

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003934-23

CAPE JETTY, LLC,

Plaintiff-Appellant,

V.

CITY OF CAPE MAY, CAPE MAY
CITY PLANNING BOARD, and CAPE
MAY CITY COUNCIL,

Defendants-Respondents,

CRAIG VERSTEEG, LISA VERSTEEG,
NICHOLAS GRISANTI, CAMILLE
GRISANTI, JOSEPH SCHLITZER,
NANCY SCHLITZER, SCOTT
MASLOW, BOBBI STOKES, JAY
KLOOSTERBOER, and BARBARA
ZICCARI,

Intervenors-Respondents.

On Appeal from:
Superior Court of New Jersey
Law Division, Cape May County
Docket No. CPM-L-83-22

SAT BELOW:
Hon. Michael J. Blee, A.J.S.C.

BRIEF OF PLAINTIFF-APPELLANT, CAPE JETTY, LLC

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I. PRELIMINARY STATEMENT

Appellant, Cape Jetty, LLC (“Cape Jetty”) owns an existing motel located on property in Cape May that is zoned to permit both hotels and restaurants. In 2019, Cape Jetty obtained approval from the Respondent, Cape May City Planning Board (“Board”), to redevelop the property with a 56-unit hotel and permitted amenities. That approval was based on a by-right application, requiring no variances, and was conditioned upon the hotel amenities being limited to hotel guests only (the “2019 Approval”).

Months later, the COVID-19 pandemic shook up the world, and battered the hotel and tourism industry as travel was shut down. For a period of time in 2020, construction activities were ordered to cease, legally prohibiting the construction of the hotel as approved in the 2019 Approval.

In 2021, as the prospects for returning to a pre-pandemic level of travel and tourism activity looked bleak, Cape Jetty sought to respond to the changing market and applied to amend the 2019 Approval to include a restaurant that would be open to both guests and the public (the “2021 Application”). The 2021 Application sought an increased building height of a mere 3.3 feet, and a parking variance that Cape Jetty proposed to mitigate through the provision of valet services and off-site parking.

While a hotel and restaurant are both permitted by zoning, objections to the 2021 Application by the public were substantial, as certain people in the community simply do not want a renovated hotel with a restaurant open to the public, whether it is permitted under the ordinance or not. Under significant public pressure, the Board capitulated to the mob mentality and denied the 2021 Application, based entirely on sentiments expressed by the public.

After the 2021 Application was denied, Cape Jetty indicated it would proceed under the variance free 2019 Approval. The initial two-year period of protection against zoning ordinance changes under the Municipal Land Use Law (“MLUL”) had passed, but there had been no zoning ordinance changes during this time, and the approval was eligible for three additional one-year extensions under the MLUL. However, Cape May City Code § 417-6(G) (“the Ordinance”) improperly provides that site plan approvals “expire” in less time than is provided by the MLUL unless building permits are secured within that truncated time period. To clarify that the 2019 Approval had not “expired,” Cape Jetty sought a one-year extension of that approval from the Board pursuant to Section 52 of the MLUL (“Extension Application”).

During the hearing on the Extension Request, there was again a public demand for rejection of reconstructing the hotel, and for denial of the Extension Application. Even though there had been no zoning changes and the

2019 Approval was completely compliant with zoning requirements, the Board capitulated to public pressure yet again and improperly denied the Extension Application based solely on hostility from the objectors to the proposed, legally permitted development of the Property. Cape Jetty appealed both the rejection of the 2021 Application and denial of the Extension Request.

The trial court and appeals court upheld denial of the 2021 Application, but the trial court found the Board's decision to deny the Extension Request unreasonable, and provided for a remand. On appeal, the parties agreed the matter could be determined on the record presented to the Board, and the Appellate Division remanded to the trial court for a final decision.

Although the trial court previously held the Board's decision to deny the Extension Request was "unreasonable," finding that the proceeding was tainted by the hostility towards the 2021 Application, the trial court on remand improperly affirmed denial of the Extension Request. Because the Board's decision to deny the Extension Request runs afoul of the MLUL, the Board's denial and the trial court's affirmation of the same should be reversed.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

Cape Jetty is the owner of the Jetty Motel, located at 6 Second Avenue, Cape May, New Jersey 08204, identified as Block 1012, Lot 15.01 on the City Tax Map (the “**Property**”). (Aa3).² The Property is situated in the C-3 Hotel Motel District (the “**C-3 District**”) of Cape May, which permits hotels, motels, eating establishments, and accessory dining facilities as of right. (Aa3); see also (Aa32); Cape May City Code §§ 525-24.A(1), (2). Currently, the Property is developed with a 34-unit motel, swimming pool, and on-site parking. (Aa32).

By Resolution adopted on August 13, 2019, Resolution No. 08-13-2019:1, after a hearing conducted on July 9, 2019, the Cape May City Planning Board (the “**Board**”) granted Cape Jetty amended preliminary and final major site plan approval to construct a 56-unit hotel with 66 ground floor parking spaces and associated amenities, with no variances requested (the “**2019 Approval**”). (Aa33). The 2019 Approval was conditioned upon the use of the amenities being limited to hotel guests only. Id.

Less than a year later, on March 9, 2020, Governor Murphy declared both a Public Health Emergency and State of Emergency due to the public

¹ The Procedural History and Facts of this matter are closely intertwined and have been combined to avoid repetition.

² “Aa__” refers to Appellant’s Appendix, filed concurrently herewith.

health hazard created by the SARS-CoV-2 virus (“COVID-19”) through Executive Order No. 103. Governor Murphy then established statewide social mitigation strategies in order to combat the spread of COVID-19, including, on April 8, 2020, Executive Order No. 122, which shut down all “non-essential” construction projects. As defined in Executive Order No. 122, the phrase “essential construction projects” did not include the construction of Cape Jetty’s hotel as approved by the Board in the 2019 Approval. Thus, Cape Jetty was legally prohibited from beginning construction of the hotel approved by the Board under the 2019 Approval until Executive Order No. 142, which permitted “[t]he physical operations of all construction projects that were not designated as essential in Executive Order No. 122 (2020) ... to resume”. However, the Governor continued to extend the public health emergency due to COVID-19, tourism spending declined steeply, and Cape Jetty re-evaluated its plans to construct the hotel with amenities available only to guests.

On March 12, 2021, Cape Jetty applied for amended preliminary and final major site plan and bulk variance approval to construct a 53-unit hotel with 123 parking spaces as follows: 81 on-site spaces and 42 off-site spaces (the “**2021 Application**”). The 2021 Application proposed the addition of a restaurant, dining, and lounge area that would be open to the public. The 2021 Application sought two (2) bulk variances: the first for parking, which was due

to the request to open the restaurant, dining, and lounge area to the public; and the second for height of the building, an increase of only 3.3 feet over the previously approved and conforming 40 feet. After a tumultuous hearing conducted on November 9, 2021, at which time numerous objectors presented their opinions to the Board that a new hotel with a restaurant open to the public was heavily disfavored, the Board denied the 2021 Application, memorialized by Resolution dated January 25, 2022, (the “**2021 Denial**”). (Aa32).

During the hearing on the 2021 application, Cape Jetty indicated that if the Board denied the amended plan, the applicant would proceed with development under the 2019 Approval. Shortly after that hearing, counsel for the objectors wrote to the Board’s counsel claiming that the 2019 Approval had expired pursuant to Cape May City Code § 417-6(G).

Cape Jetty’s counsel responded promptly, advising that the objectors’ attorney was incorrect, since “the approvals granted to the [Plaintiff] by and through [the 2019 Approval] remain viable and in effect under Section 52 of the MLUL...” (Aa76-Aa80). However, since the validity of the 2019 Approval was being contested, Cape Jetty filed a request for a one-year extension pursuant to the Section 52 of the MLUL (the “**Extension Request**”). (Aa1-Aa31). Notably, the zoning provisions applicable to the 2019 Approval had not (and still have not) changed. (Aa37).

Cape Jetty's Extension Request was heard by the Board on January 25, 2022. Cape Jetty's counsel presented the grounds for the Extension Request, explaining the procedural history of the Property, advising that Cape Jetty had not obtained a building permit in connection with the 2019 Approval because the COVID-19 public health emergency had impacted the project as it did in general to development statewide, and that during that time Cape Jetty proposed to amend the 2019 Approval with the 2021 Application, which was denied only as of November 9, 2021. As the foregoing circumstances were a matter of record well known to the Board, Cape Jetty's counsel noted no factual testimony from either Cape Jetty or its professionals was necessary. (T1/14:20-15:25).³ The Board Solicitor conceded that point. (T1/15:23-25).

Cape Jetty's counsel also advised the Board that the 2019 Approval had not expired for failure to obtain a building permit based on the MLUL:

[T]he [2019 Approval] that we're currently seeking an extension for is still valid, and we are in a position where we could submit for building permits ... in the same way that we could have prior to filing [the 2021 Application].

The reason we are here today is because [the 2019 Approval] ... has been called into question by the objectors. So we are here simply for clarification to make sure that the board is clear that the [2019

³ "T1" refers to the transcript of proceeding which took place on January 25, 2022, which was provided to the trial court and was the subject of the trial court's review on remand.

Approval] has not expired, it remains valid, and ... we are asking for an extension of [the 2019 Approval] based on the timeline that I had provided.

(T1/11:3-23; *see also*, T1/31:1-3) (“We’re merely asking for an extension asserting that the approval is still very much valid”).

During the hearing, the Board avoided the issue of whether or not the 2019 Approval had expired, which was a point of contention between Cape Jetty and the objectors, and which Cape Jetty noted was not a legally viable conclusion under the MLUL and case law. The following exchange occurred between Counsel for the Board and Cape Jetty’s counsel, after the Board voted merely to “allow” Cape Jetty to ask for the extension:

MR. CHACANIAS: [W]hat was just granted[?] So that would put this in the position where the approval is, in fact, still valid as of today and will continue to be so ... unless and until there’s a zoning change. I just want to make sure we’re on the same page.

...

MR. KING: No. We haven’t voted on that question. All we voted on is that you can ask for an extension.

MR. CHACANIAS: Well, wouldn’t that necessarily imply – that’s why I just want to make sure the record is clear. Wouldn’t that necessarily imply that the approval itself is still valid if we can ask for an extension related to it? ...

MR. KING: I don’t know, but I don’t want one more issue. We’re not dealing with that. We’re doing what we’re doing. We’re not doing that right now. ...

You're adding another issue right as we're voting.
We're not doing that now.

(T1/58:9-59:7) Following the Board's refusal to address the above issue, the Board denied Plaintiff's Extension Request. The denial was memorialized by Resolution 02-22-2022:1, adopted by the Board on February 22, 2022 (the "**Extension Resolution**"). (Aa32-Aa39). Even though the Board expressly refused to decide the above issue on the night of the hearing, (T1/58:9-59:7), the Extension Resolution incorrectly states the Board did make that finding: "**the [2019] approval has expired** and cannot form the basis for a building permit." (Aa38). (*Emphasis added.*)

Cape Jetty then filed a Complaint in Lieu of Prerogative Writs with the Superior Court on March 11, 2022, challenging the denials of the 2021 Application and the Extension Request, on grounds that both decisions were arbitrary and capricious actions by the Board. Cape Jetty also challenged Cape May City Code § 417-6(G) (the "**Ordinance**") as contrary to the MLUL and violative of Cape Jetty's vested rights in the 2019 Approval. The Complaint also asserted that N.J.S.A. 40:55D-21 tolled the 2019 Approval.

The trial court upheld the Board's denial of the 2021 Application, but found the Board's denial of the Extension Request unreasonable, stating that the Extension Request hearing was tainted by the 2021 Application:

This Court finds that the record before the Board was filled primarily with arguments against [Cape Jetty's] efforts since 2010, rather than specifically the 2019 Extension Request. This Court finds there were overlapping considerations from both the 2021 Hearing and the previous approval that tainted the Extension Hearing.

(Aa118-Aa119).

Rather than reverse the Board outright, the trial court gave Cape Jetty the option to return to the Board where it “may, but is not required to, present testimony in support of granting the extension request,” and stated that the Board “may, but is not required to, grant the Extension Request.” (Aa82). The trial court also held that the Board somehow “reconciled” the Ordinance with Section 52 of the MLUL and Aronowitz v. Planning Bd. of Tp. of Lakewood, 257 N.J. Super 347 (Law Div. 1992). Lastly, the trial court found that the 2019 Approval was briefly tolled by Section 21 of the MLUL. (Aa113-Aa116).

Cape Jetty appealed the trial court's decisions to uphold the denial of the 2021 Application; to remand the Extension Request; and the decision not to strike the Ordinance. The Appellate Division affirmed the trial court's decisions with the exception of the Extension Request, as to which the Appellate Division stated: “Because both parties are relying on the existing record related to Cape Jetty's Extension Request, we vacate the portion of the

November 30, 2022 order remanding the Extension Request to the Board. In remanding, the trial court should decide whether the denial of the Extension Request was arbitrary, capricious, or unreasonable as Cape Jetty argues.” (Aa146).

On remand, on May 29, 2024, the trial court found that the Board’s denial of Cape Jetty’s Extension Request was not arbitrary, capricious or unreasonable; and that the Extension Resolution was not deficient.⁴ This appeal followed.

III. ARGUMENT

a. Standard of Review

The “scope of review of an[y] administrative decision ‘is the same as that [for] an appeal in any non-jury case, i.e., ‘whether the findings made could reasonably have been reached on sufficient credible evidence present in the record.’” In re Taylor, 158 N.J. 644, 656 (1999) (citations omitted). “It is well established that when a reviewing court is considering an appeal from an action taken by a planning board, the standard employed is whether the ... denial was arbitrary, capricious, or unreasonable.” Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 560 (App. Div. 2004).

⁴ The transcript of these proceedings, which took place on May 29, 2024, will be referred to hereafter as “T2.”

The term “arbitrary and capricious” embraces a concept which emerges from the due process clause of the fifth and fourteenth amendments of the United States Constitution and operates to guarantee that acts of government will be grounded on established legal principles. Bayshore Sewage Co. v. DEP, 122 N.J. Super. 184, 189 (Ch. Div. 1973), aff’d, 131 N.J. Super. 37 (App. Div. 1974). Arbitrary and capricious means “willful and unreasoning action, without consideration and in disregard of circumstances.” Id. While the factual determinations of a planning board are presumed to be valid, the Court will not “rubber-stamp” findings that are not reasonably supported by the evidence. Chou v. Rutgers, 283 NJ Super. 524, 539 (App. Div. 1995), certif. denied 145 NJ 374 (1996). Rather, it is essential that the Board’s findings be grounded in evidence in the record. Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 562, *citing* Tomko v. Vissers, 21 N.J. 226, 239-240, (1956), and Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 120 (App. Div. 2000).

The Board’s decision to deny Cape Jetty’s Extension Request was arbitrary, capricious and unreasonable precisely because that decision was not grounded by evidence in the record, and it is contrary to the MLUL. For this reason, the denial should be reversed.

b. The Conclusion set forth in the Extension Resolution that the 2019 Approval Expired because of the Denial is Unsupported by the Record. (T2/14:17-16:25.)

In deciding to uphold the Board's denial of the Extension Request, the trial court erroneously found that the Extension Resolution was "supported by substantial credible evidence in the record." (Aa53-Aa57). Because the Board failed to make contemporaneous findings of fact that supported the alleged reasons for the denial, as purported to have occurred by the statements contained in the Resolution, a finding of unreasonableness is required. In failing to address this issue, or in otherwise overlooking or excusing this failure of the Board's decision to be grounded upon evidence in the record, the trial court erred and its decision should be reversed.

Generally, while Board members are encouraged to give their reasons as to why relief or should not be granted, "it is the Resolution, and not the individual reasonings of Board members that provides the statutorily required findings of fact and conclusions." New York SMSA v. Weehawken Bd. of Adj., 370 N.J. Super. 319, 334 (App. Div. 2004). However, even the court in New York SMSA v. Weehawken, *supra*, acknowledged that the findings made in the resolution must be "based on the proofs submitted" in the record. *Id.* at 333; *see also* Medici v. BPR Co., 170 N.J. 1, 21 (1987) ("The board's resolution should contain sufficient findings, based on the proofs

submitted...”); Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 562 (*citing* Tomko v. Vissers, 21 N.J. 226, 239-240 (1956)); Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 120 (App. Div. 2000). That is where the Extension Resolution falls short, in that its findings are not supported by evidence in the record, but rather, were crafted from whole cloth by the Board’s counsel after-the-fact in order to provide seeming justification for a decision that had none.

The best example of this can be found in the Extension Resolution’s assertion that the 2019 Approval “has expired and cannot form the basis for a building permit,” (Aa38), a legal conclusion that the Board expressly refused to address during the hearing, thereby necessitating a finding of arbitrariness.

During the November 9, 2021 hearing on the 2021 Application, Cape Jetty testified that if the Board denied the amended application, Cape Jetty would proceed with the construction of the hotel in accordance with the 2019 Approval. This was the motivating factor behind the Intervenors’ subsequent contention that the 2019 Approval had expired pursuant to Cape May City Code § 417-6(G), so that Cape Jetty could not forward with the 2019 Approval as planned. Cape Jetty replied that any assertion that an approval expires at the end of the two-year period is “a common misapprehension” that is not actually provided for in the statute. *See N.J.S.A.* 40:55D-52. Rather, “a site

plan is given protection, or vested rights, against a change in zoning for said period, but if at the expiration of the two years there has been no change in zoning, the site plan continues to be in full force and effect until such time as the developer determines to proceed with the development.” (Aa77); Cox & Koenig, *New Jersey Zoning and Land Use Administration*, 23-5.2(a) (GANN, 2022) (*emphasis added*). See also, Cox, *supra*, at 23-5.2(b) (“the two-year period does not mark the end of site plan approval, merely the end of the period during which the developer is protected from zoning changes”); Palatine I v. Planning Bd., 133 N.J. 546, 553 (1993); MCG Assocs. v. Dep’t of Env’tl. Prot., 278 N.J. Super. 108, 127 (App. Div. 1994).

The Board’s purview should have been whether the 2019 Approval could be extended, not whether it should have been issued in the first place, and not whether Cape Jetty was merely permitted to request an extension of that Approval, which is expressly permitted by subsection (c) of N.J.S.A. 40:55D-52 (“The developer may apply for the extension either **before or after** what would otherwise be the expiration date”) (*emphasis added*). During the Extension Request hearing, counsel for Cape Jetty said multiple times that Cape Jetty’s position is that the 2019 Approval had not expired – that it was still valid – and that Cape Jetty was seeking an extension of that Approval for eight (8) months because its validity had been called into question by the

Intervenors. (T1/11:3-23; T1/31:1-3). The Board refused to acknowledge the 2019 Approval's validity, stating, verbatim, "We're not dealing with that." (T1/58:9-59:7). Instead, it chose to vote on whether Cape Jetty could merely ask for an extension, (T1/91:23-93:1), to which the answer is clearly in the affirmative under the Municipal Land Use Law. See N.J.S.A. 40:55D-52(c).

Yet, the decision regarding the expiration issue miraculously appears in the Extension Resolution. Without having made any such determination on the record, and indeed vehemently declined to do so through the objections of the Board's counsel, the Extension Resolution states that: "[t]he Board finds that the approval is not granted an extension ... and therefore no building permit may be issued for the project because it was neither obtained within two years and it was not granted an extension. **The prior approval has expired** and cannot form the basis for a building permit." (Aa38). (*Emphasis added.*) It is impossible for the Board to assert a "finding" or "conclusion" in the Extension Resolution that the 2019 Approval had expired when the Board explicitly refused to address that very issue on the record during the hearing.

Resultantly, the Board's decision to deny the Extension Request, and the trial court's decision to affirm that denial, should be overturned because not only was the Board's decision, as provided in the Extension Resolution, unsupported by the record, but the Board's intention in denying the Extension

Request was not to address the merits of Cape Jetty's Extension Request at all. Rather, it was to undermine the validity of the 2019 Approval altogether by treating the Extension Request like a referendum of the 2019 Approval instead of a routine extension application, one that the MLUL permits to be made three (3) times after the grant of final approval. *See* N.J.S.A. 40:55D-52(a).

In fact, per the Extension Resolution's own language, the denial had little to do with the justifications provided by Cape Jetty in support of the Extension Request. Rather, the Board's decision was more concerned with the public's reaction to the 2021 Application that had only recently been denied a few months earlier. This is clear in the Extension Resolution's own language:

The Board recognized there was no major zoning change ... after the Final Approval. This analysis did not take place in a vacuum, as this property has had several iterations since 2010. The [2021] application had recently been before the Board, as outlined in the presentation of the developer in this application ... where there was substantial testimony regarding the changing dynamic at that end of town, including the naturally accreting "beach" area, that impacted traffic and parking near the subject property. There were also concerns expressed in the community, reinforced by the applicants attempt to revise the project to have a 2[4]0-seat restaurant open to the public, regarding the substantial amount of "amenity space" in the [2019] approval for the project. These are the types of changes and dynamics that, although not directly a "zoning change", are the types of circumstances that may make a development favorable in one environment, but not in an environment two years later.

(Aa37-Aa38).

The trial court readily acknowledged this issue in its November 30, 2022 decision, where it found that the 2021 Application had tainted the Extension Application hearing, rendering the Board's decision to Extension Request unreasonable. In fact, Section III of that decision is entitled, verbatim, **"The Board's decision to reject the Extension Request of the 2019 Approval was unreasonable."** (Aa109). The trial court held:

This Court finds that the record before the Board was filled primarily with arguments against [Cape Jetty's] efforts since 2010, rather than specifically the 2019 Extension Request. This Court finds there were overlapping considerations from both the 2021 Hearing and the previous approval that tainted the Extension Hearing. The request by the Board's counsel to administer the oath to Plaintiff's counsel placed the Applicant in a difficult situation, and had an adverse impact on the overall presentation.

(Aa118a-Aa119). Thus, the Court concluded that the "Board's denial of [Cape Jetty's] Request to Extend the 2019 Approval WAS unreasonable," (Aa82), and remanded for further proceedings.

This Court vacated the decision to remand the matter and directed the trial to "decide whether the denial of the Extension Request was arbitrary, capricious, or unreasonable as Cape Jetty argues," based on the record as it existed following the Extension Request hearing which took place on January 25, 2022. (Aa146). However, the trial court had already decided, in its

November 2022 decision, that the Extension Request proceeding was tainted by the history of the Property, culminating in the 2021 Application, stating outright that the Board's reason for denying the Extension Request had more to do with that Application than any of the justifications provided by Cape Jetty in support of the Extension Request.

The record on remand was the same as set forth above, yet the trial court reversed its decision and, based upon the same tainted record, decided that what was once deemed unreasonable is now "supported by substantial credible evidence and was not arbitrary, capricious, or unreasonable." The trial court's reversal on this point is erroneous, and contradicts its prior holding based upon the **exact same record**, and should be reversed.

c. **The 2019 Approval Is Fully Compliant with Cape May City's Zoning Ordinance. (T2/13:5-14:10).**

The Board conceded, in the Extension Resolution, that "there was no zoning change," before going off on tangent about the "types of changes and dynamics that, although not directly a 'zoning change', are the types of circumstances that may make a development favorable in one environment, but not in an environment two years later." (Aa37-Aa38). This is a determination to be made by a governing body in adopting zoning standards, not for the Board to make. Yet, the Board decided that a fully compliant hotel requiring no variances was no longer appropriate on the Property due to the alleged

“changing dynamic at that end of town.” Id. Regardless of whether the “dynamic” had changed, the zoning had not, and still has not. Any such alleged changes are not within the Board’s purview, as the Board has no authority to effectively rezone the Property to prevent a fully compliant hotel from being constructed under the guise of “changing dynamics.”

The Board’s decision to deny the Extension Request, therefore, is an arrogation of the municipal governing body’s zoning power. The appropriateness of the hotel as permitted in the 2019 Approval is firmly established, the Property having been zoned accordingly, and the Board outright conceded in the Extension Resolution that the Property’s zoning had not (and still has not) changed. (Aa37). This inevitably leads to the conclusion that the alleged “changing dynamics at that end of town” are not determinative as the Board claimed in the Extension Resolution. If they were, the Property’s zoning would presumably have changed since the 2019 Approval. Yet, it has not. The 2019 Approval was fully compliant with the City’s zoning ordinance as of the night of the Extension hearing, and remains fully compliant to this day. The Board simply had **no** legitimate reason to deny the Extension Request, which would have extended the period of protection afforded to the 2019 Approval for a period of only eight (8) months – until August 2022.

Viewed from another perspective, if Cape Jetty filed the *exact same* application with the Board as it did to obtain the 2019 Approval, rather than an application for a mere extension of that Approval, the Board would have been legally required to grant that application because planning boards are constrained from rejecting fully conforming applications for permitted uses. While “site plan review affords a planning board wide discretion to ensure compliance with the objectives and requirements of the site plan ordinance,” courts have made clear that such discretion “ ‘was never intended to include the legislative or quasi-judicial power to prohibit a permitted use.’” PRB Enters., Inc. v. S. Brunswick Planning Bd., 105 N.J. 1, 7 (1987) (*citing Lionel’s Appliance Ctr., Inc. v. Citta*, 156 N.J. Super. 257, 268 (Super. Ct. 1978)). (*Emphasis added.*) The MLUL explicitly states that “[t]he planning board **shall**, if the proposed development complies with the ordinance and this act, grant ... site plan approval.” N.J.S.A. 40:55D-46(b) (*emphasis added*).

The use of the word “shall” in the statute limits a planning board’s authority, when reviewing an application for site plan approval, to determining whether the development conforms with the zoning ordinance and the applicable provisions of the site plan ordinance. If it does, the planning board must grant the application. *See Cox & Koenig, New Jersey Zoning and Land Use Administration*, (GANN 2022), at § 23-10, p. 491-492 (“since the use is,

when a site plan is being considered by a planning board, always a permitted use, in most cases the board **must** grant site plan approval.”) Denial of a permitted use, on the other hand, is “a drastic action” which cannot stand without authorization from the MLUL. *Id.* at 492; *see also Shim v. Wash. Tp. Planning Bd.*, 298 N.J. Super. 395, 411 (App. Div. 1997).

Here, no such authorization would have existed had Cape Jetty filed the Extension Request as a new application, and by analogy, no valid grounds existed to deny Cape Jetty’s very routine Extension Request of the fully conforming 2019 Approval. The trial court, therefore, erred in finding otherwise.

d. The Board’s Decision to Deny the Extension Request is Not Entitled to Any Deference.

Undoubtedly, the Board will claim to enjoy a presumption of validity in rendering its decision, and seek deference from this Court. However, “a board’s decision regarding a question of law ... is subject to de novo review by the courts, and is entitled to no deference since a [planning] board has ‘no peculiar skill superior to the courts’ regarding ... legal matters.” *Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin*, 233 N.J. 546, 559 (2018); *see also, 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington*, 221 N.J. 318, 338 (2015) (“In construing the meaning of a statute, an ordinance, or our case law, our review is de novo.”). In fact, in the

recent matter of Loper Bright Enters. V. Raimondo, No. 22-451, 2023 U.S. LEXIS 1847 (May 1, 2023), the United States Supreme Court expressly reversed its ruling in Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), which called for almost absolute deference to an agency's interpretation of a statute.

Here, the Board dealt with a very simple, very routine extension request – one which the law permits to be made three (3) times over the course of five (5) years – for a permitted use that was and remains fully compliant with the City’s zoning ordinance, and would have extended the 2019 Approval for only eight (8) months. The Board appears to be under the impression that, pursuant to Section 52 of the MLUL, it enjoys unfettered discretion to deny an **extension** for a fully conforming, permitted use, while lacking the authority to deny a new application for a fully conforming, permitted use.

This juxtaposition demonstrates an anomaly in Section 52 of the MLUL, which seems to grant discretion to deny extensions even of fully conforming, permitted uses (while a Board lacks authority to deny an application for a fully conforming, permitted use) in subsection (a), based on the use of the permissive “may” relating to extensions (“the planning board **may** extend such period of protection for extensions of one year but not to exceed three extensions,”) while providing only that extensions “shall” be granted when

specific proofs are met pursuant to subsection (d). *See* N.J.S.A. 40:55D-52 (*emphasis added*). Further illustrating this peculiarity is the fact that a request for an extension is not an “application for development” subject to the hearing requirements or the notice requirements of N.J.S.A. 40:55D-10, -12. In fact, notice of an application for an extension is only required to be given to the public when the extension will be “for five or more years.” *See* N.J.S.A. 40:55D-12(a). Here, an extension of only eight (8) months, for a total of three (3) years from the date of the 2019 Approval, was requested.

All of this suggests that requests for extensions are more administrative and procedural, rather than full scale assessments as in the case of a new development application, as neither notice nor a public hearing is required in order for a Board to grant an extension so long as it remains within the five-year period. Thus, for the Board to suggest, or for the trial court to hold, that a board wields unrestricted discretion to deny an extension request when there have been absolutely no zoning changes – and when it expressly could not have denied the very same application if it had been a new “application for development” within meaning of the MLUL, subject to both notice and a hearing, runs contrary not only to the MLUL, but common sense. Such an interpretation of the statute is illogical, and is not entitled to deference.

IV. CONCLUSION

For the reasons set forth above, the trial court erred when it failed to declare the 2019 Approval to be valid and extended pursuant to N.J.S.A. 40:55D-52. Resultantly, the Board's improper decision along with the ruling of the trial court should be reversed.

Respectfully submitted,

HYLAND LEVIN SHAPIRO LLP

Dated: November 21, 2024

By: 

Robert S. Baranowski

December 23, 2024

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I. Preliminary Statement

The genesis of this appeal is Cape Jetty's ill-advised and imprudent decision not to produce a single witness to explain why the extension of an August 2019 final approval was warranted in January 2022. Instead, Cape Jetty relied upon the "procedural history" of its 2019 application, which did not help its position or explain why no action had been taken to obtain a permit since 2019.

It is not the fault of the Board or the public that the history of the project was a topic of conversation at the hearing. Instead, it was Cape Jetty who specifically requested and invited the Board to rely on the history of the application to "justify" its request to extend approval, yet again. Nevertheless, to the extent the "history" of the application demonstrated anything about the project, it demonstrated the area of the proposed development had become increasingly more active, including the growth of a nearby beach, situated at a dead end which leads to one of the most spectacular views in all of New Jersey. The Board members and the public who spoke at a series of hearings on the project were well aware of the changes in this area.

Nevertheless, had Cape Jetty provided good cause to extend the approval, the Board might have done so, as it had already done several times in the past for this very applicant. Instead, Cape Jetty set forth no admissible testimony or

explanation why another extension was appropriate or necessary. The Board weighed this dearth of information against legitimate factors mitigating against the extension, and concluded Cape Jetty had not demonstrated good cause warranting an extension.

The sole issue before the Court on this appeal is whether the Board's analysis in rejecting the extension request was arbitrary, capricious, or unreasonable. The basis for affirming the Board's decision was previously determined by both the trial court and Appellate Division. The issue is actually *res judicata* based on the prior rulings, but even considered anew, the result should be the same. The Board had valid reasons to reject the extension request. Cape Jetty gave no explanation of its delay aside from the unpersuasive procedural history of the project to support an extension, and the Board reasonably exercised its discretion to reject the request.

For these reasons, the trial court should again be affirmed, and Cape Jetty's appeal should be denied.

II. Counterstatement of Facts and Procedural History

Cape Jetty owns the Jetty Motel located at 6 Second Avenue, a unique and busy part of Cape May located at the southwestern end of the promenade and Beach Drive, where there is a cul-de-sac and view of a preserved beach leading to the lighthouse. (10a).

In 2010, the Cape May City Planning Board (the “Board”) granted preliminary site plan approval for Cape Jetty to demolish an existing motel and replace it with a new hotel and private residence. (10a). The project was partially completed, and between 2014 and 2018, Cape Jetty requested and received three extensions of its 2010 approval. (10a). In 2019, Cape Jetty proposed a new plan for the hotel, which included a very large, undefined “amenity space,” which was approved on the condition the amenity space would be available to hotel guests only. (10a).

Although the 2019 project was approved as a “by-right” application, the amenity space was a serious concern because the neighbors and the Board did not want the undefined space to generate additional visitors, employees and parking at the location. (21a-22a; 37a-38a). Therefore, the 2019 Resolution made very clear that “[a]ll amenities will be for hotel guests only and will consist of non-employee-intensive, passive uses for hotel guests only and therefore will not generate additional parking. There also will not be events to which non-hotel guests are invited.” (25a).

In November 2021, Cape Jetty returned to the Board with a new proposal which included a 240-seat restaurant, dining and lounge area open to the public, with only 81 parking spaces on-site, and 42 proposed parking spaces at an undisclosed, off-site location. (10a-11a). The Board denied the 2021

application, and its decision in this respect was affirmed by the trial court and Appellate Division. (45a-46a).

In January 2022, Cape Jetty again returned to the Board to request an extension of its 2019 approval. (32a). In Cape May, if a developer does not receive a building permit or obtain an extension within two years of approval, the approval expires and no permits will be issued. (36a). The Board therefore considered two issues: First, could Cape Jetty request the extension even though two years had already passed? Second, was it entitled to an extension? (37a-38a).

Cape Jetty produced no witnesses or testimony to support its extension request. (34a). Its attorney refused to be sworn in, indicating he felt it unnecessary as an “officer of the court,” and promising to only rely on the application’s procedural history, which was already known to the Board. (34a). The Objectors’ counsel and members of the public testified as to the legal and factual reasons why they believed the approvals could no longer support a building permit, and why an extension was inappropriate. (34a). This was the record before the Board.

Following Aronowitz v. Planning Board, 257 N.J. Super. 347 (1992), the Board determined it must allow the request for an extension to be made after the two years. (37a). However, it denied Cape Jetty’s extension request on the

merits. (38a). The only reason on the record for the delay was the ill-fated 2021 application, which seemed a terribly unpersuasive reason not to move forward with an approved project. (37a-38a). Parking and congestion in the area had only worsened, in part, because a new beach had formed nearby, and the Board had ongoing concerns about Cape Jetty's intentions regarding the "amenity space." (37a-38a).

Cape Jetty filed a Complaint in Lieu of Prerogative Writs challenging the Board's decisions and application of a local ordinance. (84a). The trial court affirmed the Board's denial of Cape Jetty's 2021 application and upheld the ordinance, but remanded denial of the 2019 application extension request to the Board due to the lack of record, unclear legal positioning of the parties and overlapping considerations. (82a).

Cape Jetty appealed the trial court's decisions as to its 2021 application and the local ordinance, and the Board cross-appealed the remand. (122a-123a). The Appellate Division upheld the Board's denial of Cape Jetty's 2021 application (138a), affirmed the validity of the local ordinance (143a-144a), and vacated the trial court's remand to the Board, directing the trial court to decide whether denial of the extension request was arbitrary, capricious or unreasonable. (146a-147a).

The trial court's July 1, 2024 decision, following remand from the Appellate Division, is the subject of Cape Jetty's present appeal.

On remand, the trial court found the Board did not act arbitrarily, capriciously or unreasonably in denying Cape Jetty's extension request where the Applicant produced no witness to explain why it had failed to obtain a building permit and instead relied on the procedural history and Covid related relief for which it never registered. (54a-55a).

III. Legal Argument

A. Standard of Review (51a)

Judicial review of a local board's decision is ordinarily limited. New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 160 N.J. 1, 14 (1999). The court's review of a board's decision is deferential, and the board's factual determinations are presumed to be valid. Grabowsky v. Twp. of Montclair, 221 NJ. 536, 551 (2015). The challenging party bears the burden of proof in demonstrating that the action was arbitrary, capricious, and unreasonable. Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81-82 (2002).

When considering whether a board acted in an arbitrary, capricious or unreasonable manner, courts are reminded that land use boards, because of their personal knowledge of local conditions and other expertise, have wide latitude

in making land use decisions. Kramer v. Board of Adjustment, 45 N.J. 268, 296 (1965); Lang v. N. Caldwell Zoning Bd. of Adjustment, 160 N.J. 41, 58 (1999); Pullen v. Twp. of S. Plainfield Planning Bd., 291 N.J. Super. 1, 6-7 (App. Div. 1996). A board is entitled to a presumption it not only acted fairly, but also possessed proper motives for its decisions. Kramer, 45 N.J. at 296; Lang, 160 N.J. at 58; Witt v. Borough of Maywood, 328 N.J. Super. 442, 453 (Law Div. 1998), aff'd, 328 N.J. Super. 343 (App. Div. 2000).

Absent a showing of a clear abuse of discretion, a court “must not substitute its own judgment for that of the board, even if it questions the wisdom of the action.” Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Bd., 420 N.J. Super. 193, 200 (App. Div. 2011); Cell S. of N.J., 172 N.J. at 81. “Our courts recognize municipal bodies are composed of local citizens who are far more familiar with the municipality’s characteristics and interest and therefore uniquely equipped to resolve such controversies.” First Montclair Partner, L.P. v. Herod Redevelopment I, LLC, 381 N.J. Super. 298, 302 (App. Div. 2005). Judicial review is intended to be a determination of the validity of the Board’s action, not a substitute for it. CBS Outdoor v. Lebanon Plan. Bd., 414 N.J. Super. 563, 578 (App. Div. 2010).

B. The Issue Raised on Appeal Has Already Been Decided and the Decisions of the Board and Trial Court Should Be Affirmed (54a-55a)

The principle of res judicata has evolved “to prevent the same claims involving the same parties from being filed and brought before a court repeatedly.” Ten Stary Dom P’ship v. Mauro, 216 N.J. 16, 39 (2013). The rule is intended to respect the finality of the initial decision, limit the burden of litigation on adverse parties, and remove unnecessary litigation from the courts. Id. In essence, the principle of res judicata bars a party from relitigating a second time that which was previously fairly litigated and finally determined. Cicchine v. Township of Woodbridge, 413 N.J. Super. 393, 402 (2010).

Here, the trial court held the Board’s denial of Cape Jetty’s extension request was proper and in accordance with applicable law in its November 2022 decision, but remanded to the Board for other reasons, a decision which was overturned by the Appellate Division. When the Appellate Division overturned the remand, the matter was effectively decided in favor of the Board, and it should not be relitigated.

In its initial decision, the trial court explained:

This Court also recognizes the procedural history of the site. . . In considering same, the Board was made aware of the complaints of the Objectors and recognized certain changes in the area which would make the addition of a restaurant and upgrade to the Jetty Motel in the form of a hotel/event venue, impracticable. (107a).

[T]he Board found that it may, but was not required to grant an extension to Plaintiff if Plaintiff proved why no action had been taken to obtain a building permit. . . (112a).

The Board was not required to grant the Extension. The Board determined that Plaintiff had not reasonably satisfied its burden regarding why no progress has been made on the project. The Board was acting in compliance with the MLUL. The MLUL requires that developers be protected from zoning changes for two years, not from changes naturally occurring in the local area such as beach accretion and increased use of street parking for electric vehicles, two of the factors affecting the area around the Cape Jetty Motel. **The are the types of factors local boards are to consider when determining the appropriateness of an application due to the board members' knowledge of issues within the community.** (114a).

The trial court then affirmatively found:

Here, the Board properly found Plaintiff was not prevented from obtaining a building permit from the time the 2019 approval was first approved. . . The Board may choose to extend the time frame of the 2019 Approval if Plaintiff proves to the reasonable satisfaction of the Board that it is entitled, but the Board is not required to do so. (114a-115a).

Therefore, the court trial held, as the law of this case, that the Board had set forth adequate and appropriate reasons to deny Cape Jetty's extension request.

Although the trial court directed a remand to the Board, the Appellate Division determined the remand was unnecessary because both parties had agreed to rely on the existing record. (146a).

Specifically, on appeal, this Court found:

Nothing in the MLUL compelled the Board to grant the extension request absent Cape Jetty demonstrating good cause to extend the 2019 Approval. . . **At the Extension Request hearing, Cape Jetty asserted it was not required to present witness testimony articulating good reasons in support of the extension. Cape Jetty stated the reasons supporting its Extension Request were based on facts of record or reasonably known or ascertainable to the Board.** (143a-144a).

Because both parties are relying on the existing record related to Cape Jetty's Extension Request, we vacate the portion of the November 30, 2022 order remanding the Extension Request to the Board. In remanding, the trial court should decide whether the denial of the Extension Request was arbitrary, capricious, or unreasonable as Cape Jetty argues. Or, as the Board argues, whether Cape Jetty failed to meet its burden under N.J.S.A. 40:55D-52(d) by proving 'to the reasonable satisfaction of the board that [it] was barred or prevented, directly or indirectly, from proceeding with the development because of delays in obtaining legally required approvals from other governmental entities and that the developer applied promptly for and diligently pursued these of these approvals.' (146a-147a).

As the trial court noted in November 2022, the record certainly was not lacking in reasons to *reject* the extension request (the Board had valid reasons),

but rather, there were insufficient reasons in the record to *approve* the extension request (seeking more “good cause” to be put on the record). (118a-119a).

The trial court only remanded the extension request to “[permit] the Board to require additional information pertaining to ‘good cause.’” (119a). Following the Appellate Division’s reversal, there was no remand to the Board to obtain good cause, and a lack of good cause was already established. Nevertheless, in its subsequent decision, on appeal here, the trial court recited the following “pertinent language from the Board’s decision” supporting denial:

Mr. Crowley: The issue is whether or not they should be getting an extension, and I’m looking at the fact that we’ve heard nothing about what was done in the 24 months that they had [after] the approval process. That was the 19th. Seven months transpired. There’s no evidence that the applicant did anything to advance the application, that we’ve heard. COVID came in. COVID didn’t extend the approval process for permits, but it didn’t say stop working on projects. It’s clear to me that, based on this hearing, that the applicant spent most of the two years planning yet another application for the board as opposed to planning to implement the one he had approval for, and finally, that application protection for two years by law was, I think, to ensure that no ordinances change with respect to zoning, and I would argue that it doesn’t have to be a big change; it has to be a change. The ordinance changed, and it affects parking in an already tight parking situation. And so for those reasons, I cannot extend this application. I vote no. (48a-49a).

Ms. Sheehan: I don't feel that the applicant has stated a case on why they need the extension. They were available and had the ability to make a new application. So my answer is no. (49a).

Mayor Mullock: I echo the sentiments. We were given no new testimony this evening, and I think the point of, we wouldn't have extensions if we didn't need to accept certain extensions, it hit home for me. I vote no. (49a).

Chmn. Bezaire: I'm sympathetic, as is Mike, to anybody who had to try and do anything during the COVID crisis. . . Obviously the developer had plans for alternate design. That did not pan out and that was part of the time that he could have applied for it. So I'm voting no as well. (49a).

Based on this record, the trial court found the Board was willing to weigh the policy of the ordinance encouraging developers to move forward with projects after approval with the reasons why Cape Jetty had taken no action to obtain a building permit, but there was nothing in the record to support the delay, and the history of the project on which Cape Jetty relied contained no legitimate explanation, such that it did not warrant an extension. (50a-51a).

While the remand was initially ordered to allow Cape Jetty to set forth good cause for an extension, once the remand was overturned, the Board's decision was essentially affirmed. Cape Jetty should not be permitted to relitigate the determinations made at the outset of this matter on appeal.

C. Even if the Issue Is Revisited, The Board's Decision Should Be Upheld (54a-56a)

Aside from its 2021 application for a parking variance with no parking plan (now rejected by three levels of decision makers), Cape Jetty provided no testimony as to how the procedural history of its 2019 application supported its extension request or its failure to apply for or obtain a building permit.

The Board's findings were not deficient, and were set forth clearly and directly by its members, and in its Resolution, as affirmed by the trial court. (37a-38a). Cape Jetty set forth no facts demonstrating good cause for its delay and relied on the procedural history, from which the Board determined it had done nothing to advance the 2019 approval, and instead focused on a new application during the two-year protection period. (49a-50a). The Board's Resolution summarized the same finding:

The Board recognized that there was no major zoning change (although arguably there had been a change in the EV Parking requirement through an ordinance amendment) after the Final Approval. This analysis did not take place in a vacuum, as this property has had several iterations since 2010. The application had recently been before the Board, as outlined in the presentation of the developer in this application (and in the Resolution 08-13-2019 and the Resolution passed on 1/26/2020, the same night as the present hearing), where there was substantial testimony regarding the changing dynamic at that end of the town, including the naturally accreting "beach" area, that impacted traffic and parking near the subject property. There were also concerns expressed in the community, reinforced by the

applicants attempt to revise the project to have a 250-seat restaurant open to the public, regarding the substantial amount of vague “amenity space” in the existing approval for the project. These are the types of changes and dynamics that, although not directly a “zoning change”, are the types of circumstances that may make a development favorable in one environment, but not in an environment two years later. As a matter of policy, the ordinance suggests that the project should move forward in two years, and if it does not, the Board may balance why it has not done so with the other considerations outlined above. The Board was willing to weigh those considerations against the reasons why no action had been taken to obtain a building permit, and to better understand why the project had not advanced. However, aside from indicating the developer focused for a period of time on making a new proposal (which was soundly and promptly rejected by the Board 9-0 more than two years after the final approval), there was no testimony at all provided to explain the delay. The developer himself did not testify, nor did any sworn professional. The Applicant's attorney relied upon the procedural history of the application, but that procedural history in no way explained the reason why the project was not advanced toward a building permit in the last two years. There was a dearth of proof on the issue of the delay, including a total absence of sworn testimony, and this was despite repeated invitations to make such a presentation. (371-38a).

As explained above, the remand decision of the trial court was limited to whether the Board's decision was reasonable and record-based. Cape Jetty cannot relitigate the issues from its prior appeal with regard to the validity of Cape May's Ordinance or whether the matter should have been remanded to the

Board at all. The Appellate Division has already ruled against Cape Jetty on both issues which it raises again in its appeal brief.

Finally, Cape Jetty's argument that the Board lacked authority to deny the extension request because the application presented a fully conforming, permitted use and there had been no zoning changes in the two years between approval and expiration of the protective period ignores two important aspects of the record. First, the approval was subject to various conditions, including restrictions on use of the amenity space, parking requirements and traffic safety and control measures, which originate from concerns about additional development in an already busy area of Cape May. (22a-28a). Second, there *was* a zoning change in the EV parking requirement through an ordinance amendment following approval. (100a-101a). Both of these factors could lead to a different result from the initial 2019 approval if the same exact proposal were to be made by Cape Jetty today.

As to the limited issue on appeal, the conclusions and reasoning of the Board were both reasonable and consistent, however, the record in support of the extension request provided no legitimate justification or explanation to support an extension. It was not the Board's job to create Cape Jetty's record in support of the extension, and its decision to deny the request was not arbitrary or capricious.

IV. Conclusion

For these reasons, the City of Cape May Planning Board respectfully requests that the Court affirm the trial court's decision and affirm the Cape May Board's determination to deny Cape Jetty's extension request.

Respectfully submitted,
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*Attorneys for Defendant-Respondent,
City of Cape May Planning Board*

By: s/ Richard M. King, Jr.
Richard M. King, Jr., Esquire

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003934-23

CAPE JETTY, LLC,

Plaintiff-Appellant,

V.

CITY OF CAPE MAY, CAPE MAY
CITY PLANNING BOARD, and CAPE
MAY CITY COUNCIL,

Defendants-Respondents,

CRAIG VERSTEEG, LISA VERSTEEG,
NICHOLAS GRISANTI, CAMILLE
GRISANTI, JOSEPH SCHLITZER,
NANCY SCHLITZER, SCOTT
MASLOW, BOBBI STOKES, JAY
KLOOSTERBOER, and BARBARA
ZICCARI,

Intervenors-Respondents.

[illegible]

On Appeal from:

Superior Court of New Jersey

Law Division, Cape May County

Docket No. CPM-L-83-22

SAT BELOW:

Hon. Michael J. Blee, A.J.S.C.

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I. PRELIMINARY STATEMENT

This matter calls upon the Court to determine whether a planning board acted in an arbitrary and capricious manner by rejecting a request for an extension of a previously granted approval that was consistent with zoning and required no variances. It is not the first time this Court has reviewed the matter. Previously, the Court remanded the same issue to the trial court for review after the lower court found such action to be arbitrary and capricious, yet provided for further development of the record before the Board. This Court determined after oral argument that the trial court should render its decision based upon a record that the parties agreed was sufficient to support a final determination.

On remand, the trial court this time sustained the denial of the extension request, despite previously finding the determination of the Planning Board of the City of Cape May (“Board”) to be arbitrary, capricious and unreasonable, based on the same exact record the trial court previously reviewed. The Board now argues, both incorrectly and disingenuously, that this new trial court opinion should be affirmed because the very issue that was the subject of the remand had purportedly been adjudicated in the Board’s favor previously, a position that Plaintiff Cape Jetty, LLC (“Cape Jetty”) urges this Court to ardently reject.

By way of further explanation, the Board contends that because this Court vacated the portion of the November 2022 decision remanding the Extension Request, the Board's decision was somehow affirmed. The Board then unconvincingly argues that the doctrines of *res judicata* or "law of the case" should apply to the trial court's original decision to sustain the Board's denial of the extension request.

Not only is this analysis fatally flawed, but if the same reasoning was to be applied to the trial court's original opinion, application of these doctrines would actually work in Cape Jetty's favor. In its November 2022 decision, the trial court expressly stated that the Board's rejection of the extension request was unreasonable, but then also permitted Cape Jetty to present additional information to the Board, to further develop the record. Cape Jetty pursued an appeal of various determinations rendered by the lower court, including the "elective" remand to the Board on this issue. On appeal, after the parties agreed at oral argument that the record presented below was adequate for the trial court to render final judgment on the issue, this Court remanded the matter to the trial court for such action to be taken.

In its most recent decision, however, the trial court arbitrarily reversed its prior decision, based upon the exact same record, and declared that the Board's denial of the extension request was supported by the record. This determination is arbitrary and capricious, and should be reversed.

The Board attempts here to gaslight this Court by claiming that, in the November 2022 decision, the trial court found that the Extension Request denial was not arbitrary, yet remanded the matter anyway to see if Cape Jetty could present additional reasons why the Board should extend the 2019 Approval, even though the Board allegedly had sufficient grounds to deny the request. This is not what occurred.

It is clear from the record that the Board was not interested in adducing any reasons to approve the extension request, and rather, strained to concoct any justification for its denial of a routine extension request for a fully-conforming, permitted use, which required neither public notice nor a hearing. It is readily apparent that the Board usurped the zoning power of the City's governing body, deeming the hotel to be inappropriate due to so-called "changing dynamics" when the zoning ordinance already provides the site is appropriate for the hotel. Denial of the extension request in the absence of a zoning change is the epitome of arbitrary, capricious and unreasonable action, and therefore, the Board's decision here should be overturned.

II. COUNTER-STATEMENT OF FACTS

Cape Jetty reiterates and incorporates the “Procedural History and Statement of Facts” contained in its brief filed with the Court on November 21, 2024, as if set forth at length herein. By way of further supplement in response to the Board’s brief, Cape Jetty notes that this Court stated very clearly the decision to be made by the trial court on remand: “In remanding, the trial court should decide whether the denial of the Extension Request was arbitrary, capricious, or unreasonable as Cape Jetty argues. Or, as the Board argues whether Cape Jetty failed to meet its burden...” (Aa146).

The Board now argues that the trial court had already decided that Cape Jetty had failed to meet its burden. However, in its November 2022 decision, the trial court expressly stated: “The Board’s decision to reject the Extension Request of the 2019 Approval was **unreasonable**.” (Aa109). (*Emphasis added*.) This Court subsequently ordered the trial court to render a final decision upon remand, without consideration of further evidence, as to “whether the denial of the Extension Request was arbitrary, capricious, or **unreasonable**.” (Aa146). (*Emphasis added*.)

On remand, the trial court somehow found that the same decision it previously found to be unreasonable is now “supported by substantial credible

evidence in the record and was not arbitrary, capricious, or unreasonable.”

(Aa530). This appeal followed.

III. ARGUMENT

A. The Doctrines *Res Judicata* and “Law of the Case” Do Not Apply in This Case, and if They Do, They Apply in Favor of Cape Jetty.

If the doctrines of *res judicata* or the “Law of the Case” were even applicable here, those principles support a determination that the trial court could not enter a decision entirely contrary to its original ruling, based upon the same exact record that the trial court previously reviewed.

The Board attempts to reach the opposite result by way of revisionist history and a contorted interpretation of this Court’s remand ruling, claiming that when this Court reversed the lower court on the “permissive” remand, the matter was decided in favor of the Board, and should not be relitigated.

As an initial matter, the trial court never stated in its original opinion that the Board’s denial of Cape Jetty’s extension request was proper. In fact, the trial court’s original decision was quite the opposite. The citations cherry picked by the Board to support its revisionist history, purporting to support the Board’s erroneous position, are taken out of context. First, the Board cited to the following: “This Court also recognizes the procedural history of the site... In considering same, the Board was made aware of the complaints of the

Objectors and recognized certain changes in the area which would make the addition of a restaurant and upgrade to the Jetty Motel in the form of a hotel/event venue, impracticable.” Rb¹ at p. 8.

However, in making this citation, the Board removed a very significant portion of this passage which indicates that the Court’s recognition of “the procedural history of the site” was related to the Board’s denial of Cape Jetty’s 2021 Application, not the Extension Request. See (Aa107-Aa108).

The 2021 Application proposed a change to the 2019 Approval through the inclusion of a 240-seat restaurant that would have been open to the public, thereby calling for a significant increase in parking and resulting in a variance. The 2019 Approval which Cape Jetty sought to extend via the Extension Request was a completely permitted use and variance free, limiting all of the amenity space to hotel guests only and obviating the need for additional parking. It is misleading for the Board to suggest that the trial court relied on the “procedural history of the site” as a reason to deny the Extension Request when the referenced quote relates to the 2021 Application.

As another example of the Board’s misdirection, the Board cites the trial court as stating “the Board found that it may, but was not required to grant an extension to Plaintiff ...” (Aa112) – which was merely a recitation by the trial

¹ “Rb” references Respondent’s brief filed in this matter.

court of the Board’s attempt to “reconcile” its unlawful ordinance with the Municipal Land Use Law (“MLUL”). In fact, in making that statement, the trial court was merely reciting the Planning Board’s position rather than making any sort of finding that could potentially be subject to *res judicata*.

The Board goes on to argue the “law of the case” doctrine, stating that “the court trial held, as the **law of this case**, that the Board had set forth adequate and appropriate reasons to deny Cape Jetty’s extension request,” Rb at p. 9 (*emphasis added*). The Board then fails to elaborate on which doctrine, whether *res judicata* or “law of the case,” should prevent Cape Jetty from continuing the prosecution of its appeal in accordance with this Court’s remand. (Aa146-Aa147). In reality, neither doctrine applies in this case, and if so, they would apply in Cape Jetty’s favor.

Res judicata as a principle of law bars a party from relitigating a second time what was previously fairly litigated and determined finally. The general requirements for the invocation of this principle are a final judgment by a court ... of competent jurisdiction, identity of issues, parties and cause of action and thing sued for. Cicchine v. Twp. of Woodbridge, 413 N.J. Super. 393, 402 (Super. Ct. 2010) (quoting Lubliner v. Paterson Bd. of Alcoholic Beverage Control, 33 N.J. 428, 435(1960)). *Res judicata* is an ancient judicial doctrine which contemplates that when a controversy between parties is once fairly

litigated and determined, it is no longer open to re-litigation. Id. In essence, these principles bar a party from relitigating a second time that which was previously fairly litigated and finally determined. Id., *citing* Charlie Brown of Chatham v. Bd. of Adjustment, 202 N.J. Super. 312, 327 (App. Div. 1985).

Similarly, the “law of the case” doctrine is a rule “intended to ‘prevent re-litigation of a previously resolved issue’ in the *same* case.” State v. K.P.S., 221 N.J. 266, 276 (2015), *citing* Lombardi v. Masso, 207 N.J. 517, 538 (2011). It is a “discretionary rule that calls on a court ‘to balance the value of judicial deference for the rulings of a coordinate [court] against those ‘factors that bear on the pursuit of justice and, particularly, the search for truth.’” Id.

The Board’s position effectively frames the Court’s remand order as violative of the doctrine of *res judicata*, purportedly as it would revisit an issue that had already been litigated; however, to the extent that issue was litigated, such decision was entered in favor of Cape Jetty, and to the extent the trial court was ordered to review the matter again on remand, it was relevant to treating the record as complete, rather than inviting any further supplementation. Indeed, it was on that very record that the trial court decided that “[t]he Board’s decision to reject the Extension Request of the 2019

Approval was unreasonable,” (Aa109),² because the hearing at which the Extension Request was decided was tainted by the Board’s and the public’s *perception* of the 2021 Application, which had been denied just months earlier.

This Court finds that the record before the Board was filled primarily with arguments against [Cape Jetty’s] efforts since 2010, rather than specifically the 2019 Extension Request. This Court finds there were overlapping considerations from both the 2021 Hearing and the previous approval that tainted the Extension Hearing.

(Aa118a-Aa119).

Thus, while finding the Board’s action unreasonable, the trial court remanded the matter to the Board to further develop the record; a decision which Cape Jetty appealed, and this Court vacated, directing the trial court to make its decision based on the record of the January 25, 2022 hearing.

On remand, the Board’s denial of the Extension Request was the issue to be reviewed by the trial court. That final decision was to be made, not one that was already made, rendering the doctrines of *res judicata* and “law of the case” inapplicable. However, to the extent the Court finds either of those doctrines applicable (as the Board argues), then the trial court already decided

² See also, Aa116 (“The Board denial of plaintiff’s request for an extension of the 2019 approve was **unreasonable**”); and Aa82 (“Board’s denial of [Cape Jetty’s] Request to Extend the 2019 Approval WAS unreasonable”).

that the Board's decision to deny the Extension Request was unreasonable, and if that initial decision on that issue was final, the trial court's subsequent decision to the contrary must be overturned.

B. The Board's Brief Demonstrates It Would Have Been Futile for Cape Jetty to Proceed Before the Board on Remand.

The Board readily admits "there was no major zoning change." (Aa37). This demonstrates that the Board's decision to deny the Extension Request had nothing to do with extending the prior approval, but rather, it merely served as an improper mechanism to effectively retract the prior 2019 approval, contrary to the zoning, reflecting the abject hostility towards the 2021 Application which had been denied only two (2) months before. The trial court, in the November 2022 decision, agreed with Cape Jetty as to this point. (Aa118a-Aa119).

The foregoing again illustrates why the Board's decision regarding the Extension Request is not entitled to deference. The Resolution and the Board's own argument clearly demonstrate that the Board was more concerned with the 2021 Application than the 2019 Approval when it denied the Extension Request, and also, that the Board took it upon itself to effectively rezone the Property due to the alleged "changing dynamic at that end of town,"

unlawfully usurping the authority of the governing body and denying a routine extension request for a permitted use.

In a last ditch effort to allege a “zoning change” to justify the denial of the Extension Request, which had nothing to do with the fact that the hotel was and remained compliant with the zoning, the Board claims that “there *was* a zoning change in the EV parking requirement through an ordinance amendment following [the 2019] approval” in a feeble attempt to somehow justify denial of Cape Jetty’s Extension Request. *See* Board’s Brief, at p. 15; *see also*, Aa37. A Board member attempted to bring this up during the January 25, 2022 hearing:

MR. CROWLEY: [T]he other thing that one of the witnesses, or non-witnesses said, was that the two-year was an extension to protect against ... zoning ordinance that [might] change within that two-year period. ... The City council just changed the parking ordinance and zoning code for accommodation to electric vehicles ... That’s a change in the zoning ordinance after the expiration of [the 2019 Approval].
...

MR. KING: ... **I don’t know the extent it impacts this particular application.**

MR. CROWLEY: Well, they’re maxed out at 66 parking spaces and this would require ... an additional four parking spaces ...

MR. KING: [M]y impression of the ordinance and one of the complaints about the ordinance was, I think it actually reduces their parking requirement. I think they’d have to put in some EVs and they get a two-

for-one credit so ... **it would actually require less parking.**

T1/37:21-39:4 (*emphasis added*). The Board's counsel was correct, and his assessment was corroborated by the Board's engineer. T1/39:11-20. The Board's counsel then stated that the period of protection afforded to Board approvals under Section 52 of the MLUL was "designed for changes that would make [the approval] inconsistent with your master plan ... like if the lot sizes change in the subdivision or if the density requirements were substantially different." T1/40:7-41:2.

That did not happen here. No such change occurred in this instance which would render the 2019 Approval inconsistent with the City's Master Plan. Quite the contrary, the only zoning change to which the Board could point, in a desperate attempt to find any excuse to deny the Extension Request, ended up backfiring, as it would have **lessened** Cape Jetty's parking requirement. Yet, the Board, still contends that the "EV parking requirement" could "lead to a different result from the initial 2019 Approval if the exact same proposal were to be made by Cape Jetty today." The only result would be that Cape Jetty's application would not need to have as much parking as the 2019 Approval, yet the Board implies that it could have led to a denial, as if the simple requirement that developers provide make-ready parking spaces

could somehow affect the appropriateness of a hotel in a district that is specifically zoned for hotels. This is patently false.

The Board's attempt to find any justification to deny the Extension Request, including its attempt to conjure up a zoning change which would not in any event have warranted a denial, demonstrates it would have been futile for Cape Jetty to return to the Board following the trial court's initial remand; there was no amount of testimony that would have changed the result, which the Board was determined to reach, being denial of Cape Jetty's ability to redevelop the property with a hotel as allowed by the zoning. The Board simply saw an opportunity to retract the 2019 Approval via denial of the Extension Request, and the Board did so, to the detriment of Cape Jetty and its vested rights as a private property owner.

IV. CONCLUSION

As set forth above, the trial court erred when it failed to reverse the Board's denial of Cape Jetty's request to extend the 2019 Approval pursuant to N.J.S.A. 40:55D-52. Resultantly, the Board's improper decision to deny the Extension Request, and the trial court's affirmation of that decision, should be

reversed, and the 2019 Approval should be extended in accordance with the Municipal Land Use Law.

Respectfully submitted,

HYLAND LEVIN SHAPIRO LLP

Dated: January 6, 2025

By:


Robert S. Baranowski