

SUPREME COURT OF NEW JERSEY
Docket No. 090407

MONARCH COMMUNITIES, LLC, a
Limited Liability Company of the
State of Delaware,

Plaintiff,

v.

TOWNSHIP OF MONTVILLE;
MAYOR AND COUNCIL OF THE
TOWNSHIP OF MONTVILLE; and
TOWNSHIP OF MONTVILLE
ZONING BOARD OF
ADJUSTMENT

Defendants-Petitioner

and

JMC INVESTMENTS, LLC, a New
Jersey Limited Liability Company,

Plaintiff-Respondent

v.

TOWNSHIP OF MONTVILLE;
MAYOR AND COUNCIL OF THE
TOWNSHIP OF MONTVILLE; and
TOWNSHIP OF MONTVILLE
ZONING BOARD OF
ADJUSTMENT

Defendants-Petitioner

ON PETITION FOR CERTIFICATION
FROM THE APPELLATE DIVISION
OF THE SUPERIOR COURT OF NEW
JERSEY

Appellate Docket No.: A-929-23

Sat Below:

Hon. Hany A. Mawla, P.J.A.D.

Hon. Kay Walcott-Henderson, J.A.D.

Hon. Robert M. Vinci, J.A.D.

ON APPEAL FROM FINAL ORDER OF
THE SUPERIOR COURT OF NEW
JERSEY, LAW DIVISION, MORRIS
COUNTY

Law Division Docket No.:

MRS-L-1986-21

MRS-L-1995-21

Sat Below:

Hon. Stephan C. Hansbury

**PLAINTIFF-RESPONDENT JMC INVESTMENTS, LLC BRIEF IN
OPPOSITION TO THE PETITION FOR CERTIFICATION**

BEATTIE PADOVANO, LLC
200 Market Street, Suite 401
Montvale, New Jersey 07645
(201) 799-2149
adelvecchio@beattielaw.com

Antimo A. Del Vecchio, Esq.
Of counsel

Daniel L. Steinhagen, Esq. (018622005)
On the brief

March 17, 2025

TABLE OF CONTENTS

Counterstatement of the Matter 1

Why Certification is Not Warranted 6

The Petition fails to Satisfy the Requirements of Rule 2:12-4 because the
Decision neither raises an issue of general public importance that has not yet
been resolved nor is in conflict with any other decision of this Court or the
Appellate Division..... 6

 A. This Court has addressed the negative criteria requirements for use
 variance applications involving inherently beneficial uses on more than
 one occasion, and the Petition does not raise any questions of general
 public importance..... 7

 B. The Decision does not conflict with Salt & Light; the outcome in this
 case was different because the facts were different 14

Comments with Respect to the Decision 18

Conclusion 20

TABLE OF AUTHORITIES

Cases

<u>AMG Associates v. Tp. of Springfield</u> , 65 N.J. 101 (1974).....	7
<u>Kohl v. Fair Lawn</u> , 50 N.J. 268 (1967)	7
<u>Kramer v. Sea Girt</u> , 45 N.J. 268 (1965)	7
<u>Med. Center at Princeton v. Twp. of Princeton Bd. of Adj.</u> , 343 N.J. Super. 177 (App. Div. 2001)	12
<u>Medici v. BPR Co., Inc.</u> , 107 N.J. 1 (1987)	passim
<u>New Brunswick Cellular Tel. Co. v. S. Plainfield Bd. of Adj.</u> , 160 N.J. 1, (1999).....	passim
<u>Nuckel v. Little Ferry</u> , 208 N.J. 95 (2011)	8
<u>Price v. Himeji</u> , 214 N.J. 263 (2013)	7
<u>Salt & Light Co., Inc. v. Willingboro Bd. of Adj.</u> , 423 N.J. Super. 282 (App. Div. 2011), <u>certif. denied</u> , 210 N.J. 108 (2012)	passim
<u>Sica v. Wall Twp. Bd. of Adj.</u> , 127 N.J. 152 (1992)	passim
<u>Smart SMR of NY, Inc. v. Fair Lawn Bd. of Adj.</u> , 152 N.J. 309 (1998)...	passim

Statutes

N.J.S.A. 40:55D-70	5, 7, 9
--------------------------	---------

Rules

Rule 2:12-4.....	6
------------------	---

COUNTERSTATEMENT OF THE MATTER

Without actually requesting it, the Montville Board of Adjustment's petition for certification seeks to undo this Court's decision in Sica v. Wall Twp. Bd. of Adj., 127 N.J. 152 (1992). Sica held that an applicant seeking a use variance for an inherently beneficial use must not satisfy the second prong of the negative criteria in N.J.S.A. 40:55D-70(d) by an enhanced quality of proof per this Court's earlier ruling in Medici v. BPR Co., Inc., 107 N.J. 1 (1987). The ruling that the Board seeks would enable a board of adjustment to deny use variance applications for uses that are universally considered of value to the community because they fundamentally serve the public good and promote the general welfare, such as schools, hospitals, child care centers, houses of worship, and, in this case, a multi-level congregate care facility for the frail elderly, because the municipal master plan does not expressly recommend a particular property for the use.

Montville's Planning Board amended the land use plan element of the Borough Master Plan in 2019. That amendment does not contain any recommendations about the property that Monarch Communities, LLC¹ sought to develop. After Monarch presented a compelling case for use variance relief

¹ Respondent JMC Investments, LLC is the contract purchaser of the property that is the subject of this appeal. JMC is pursuing the approval and is the party-in-interest for this appeal.

because its use is inherently beneficial, the Board reached a bizarre conclusion: that the approval of Monarch's application would cause a substantial impairment to the intent and purpose of Montville's amended Master Plan despite there being nothing in the Master Plan that it could identify that would be impaired. Instead, the Board fixated on the fact that the initial draft of the amendment had recommended Monarch's property for this very use and that the version adopted had simply eliminated the rezoning recommendation for a multi-level congregate care use on the subject property. The Board demanded that Monarch prove that approval of its project would not cause substantial impairment to a document that is silent regarding the subject property and the possibility of its use for a multilevel congregate-care facility, and, at the same time, explain why the Planning Board had taken that path.

The rubric adopted by the Board in its resolution of denial claimed that "the Township has affirmatively removed the proposed uses from the zoning of this property." [Da140 at ¶ 42]. This conclusion was and remains wrong, as the Board Attorney admitted below. [Pa348]. The Board argues here that it "considered the fact that [Montville's] ordinance was not amended to include this use at the Property . . ." [Pet. Br. at 3-4]. But a denial on these grounds is nothing more than the reconciliation test of Medici, 107 N.J. at 21 , that this

Court expressly forbade boards of adjustment from using when evaluating applications for inherently beneficial uses in the Sica decision. 127 N.J. at 154-155 (“This appeal raises the question whether the enhanced standard² also applies to inherently beneficial uses. . . . [W]e conclude that the enhanced standard does not apply to inherently beneficial uses”). And that would be true even if the Board had its facts straight.

And the record of the proceedings before Montville’s Planning Board confirms that the Property was to be recommended for the proposed use, and more importantly, the Township’s planner deemed the Property “appropriate” for the proposed use at that time. [Pa447 at 100-7 to 100-21]. But residents had presented a petition with 600 signatures demanding its removal from the plan because they wanted the Township to acquire it for open space, and as they recognized, a rezoning could increase the Property’s value. [Pa434 at 43-18 to 48-12]. The decision not to recommend the rezoning of the Property in the MPA was not about Montville’s zoning, it was simply about a potential negotiation strategy and extra money that the Township did not want to spend to acquire the Property. [Pa448 at 101-1 to 102-13]. But the Township

² Medici’s enhanced quality of proof requires that “[t]he applicant’s proofs and the board’s findings that the variance will not ‘substantially impair the intent and purpose of the zone plan and zoning ordinance,’ *N.J.S.A.* 40:55D-70(d), must reconcile the proposed use variance with the zoning ordinance’s omission of the use from those permitted in the zoning district.” 107 N.J. at 21.

never sought to acquire the Property in any event. The Board’s decision to “hang its hat” on the Master Plan amendment’s lack of recommendation for the Property – when compared against what actually happened – highlights a glaring deficiency in its analysis. Had the Board done the analysis it claims it wants this Court to require, the foregoing would easily suffice to demonstrate that there is no substantial impairment to the intent and purpose of the zone plan.

The Board’s presentation of the facts of this case is hardly accurate. Indeed, despite making the same arguments to the trial court that it does here, it immediately corrected its own brief by letter advising:

We have filed a trial brief and need to provide the Court with a clarification that we just learned as to the status in Montville of the Master Plan update implementation ordinance. In our brief, we referred to the Master Plan update and Land Use Element that were in fact adopted by the Planning Board in or about early 2020, and we were under the belief that the governing body had also finalized it by adopting an ordinance. However, we are now advised that the Township Committee has not as yet voted upon that implementing ordinance.
[Pa348; emphasis added].

Monarch identified the Board’s failure to brief this issue in the Appellate Division. [Mon. App. Br. at 31-32]. But even here, the Board again ignores the history of this case and defends its decision to deny the

application because “the [Township] Committee had recently addressed and rejected the site. . .” [Pet. Br. at 7].

Even in its Petition, the Board cannot articulate what in the amendment to the Master Plan is being impaired, aside from its own interpretation of *why* the Planning Board did what it did. But N.J.S.A. 40:55D-70 does not require an applicant seeking a variance to analyze the thoughts of members of the planning board. Instead, the board of adjustment’s task was to analyze the variance request against what is actually written in the master plan document. The Board has identified nothing in the Master Plan that the variance will impair.

The Board’s confused conclusion about purported substantial impairment to the intent and purposes of the zone plan and zoning ordinance does not mean that boards of adjustment require guidance about what the law requires. It could not, as it wrongly claims on page 12 of its Petition, rely on “directions” from the Planning Board that are not written in the Master Plan, or from the Township Committee’s inaction as a de facto prohibition against a use variance. Instead, the Board simply needed guidance as to the facts of this case before making its arbitrary, capricious and unreasonable decision. But this does not warrant certification of the Appellate Division’s February 3, 2025 written decision (the “Decision”).

WHY CERTIFICATION IS NOT WARRANTED

THE PETITION FAILS TO SATISFY THE REQUIREMENTS OF RULE 2:12-4 BECAUSE THE DECISION NEITHER RAISES AN ISSUE OF GENERAL PUBLIC IMPORTANCE THAT HAS NOT YET BEEN RESOLVED NOR IS IN CONFLICT WITH ANY OTHER DECISION OF THIS COURT OR THE APPELLATE DIVISION.

The Court should deny the Petition for the simple reason that it fails to meet the explicit criteria required for this Court's review. Rule 2:12-4 provides:

Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

In support of its Petition, the Board advances two contradictory arguments which it contends warrant the grant of certification. First, the Board argues the Appellate Division's decision raises questions of "general public importance" that have not been addressed regarding the application of the second prong of the negative criteria in inherently beneficial use variance cases. Second, the Board claims the Appellate Division's decision directly conflicts with its earlier decision in Salt & Light Co., Inc. v. Willingboro Bd. of Adj., 423 N.J.

Super. 282 (App. Div. 2011), certif. denied, 210 N.J. 108 (2012). As explained below, the arguments are entirely without merit and require the denial of the Petition.

A. This Court has addressed the negative criteria requirements for use variance applications involving inherently beneficial uses on more than one occasion, and the Petition does not raise any questions of general public importance.

This Court has frequently addressed the proof requirements for variances to allow a use not permitted in a zoning district under N.J.S.A. 40:55D-70(d)(1). See, e.g., Price v. Himeji, 214 N.J. 263 (2013); New Brunswick Cellular Tel. Co. v. S. Plainfield Bd. of Adj., 160 N.J. 1, (1999); Smart SMR of NY, Inc. v. Fair Lawn Bd. of Adj., 152 N.J. 309 (1998); Sica, supra; Medici, supra; AMG Associates v. Tp. of Springfield, 65 N.J. 101 (1974); Kohl v. Fair Lawn, 50 N.J. 268 (1967); Kramer v. Sea Girt, 45 N.J. 268 (1965). Through this Court's use variance jurisprudence, use variance applications are divided into three different subcategories, based on the manner in which an applicant demonstrates the "special reasons" that N.J.S.A. 40:55D-70(d)(1) requires: because (i) the zoning ordinance causes undue hardship or economic inutility (AMG; Kramer); (ii) because the lot for which the variance sought was particularly suitable (Price; Medici); or (iii) because the use inherently serves the public good irrespective of location (Sica). Nuckel v. Little Ferry, 208 N.J.

95, 103 (2011). For the different types of use variance, the differentiating factor is how an applicant demonstrates special reasons, the absence of substantial detriment to the public good and substantial impairment to the intent and purposes of the zone plan and zoning ordinance.

In Sica, the question presented was whether the enhanced quality of proof for the second prong of the negative criteria required by Medici, supra, 107 N.J. at 21 (i.e., the quantum of proof required to demonstrate that the variance would not cause substantial impairment to the zone plan and zoning ordinance) applied to a use variance for an inherently beneficial use. This Court found that the enhanced quality of proof did not apply to inherently beneficial use, 127 N.J. at 155, 160-162, and elaborated on how an applicant could satisfy the negative criteria. Id. at 162-166. To do so, the Court fashioned a four-part test that would guide boards of adjustment to balance the positive attributes of the use against the negative criteria. Although the Court expressly mentioned the second prong of the negative criteria, id. at 164 (“Some balancing of benefits and burdens necessarily occurs when one considers whether a use variance will have a substantial detrimental effect on the public good and the zone plan”), the fourth balancing factor only required boards of adjustment to “weigh the positive and negative criteria and

determine whether, on balance, the grant of the variance would cause substantial detriment to the public good.” Id. at 166.

The Court’s decision in Sica prompted a statutory amendment to the negative criteria in N.J.S.A. 40:55D-70 to ensure that the absence of substantial impairment to the intent and purpose of the zone plan and zoning ordinance remained a consideration for use variances when an inherently beneficial use is proposed. Specifically, in 1997, the Legislature amended the statute to provide as follows:

“No variance or other relief may be granted under the terms of this section, *including a variance or other relief involving an inherently beneficial use, without a showing that* such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance . . . L. 1997, c. 145 See Smart SMR, supra, 152 N.J. at 324 (emphasis in original)

Smart SMR concluded that cellular communications towers were not inherently beneficial uses. However, because the United States Congress limited, through the Telecommunications Act of 1996, the ability of municipalities to denying variances for wireless telephone service facilities, the Court recognized that because wireless telephone service facilities inherently serve the general welfare if they satisfy the requirements of the Telecommunications Act, and therefore automatically establish special reasons

for a use variance, id. at 331-332, the balancing of the positives and negatives under Sica was appropriate. Id. at 332.

The following year, in New Brunswick Cellular, the Court revisited use variances for wireless telephone service facilities. The issue in the case was whether the board of adjustment had “erroneously concluded that Comcast had not satisfied the ‘positive’ and ‘negative’ criteria entitling it to a use variance under N.J.S.A. 40:55D-70(d)(1).” 160 N.J. at 5. Relying on Smart SMR, the Court analyzed the variance request using the balancing test outlined in Sica and made specific reference to the requirement – based upon the 1997 amendment to the MLUL – that a board of adjustment’s obligation with respect to the negative criteria was as follows:

To satisfy the negative criteria, an applicant must show that the use will not substantially impair the purpose and intent of the zoning ordinance, or constitute a substantial detriment to the public good. With telecommunications facilities, “we will weigh, as we would with an inherently beneficial use, ‘the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.’” 160 N.J. at 15, *citing* Smart SMR, 152 N.J. at 332 (*quoting* Sica, *supra*, 127 N.J. at 166)

After consideration of the board’s findings, the Court concluded that the balancing effort undertaken did not withstand judicial review because the minimal effects on the zone plan and zoning ordinance did not outweigh the

benefits of the service provided by the proposed use. Id. at 16. That analysis included specific consideration of the contents of South Plainfield’s master plan and the lack of cogent explanation of how the proposal would undermine the zone plan in either the resolution denying the application or in the hearing record. Ibid.

A point that Smart SMR stresses is that Sica’s determination, even after the 1997 amendment to N.J.S.A. 40:55D-70(d), use variance applicants seeking approval of an inherently beneficial use do not need to reconcile the omission of the use from the zone plan and zoning ordinance under Medici’s enhanced quality of proof requirement³. Smart SMR, 152 N.J. at 332-333. Instead, as the Appellate Division noted in Salt & Light, supra, “the satisfaction of the negative criteria involves weighing the evidence relating to the positive and negative criteria under the procedures set forth in [Sica]. . .” 423 N.J. Super. at 287. Salt & Light properly recognized that the potential for substantial detriment to the zone plan and zoning ordinance fit squarely within

³ The Medici Court gave examples of how a developer could reconcile the omission of a particular use from the zoning ordinance, by, for example, highlighting changes to the neighborhood or demonstrating that the use was a new use that was not contemplated at the time of adoption of the ordinance. 107 N.J. at 21, n. 11. The Court provided further guidance on the contours of the enhanced quality of proof requirement by noting that “Reconciliation on this basis becomes increasingly difficult when the governing body has been made aware of prior applications for the same use variance but has declined to revise the zoning ordinance.” Id. at 21-22.

the second of the four-part Sica balancing test – one that requires boards of adjustment reviewing use variances for inherently beneficial uses to identify “the detrimental effect that will ensue from the grant of the variance.” Id. at 290-291, *quoting Sica*, 127 N.J. at 166. It then balanced the positives of the application against the negatives in the fourth step of the balancing test, and based upon the specific facts of the case, upheld the denial of the variance.

It is hardly disputable that Smart SMR and New Brunswick Cellular address the appropriate level of scrutiny that the second prong of the negative criteria must receive in the analysis of an inherently beneficial use variance application. The Court’s instructions were clear enough for the Willingboro Appellate Division in Salt & Light to properly apply the Sica balancing test and undertake an analysis of actual impacts to Willingboro’s zone plan and zoning ordinance and then balance them against the positive attributes of the project. 423 N.J. Super. at 292; *see also*, Med. Center at Princeton v. Twp. of Princeton Bd. of Adj., 343 N.J. Super. 177, 212-213 (App. Div. 2001)(relying on Smart SMR to confirm that the 1997 amendment did not require an enhanced quality of proof to satisfy the second prong of the negative criteria in an inherently beneficial use variance application). They were likewise clear enough for the both the Appellate Division and the Law Division here.

Unlike the proof requirements for variances for inherently beneficial uses, a garden variety use variance application must satisfy the strict requirements of the Court's decision in Medici. To do so, an applicant must reconcile the omission of the use sought from the zoning ordinance by highlighting the governing body's inadvertent decision. In explaining the proof requirement, the Court noted that "when an informed governing body does not change the ordinance, a board of adjustment may reasonably infer that its inaction was deliberate." 107 N.J. at 20-21. That is the standard that the Board erroneously seeks to hold Monarch to, and tried to make it demonstrate that the variance could be reconciled with the omission of the use from the zoning ordinance and the master plan. [Pa133-134 at ¶ 25-26]. It was simply wrong to do this, and the Decision correctly affirmed the reversal of the Board's arbitrary, capricious and unreasonable decision to apply inapplicable standards to Monarch's application.

That determination does not make the matter one of general public import. The Board made a legal error and the Law Division reversed the denial, and then the Appellate Division affirmed that ruling. There is no need for the Court to revisit its decades-old determination that the enhanced quality of proof does not apply to inherently beneficial use variance proceedings under the guise of giving boards of adjustment more guidance about how to apply the

second prong of the negative criteria. It has done that repeatedly, including in

Medici:

The key word here is "substantially." It comes from the statute itself. Obviously, any permission for a nonresidential use in a residential zone may have some tendency to impair residential character, utility or value. But the statutory rationale of the function of the board of adjustment is that its determinations that there are special reasons for a grant of variance and no substantial detriment to the public good or impairment of the zone plan, etc., in such grant represent a discretionary weighing function by the board wherein the zoning benefits from the variance are balanced against the zoning harms. If on adequate proofs the board without arbitrariness concludes that the harms, if any, are not substantial, and impliedly determines that the benefits preponderate, the variance stands.

Id. at 22, n. 12

The question the Board presents has been asked and answered before by this Court. There is no reason for the Court to grant certification on this issue.

B. The Decision does not conflict with Salt & Light; the outcome in this case was different because the facts were different.

The Board's attempt to manufacture a conflict between the Decision and Salt & Light is groundless and does not warrant the grant of certification for its petition. Both the Decision and Salt & Light applied the Sica balancing test, including the requirement that the 1997 amendment reaffirmed: that the second prong of the negative criteria applied to all variance cases. The reason why the outcome in Salt & Light is different from the one reached by the Appellate Division here is that the facts of each case are different. The denial in Salt &

Light was predicated on two factors: (1) minimal additional benefits to the public via the construction of two two-bedroom dwellings in place of an existing four-bedroom home, which suggested that the proposal had no greater ability to house homeless persons, and (2) the variance would undermine the integrity of an entirely built-out single-family neighborhood. 423 N.J. Super. at 292.

Here, by contrast, the neighborhood where Monarch proposed its multi-level congregate care facility is not uniformly developed with single-family homes, but rather, contains a variety of uses. As the Decision notes, the lot to the north of the property is a depot for school buses. Montville's municipal complex is located immediately to the north of that property. A large townhouse development is located immediately to the west of the property. Only the property's southern lot lines touches lots currently utilized for single-family uses, and further south of the property on Changebridge Road are a preschool, industrial uses and a restaurant, which is the reason the Board's own planner advised that ". . . non-residential development is the predominant land use along the westerly side of Changebridge Road in this area." [Pa19]. Yes, the rear yards of a single-family neighborhood are located on the east side of Changebridge Road, but the neighborhood is not exclusively devoted to single-family uses, and thus is dissimilar to the neighborhood in Salt & Light

where the Applicant proposed a two-family home in a neighborhood that had only single-family dwellings. Monarch's proposed residential community for the frail elderly in an area of Montville with varied residential, commercial, governmental and other uses does not undermine the integrity of an area that does not present a uniform zoning pattern. Without such consistency or uniformity, there was not substantial impairment to the intent and purpose of the zone plan and zoning ordinance.

Moreover, unlike in Salt & Light, Monarch's proposal would generate significant public benefits. While the property could have been developed with one enormous dwelling that mirrored the dimensions of the proposed development, or with homes that were similar in size to those across Changebridge Road, the multi-level congregate care community is intended to provide housing and care for senior citizens, including the disabled, who are no longer able to live in their own homes. The uncontested evidence presented at the hearing demonstrated that there was a vast gap in the demand for the services that Monarch wanted to provide to the frail elderly and what is available to the frail elderly in Montville and surrounding communities. These services, including those that are vital to disabled seniors to continue their activities of daily living, are simply inaccessible to them under Montville's zoning absent a use variance. Moreover, Monarch's project would provide a

substantial increase in the number of units of affordable housing that could be constructed on the property where Montville has a significant unmet need for affordable housing.

Further highlighting the disparity between the Decision and Salt & Light is the fact that Montville's master plan is silent about the property's use for multi-level congregate care. The Board tries to make much of the fact that a recent amendment to its land use plan omitted recommending the property for the proposed use, and that the Township's governing body did not rezone the subject property for the proposed use. This argument is nothing but a backdoor attempt to impose the enhanced quality of proof requirement under Medici that Sica held was inapplicable to use variances for inherently beneficial uses, and which Smart SMR and New Brunswick Cellular reiterated was inapplicable to a board of adjustment's balancing of the positives and negatives under the Sica balancing test even after the 1997 amendment to the MLUL. Had the Board properly balanced the facts in the context of the applicable law, it would have approved the use variance.

What the Board is really asking for permission to do is make a negative inference that the project impairs the intent and purposes of the zone plan because the 2019 Master Plan Amendment did not recommend the rezoning of the subject property for multi-level congregate care housing. The 2019 Master

Plan Amendment is utterly silent on this issue. But that silence undermined the Board's capricious rejection of Monarch's inherently beneficial use variance: since the document itself contains nothing about the subject property or the proposed use, there is nothing specific that the Board did or could point to about why the use variance would substantially impair the intent and purposes of the zone plan. Instead, based on nothing more than its own conjecture, the Board sought to go beyond the four corners of the document to find – contrary to the facts in the record – that an approval would cause a substantial impairment because it presumed to know why the Planning Board remained silent on the issue. Both the Law Division and the Appellate Division saw straight through this flimsy analysis and rejected the Board's effort to re-install the enhanced quality of proofs in derogation of this Court's decision in Sica.

COMMENTS WITH RESPECT TO THE DECISION

The Board's claim that the Appellate Division misunderstood the planning and zoning process is based solely upon a scrivener's error on page 15 of the Decision that "the zoning board omitted the property from being used for senior housing. The record shows that the township's master plan had not yet been adopted . . ." [Pet. Br. at 17-18; Decision at 15]. The Appellate Division was referring to the Board's own letter to the Law Division alerting the trial judge that its argument at trial – that the Township had implemented

the Master Plan amendment through zoning – was false. [Pa348]. And the apparently unintentional reference to the zoning board having not yet adopted the master plan is hard to square with the Appellate Division’s recitation of the Board’s argument on page 12 of the Decision – which correctly refers to the Planning Board as the entity that adopts the master plan – as anything but an inadvertent typographical error.

On the merits, the Decision undercuts the argument the Board desired to make. The Appellate Division rejected – as a matter of fact – the Board’s argument that the use variance would substantially impair the intent and purpose of the zone plan by referencing the surrounding neighborhood in the exact manner Salt & Light analyzed the facts of that case. The Decision concluded that there was no credible argument that a multi-level congregate care facility would substantially deviate from a zoning scheme that contained residential uses, a bus depot and the Township municipal complex. [Decision at 15]. The Petition highlights the Board’s true complaint – the surrounding development pattern rightly constrained its decision-making and compelled the approval of the use variance. The Board, prevented it from reaching the same end-point that the Willingboro Board of Adjustment reached in Salt & Light because that neighborhood contained exclusively single-family dwellings, is

simply carping that the facts of this case mandated a different outcome than in Salt & Light. This is not a reason to grant certification.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court deny the Montville Zoning Board of Adjustment's petition for certification.

Respectfully submitted,

BEATTIE PADOVANO, LLC
Attorneys for Plaintiff-Respondent JMC
Investments, LLC

By: /s/ Antimo A. Del Vecchio
Antimo A. Del Vecchio, Esq.