capable of

displaying commercial and non-commercial messages such as advertisements and weather alerts, which is completely unrelated to the Property's principal use of a motel. As such, the billboard does not meet the definition of an "accessory use" under the Ordinance since it is not "of minor significance and a use commonly, habitually, and by long-standing practice established *as reasonably associated with the principal use*" of the Property, which is a motel. *Id.* at 274 (emphasis added). Thus, the proposed billboard's "failure to qualify as an accessory makes it a principal use." *Ibid.*

As set forth in the caselaw, and as conceded by Plaintiff's counsel at the hearing, the proposed billboard constitutes a principal use. Thus, the Board's interpretation was correct and should not be disturbed. As discussed below, the fact that the Board did not apply the "principal use height limitation" to the proposed billboard has no bearing on the propriety of the Board's interpretation.

C. Plaintiff Is Not Entitled to A Height Variance.

Plaintiff contends that since the proposed billboard is a principal use, it was entitled to either a "(d)(6)" height variance where the height exceeds 10 feet or 10% of the maximum height permitted or a bulk variance for height variations less than that. (Pl. Br. pp. 39). Plaintiff argues that, by virtue of being a "principal use," the billboard is somehow no longer a "sign" subject to the Township's maximum height restrictions for signs and instead becomes subject

to the 50-foot height maximum for buildings. (Id.) However, even had the Board approved Plaintiff's use variance to permit a billboard as a second principal use, the billboard would not "transform" from a "sign" into a "building" by virtue of being deemed a principal use. Indeed, the Township's ordinance specifically denotes that a "billboard" is a "sign," albeit a prohibited one. (Ordinance § 218-83E (12), Pa1007). Simply put, a billboard obviously remains a "sign" regardless of whether it is an accessory or principal use, and the size and height maximums set forth in the Ordinance would still apply herein.

Even if the Board had approved Plaintiff's use variance application to permit the billboard, Plaintiff would not be entitled to erect a 50-foot (or 45' as proposed) billboard where the maximum sign height is 20 feet. Even under the standard for a "(d)(6)" height variance, Plaintiff cannot establish that: (a) the billboard was no higher than it needed to be to serve its purpose; (b) the billboard was consistent with the height of similar signage in the zone; and (c) that the technology of a digital billboard could ameliorate any "purported negative effects" of the 378 square foot billboard. Despite having conceded during the Board's hearing that Plaintiff could reduce the height to 25 feet, Plaintiff contends that a height of 45 or 50 feet is "no higher than needed to serve its purpose." (Pl. Br. pp. 40). Moreover, far from a 45- or 50-foot height being "consistent with the height of similar signage in the zone," the motel sign located

on the same Property is only 15 or 16 feet high and 4 foot by 8 foot (4' x 8') in size. 1T 38:20-39:5. Suffice to say, Plaintiff is not entitled to a height variance under any standard and the Board's decision denying Plaintiff's use variance application should not be disturbed.

D. Plaintiff Is Not Entitled To Any Remaining Bulk Variances.

Plaintiff also sought bulk variance relief sought for: (1) the height of the billboard; (2) permitting two signs on the Property where only one is permitted; and (3) permitting a sign area for each side of the billboard of 378 square feet where a maximum of 40 square feet per side is permitted. (Review Letter, Pa1166). Plaintiff cites Puleio v. N. Brunswick Tp. Bd. of Adjustment, 375 N.J. Super. 613, 621 (App.Div. 2005), for the premise that where a use variance is sought, a bulk variance is subsumed in the use variance analysis. Puleio involved the "novel question" of what standard applies under the MLUL to an application to subdivide property located in a single-family residential zone when, a year after the use variance was granted, plaintiff sought to subdivide the property to create two lots, one with a two-family residence and the second with a single-family residence. Id. at 615. The Appellate Division noted that, "[g]enerally application for a 'c' variance and a 'd' variance cannot coexist" and thus, "'c' variances are subsumed in the 'd' variance" request." Id. at 621. See, e.g., O'Donnell v. Koch, 197 N.J. Super. 134, 145-46 (App.Div. 1984) (use variance

granted for a funeral home parking lot “subsumed” the bulk variances for curb cuts, privacy fencing and separation between curb cuts and residences which were “necessarily included in the grant” of the use variance).

Here, the Board acted properly and within its discretion to *deny* Plaintiff’s use variance request. Thus, the bulk variances are not “subsumed” in a use variance and Plaintiff is not entitled to any bulk use variances for height, size or number of signs.

E. There Is Ample Factual Support For The Board’s Denial. (Pa15).

There is ample evidential support in the record supporting the Board’s conclusion that the proposed billboard application did not satisfy the negative criteria based on the detrimental impact as detailed above. The Resolution contained the Board’s specific factual findings regarding the manners in which plaintiff failed to satisfy the negative criteria, as follows:

. . the size of the billboard proposed by the Applicant is significantly larger than the size of permitted signs in the TC zone and same is significantly larger than the signs that currently exist in the surrounding neighborhood.

Board members expressed concerns in relation to the height of the proposed billboard and the overall size of same and the impact that it would have on neighboring properties.

. . . the Board finds that the purposes of zoning identified by the Applicant would not be advanced in connection with this application and same do not support the relief requested by the Applicant.

Board members agreed that the proposed billboard would impair the intent and purpose of the zone plan and zoning ordinance as same would present a substantial detriment to the aesthetics of the neighborhood.

Board members determined that the proposed development would be detrimental to the surrounding neighborhood. A majority of the Board found that the project and the requested variances were not appropriate and were contrary to the Township's Master Plan, its Zoning Ordinance, and the TC Zone Plan.

(Pa1181-82). Given the ample evidential support in the record establishing Plaintiff's failure to satisfy the negative criteria, reversal of the Board's decision is unwarranted.

CONCLUSION

For all the foregoing reasons, the trial court's rulings upholding the constitutionality of Middle's Ordinance and the Board's denial of Plaintiff's Application were correct and should not be disturbed. For these reasons, Plaintiff's appeal must be denied.

Respectfully submitted,

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GARDEN STATE OUTDOOR LLC, Plaintiff- Appellant, v. ZONING BOARD OF ADJUSTMENT OF MIDDLE TOWNSHIP AND THE TOWNSHIP OF MIDDLE TOWNSHIP, Defendant - Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3622-23 ON APPEAL FROM: NEW JERSEY SUPERIOR COURT LAW DIVISION CAPE MAY COUNTY VICINAGE DOCKET NO.: CPM-L-000304-22 SAT BELOW: Hon. Michael Blee, J.S.C.
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APPELLANT GARDEN STATE OUTDOOR LLC'S REPLY BRIEF

Dated: April 24, 2025

On the brief: Justin D. Santagata, Esq.
Samantha Edgell, Esq.

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INTRODUCTION

This is Garden State Outdoor LLC's ("**Garden State**") reply brief in support of its appeal. This reply adopts all definitions from Garden State's merits brief.

Middle's opposition never even attempts to grapple with its failure of narrow-tailoring on the billboard ban. Pages go on and on talking about the history of Middle with no specific reference or connection to the billboard ban, let alone an explanation of narrow-tailoring. Indeed, at one point, Middle relies on the "Cape May County Plan" to apparently support banning billboards *across the entire county*. Whatever may be said of personal opinions on billboards, the First Amendment and the New Jersey Constitution deserve far more than what was presented by Middle. Generic reference to zoning as a whole does not satisfy narrow-tailoring. While the burden on Middle here is not extreme, it is more than rational basis, and it requires more than a slavish adherence to a refusal to consider *any off-premises speech at all*.

REPLY

Not a lot of facts here are in dispute, but there are holes in Middle's record and several misleading factual statements by Middle. Each are taken in turn below along with related legal issues.

First, Middle's billboard ban does not "permit political signs." (Db17.) It permits "temporary political signs." (Pa135, 136.) Middle misstates this on purpose to try to obscure the vast overbreadth of the billboard ban. But at the trial court,

Middle conceded this: “political signs, if they are temporary.” (3T:19.) “The temporary political sign” limitation is *itself unconstitutional*. See e.g. *Whitton v. City of Gladstone*, 54 F.3d 1400, 1403 (8th Cir. 1995) (striking down same ban); *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1069 (3d Cir. 1994); *Northampton Cnty. Democratic Party v. Hanover Twp., Civil Action*, 2004 U.S.Dist. LEXIS 7755 at *28 (E.D. Pa. Apr. 26, 2004). For example, a sign that says “Obama Forever” or “Trump Forever” is *illegal in Middle*. Any political sign that is not for an elected official or candidate or cause *that is on the premises is illegal*. Again: this is undisputed.

Second, Middle states several times that its billboard ban has been updated or amended, but that is false and misleading. (Db17.) While the sign ordinance *generally* has been updated and amended, the billboard ban has not been substantively touched in *50 years*. This is undisputed. Compare Pa129 (current code) with Pa349 (1969 code).

Third, and similarly, in Middle’s lengthy recitation of its zoning history there is actually no mention of the word “billboard” in terms of legislation, a master plan, or a planning report other than 1969. See Db14-20. The word “billboard” appears only five times in this section of Middle’s brief; four of them are generic references untethered to any analysis, with only the beginning in 1969 being a reference to something substantive. Id.

Fourth, and in contradiction to Middle’s position here, the master plan reports prior to the institution of the 1969 billboard ban do not *support it*. The 1964 master plan states that the “Rio Grande Area” is an “intensively developed regional business area along Route #47...Included in this area are a shopping center, numerous motels...” (Da41-42.) The primary thrust of the 1964 master plan was to suggest controlled “resort development” while preserving other rural and residential areas. (Da57.) The word “sign” or “billboard” does not even appear in the 1964 master plan. The second 1964 master plan report is similar. (Da74.)

From there, as Middle basically concedes, its zoning history talks around the billboard ban, pretends it does not exist, and suggests signage that is anathema to an outright billboard ban, such as “orderly development,” “enhance[ed] visual environment,” “design compatibility,” and “discourage sign proliferation.” (Db18-20.) As was said in Bell v. Stafford, 110 N.J. 384, 397 n.7 (1988), Middle “has shown that a much more narrow ordinance could have been tailored.”

Fifth, one ominous word that appears over and over in relation to signs is “safety.” (Id.) This word appears without evidence or explanation as to how signs or billboards are “unsafe.” On this record, the Court cannot possibly unpack potentially valid substantial interests, such as aesthetics, with an invalid one— “safety.” While “safety” can be a substantial interest, the Supreme Court has already held evidence is required and that saying “safety” is not enough. E & J Equities, Ltd. Liab. Co. v.

Bd. of Adjustment of the Tp. of Franklin, 226 N.J. 549, 584 (2016). This is why a plenary hearing was necessary below: there were clearly conflicting and potentially invalid substantial interests perhaps intertwined with valid ones and the trial court should have separated them and then analyzed narrow-tailoring. See e.g. Exxon Co., U.S.A. v. Livingston, 199 N.J.Super. 470, 478 (App. Div. 1985) (remanding for review absent improper considerations); Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J.Super. 515, 537 (Law Div. 2006) (same); Twp. of Cinnaminson v. Bertino, 405 N.J.Super. 521, 536 (App. Div. 2009) (remanding for consideration of “interplay of restrictions” as they relate to narrow tailoring and reasonably equivalent alternatives).

Sixth, Middle does not dispute that common off-premises speech is prohibited, such as supporting the local high school football team or “Go Eagles.” That is the staggering breadth of the billboard ban.

Seventh, it is certainly true and correct that “aesthetics” are a substantial interest, but that is vastly different from arguing— as Middle does— that “aesthetics” justify *any billboard ordinance*. Middle has the burden of establishing substantial interest with evidence *and narrow tailoring* and reasonably equivalent alternatives. See e.g. Twp. of Cinnaminson, 405 N.J.Super. at 537 (“township shall bear the burden”) [cites omitted]. Middle states” “our jurisprudence makes clear that aesthetic concerns...can constitute a legitimate government objections which

justifies a town-wide ban on billboards,” citing State v. Miller, 83 N.J. 402, 409-410 (1980). But Miller struck down a “town-wide ban” because it was not narrowly-tailored! Miller, supra at 411. Yes, Miller upheld the *substantial interest*, but not the *narrow tailoring*. Middle missed the constitutional point. This is the same constitutional point made in E&J Equities. Contrary to Middle’s assertions, the municipality there had the same extensive record of generalized aesthetics *and it lost*:

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

E&J Equities, supra at 643.

As exemplified *factually* in E&J Equities, narrow tailoring is not “rational basis” and it is not the higher standard of “least restrictive alternative” (which is applied to content-specific speech regulation). See Johnson v. City & Cnty. of Phila., 665 F.3d 486, 492 (3d Cir. 2011). “While the requirement of narrow tailoring does not mean that the ordinance must be the least restrictive means of serving the Borough's substantial interests, government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance

its goals. Accordingly, the issue of narrow tailoring cannot be determined without **knowing the undesirable secondary effects.**” Phillips v. Borough of Keyport, 107 F.3d 164, 174 (3d Cir. 1997) [emphasis added]. This is the key that Middle misses (and actually argues against itself). Middle’s goals are “design compatibility,” “discourage[ing] proliferation,” and “enhance[ing] the visual environment.” But the billboard ban places a “substantial portion of the burden on speech [that] does not serve to advance its goals.” Id.; see Johnson, supra (upholding ban limited to “certain specifically defined portions of city property” where goal was to reduce proliferation). In this context, ordinances that “restrict too little speech because its exemptions discriminate on the basis of the signs message” and ordinances that “prohibit too much protected speech” are both unconstitutional. E & J Equities, 226 N.J. at 573.

Yes, of course, a total ban on all off-premises speech accomplishes Middle’s goals (so does banning any written word larger than one foot or banning speaking entirely), but it goes too far, and Middle does not even attempt to confront this constitutional problem. Middle just ricochets from “aesthetics” to a total ban on all off-premises speech. A conditional use ordinance accomplishes the same goals without overburdening all the speech here. See e.g. Elray Outdoor Corp. v. Bd. of Adjustment of Englewood, 2009 N.J. Super.Unpub.LEXIS 2378 at *22 (App. Div. Sep. 8, 2009) [Pa1511]. Distance regulations naturally limit “sign proliferation.” See

Hucul Adver., Ltd. Liab. Co. v. Charter Twp. of Gaines, 748 F.3d 273, 278 (6th Cir. 2014) (upholding spacing requirements as narrowly tailored). Distinctions between kinds and dimensions of off-premises signage (not necessarily billboards) in particular zones would pass constitutional muster. Or, as suggested in Bell, an ordinance prohibiting signs that “obstruct driving vision, traffic...” Bell, *supra* n.7. The possibilities are nearly innumerable as to how to accomplish Middle’s goals in a constitutional manner while *naturally* limiting billboards *to very few in number*.¹

Eighth, Middle attempts to both disregard Interstate Outdoor Adver., L.P. v. Zoning Bd. of Mount Laurel, 706 F.3d 527, 535 (3d Cir. 2013), and rely upon it. Initially, Middle relies upon it *for pages*. (Db29-32.) Then Middle says it does not matter and did not matter to the trial court. (Db28.) Garden State has already explained why Interstate Outdoor is clearly wrong. (Pb31.) But the problem for Middle is that the trial court *clearly relied upon it, both factually (which makes no sense) and legally*.²

¹ There is a wrong assumption that this limitation cannot be effectuated. Of course it can. It only takes a willingness to let go the blind adherence against all off-premises speech.

² Middle says that E&J Equities relied upon Interstate Outdoor. (Db38.) That is not true. E&J Equities merely cited Interstate Outdoor for “the fact that restrictions prohibit a form of speech attractive to plaintiff does not mean that no reasonable alternative channels of communication are available.” E&J Equities, *supra* at 573. No one disputes that very uncontroversial principle. None of the analysis in Interstate Outdoor is remotely relied on in E&J Equities and, of course, the Supreme Court reached the opposite conclusion.

Factually, the trial court’s *entire analysis* of reasonably equivalent alternatives³ is two paragraphs where Interstate Outdoor is cited *four times and nothing else. No facts in the record. No evidence from Middle.* (Pa12.) As already set forth, much of the trial court’s analysis is circular and self-defeating, ignoring that there was no evidence for it (which is conceded). For example, the trial court says that on-premises signage is a reasonably equivalent alternative. How? It literally cannot do *what a billboard does*—advertise for off-premises activity. *It is illegal in Middle.*

The overarching problem with the trial court’s analysis is that it assumes, wrongly, that the “intended audience” is just *anyone* who can receive advertising or has eyes. That is wrong. Billboards are proximal and temporal: they advertise usually nearby and oftentimes they advertise events that are happening in the near future. “Go here on Wednesday.” “This is around the corner.” Viewed in this correct framework, the trial court’s “list” of alternatives is beyond comprehension. The only option that could satisfy this intended audience in the manner a billboard does is the “internet,” but the trial court did not explain what that means. Does the trial court assert that people driving through Middle can automatically get text alerts saying

³ For purposes of this reply, Garden State uses “reasonably equivalent alternatives” as synonymous with “ample alternative channels.”

“go here”? How does that work? Where is the evidence *that is real*? What about cost?

Reasonably equivalent alternatives, or “ample alternative channels,” has a legal meaning and it is not wild hypotheticals having no relation to the means of communication and intended audience. If the intended audience is a certain subset of recipients, such as attendees at a hockey game, then barring communication within 1,000 feet of a game does not leave open reasonably equivalent alternatives just because, hypothetically, the sender could, through “tremendous effort,” maybe reach some of them some other way. Harrington v. City of Brentwood, 726 F.3d 861, 865-866 (6th Cir. 2013). Cost does matter. Id. Reality and practicality are important. Id.

Time/place/manner review is “meaningfully different” than rational basis scrutiny. The former does not permit “rational speculation”; it requires *evidence*. Silvester v. Becerra, 583 U.S. 1139, 1146 (2018). There is no evidence *at all*, even attempted, that the trial court’s “list” of “alternatives” satisfies time/place/manner review. The “list” is just cribbed from Interstate Outdoor. Contra Johnson, 665 F.3d at 494 (“evidence”).

Legally, the trial court avoided the type of narrow-tailoring analysis in Wheeler v. Comm'r of Highways, 822 F.2d 586, 596 (6th Cir. 1987), where restrictions, uses, and zones were balanced against one another:

Unlike the Maine statute and the San Diego ordinance, the Billboard Act and regulations leave open ample alternatives for communication of non-commercial and commercial messages. The prohibition against off-premises signs in the Billboard Act and regulations does not apply in areas zoned commercial or industrial prior to September 21, 1959. Signs unrelated to an on-premises activity are permitted in urban areas provided that the sign is located more than 660 feet from the interstate highway. Non-commercial and commercial messages are permitted anywhere provided that an activity relating to the message is conducted on the premises. Finally, the restrictions do not regulate the erection or maintenance of signs other than in areas near interstate or federal-aid primary highways.

This is what the Supreme Court intended in Bell and Stafford. But Middle is arguing from 1969.

It bears repeating that neither this Court nor the Supreme Court has: (i) ever upheld an ordinance like the one here; or (ii) ever accepted the type of supposition and lack of evidence that Middle relies upon in this context. Contra Twp. of Cinnaminson, 405 N.J.Super. at 537 (referring to analysis at plenary hearing as “exquisite exercise of judicial authority”).

Eighth, while Garden State will leave the Board’s denial to already extant briefing, the “principal use”/“sign” argument by Middle warrants short comment because it evidences the problem with the billboard ban as a whole. It simply makes (again) no sense when it has to be interpreted in this context. Contrary to Middle’s argument, Middle does not distinguish *in its actual code* between a “principal use” that is a “building” and “principal use” that is a sign. The portions of the sign ordinance that govern size/etc. are *only* for on-premises signage customarily and

incidentally connected *to the principal use* because, by Middle's definition, they cannot relate to anything but on-premises activity. (Pa132-134.) Middle's code does not contemplate a *second principal use at all*: "principal use" means "the main purpose for which a lot or building is used." (Pa159.) *Singular*. "Main purpose." So the question *under Middle's own definition is not about customary/incidental, but what is the main purpose? The main purpose is plainly a motel and therefore the billboard is not a principal use*. Having relied upon the billboard ban for everything else, Middle literally casts the language of its own code aside and tells the Court *to ignore it*. This is precisely the holding that occurred in Outfront Media, LLC v. Planning/Zoning Bd. of Borough of Bogota, 2019 N.J.Super.Unpub.LEXIS 1657 at *5 (App. Div. July 19, 2019). This Court held the municipality *to what it legislated*.

CONCLUSION

If the record Middle has produced justifies the billboard ban, then Bell and E&J Equities have been undone, not by the Supreme Court, but by obstinance.

Respectfully submitted,

/S/

JUSTIN D. SANTAGATA