BLOOMFIELD EIGHT, LLC, a New Jersey Limited Liability Company, Plaintiff, v. CITY OF HOBOKEN, VIRGINIA BUONFIGLIO, Acting Zoning Officer, ALFRED N. AREZZO, CONSTRUCTION OFFICIAL CITY OF HOBOKEN, AND HOBOKEN BOARD OF ADJUSTMENT, Defendants,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO. HUD-L-1239-10 Civil Action

BRIEF ON BEHALF OF PLAINTIFF,
BLOOMFIELD EIGHT, LLC

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is an action in lieu of prerogative writs in which plaintiff, Bloomfield Eight, LLC (hereinafter "Bloomfield Eight"), seeks to remedy the arbitrary, unreasonable and capricious conduct of a panoply of Hoboken Officials in connection with plaintiff's proposal to construct an addition to its building located at 806 Bloomfield Street, also known and designated as Block 195, Lot 45 on the tax map of the City of Hoboken.

The property in question is 2,000 feet in area and is located on the west side of Bloomfield Street, approximately 55 feet north of its intersection with Eighth Street. The property is rectangular in shape with frontage of 20 feet along Bloomfield Street to the east and with a depth of 100 feet. The lot is situated in the City's R-1 Residential Zone which permits residential buildings and retail businesses and services. The purpose of the R-1 District is to "conserve the architecture, scale and grain of residential blocks and street patterns, and to reinforce the residential character of the district." See Hoboken Zoning Ordinance Section 196-14.

Prior to the sequence of events leading up to this lawsuit, there was situated on the property a three and one-half story (four stories including basement) residential building built in

1901 and containing four apartment units. See June 17, 2009 Letter Memorandum of Elizabeth Vandor, PP, Board Planner. The building extends across the entire 20 foot width of the property and 45 feet into the lot's depth. A one story extension of the building extends an additional 28 feet into the lot resulting in a 20'x 73' building footprint. Further a free-standing accessory structure was located at the rear lot line resulting in total coverage of 81.8% of the lot area.

Plaintiff sought to modernize and expand the structure by demolishing the one story extension and free-standing accessory structure and to extend the remaining 45 foot structure an additional 15 feet into the lot, resulting in the building having a length of 60 feet and a rear yard setback of 40 feet.

Given the age of the structure, there were existing non-conformities vis-à-vis the present zoning ordinance. Specifically, the building was constructed on the front lot line (as are many of the older buildings in Hoboken) whereas the present Ordinance requires a front yard setback of five feet. Further, the building has four floors when the basement is included (again, similar to other older structures in the City) whereas the Ordinance now limits buildings in the R-1 Zone to three stories. Finally, the building has four dwelling units whereas the present Ordinance, as applied to the structure permits 3.03 units. The present zoning provisions which

established the pre-existing non-conformities were adopted in 2002.

The Vandor report indicates that plaintiff's proposed expansion required two variances, i.e., a variance to permit the expansion of a pre-existing non-conforming structure and an expansion of the density of the residential units. With regard to the latter, it is important to note that the density increase does not involve an increase in the residential units, but rather an expansion of the area of the individual units.

Plaintiff's odyssey through the labyrinth of the Hoboken Zoning process began in or about October 25, 2007, at which time plaintiff submitted a zoning application seeking a First Certificate of Zoning Compliance in order to construct the improvements referred to above. On November 5, 2007, Applicant received the first certificate. On July 15, 2008, plaintiff sent a first notification letter regarding its proposed construction to neighboring property owners as required by the applicable Hoboken Ordinances. Thereafter, on August 8, 2008, preliminary plans were submitted by the plaintiff which were approved on the same day by the Construction Code Office. Three days earlier, on August 5, a clean-out permit was issued to the plaintiff by the Hoboken Construction Official permitting plaintiff to demolish and clean out the interior of the building.

On August 28, plaintiff submitted detailed plans for its addition, prepared by Frank Minervini and Anthony Vandermark, Architects, which were approved by the Construction Code Office on September 2, 2008, having first been reviewed and approved by the Building, Fire Code, Electrical and Plumbing Subcode Officials. Based upon same, coupled with the previously referenced clean-out permit, plaintiff's employees, contractors and subcontractors began work on the project.

The clean-out work was completed on or about October 15, 2008 and on December 22, 2008, plaintiff provided letter notification to neighboring property owners, as required by the relevant Hoboken Ordinances, that demolition and construction would be commencing. On January 6, 2009, plaintiff applied for and received appropriate construction permits to begin building the addition. Thereafter, and for the next few months, the necessary demolition work for removal of the rear façade was worked on and completed.

On or about March 17, 2009, plaintiff commenced the digging and underpinning work in preparation for the commencement of the necessary cinder block wall for the addition, with the new wall being placed on top of the existing brick. The cinder block work started on March 25, 2009 and was completed five (5) days later on March 30. At that point, approximately 80% of the

exterior work on the project was completed and approximately 20% of the interior work was done.

To plaintiff's surprise, and notwithstanding the fact that all of the work done by the plaintiff was in accordance with the plans submitted and the permits that had been issued, on April 1, 2009, the Acting Zoning Officer issued a partial stop work order to the plaintiff as a result of the decision of the Hoboken Zoning Officer to revoke the First Certificate of Zoning Compliance that had been issued almost two years earlier in November 2007. The Stop Work Order instructed plaintiff to cease all exterior work and to limit its interior work only to the existing building footprint. Plaintiff was further instructed to apply to the Hoboken Board of Adjustment for variance relief that the Zoning Officer now deemed to be necessary. Although plaintiff vehemently objected to this course of events, it made the application to the Board of Adjustment so as to exhaust its administrative remedies.

The nature and number of the variances was subject to some discussion throughout the public hearings. The arbiters of these issues were the Board Planner and the Board Attorney. The Board Planner, Elizabeth Vandor, PP, AICP, noted in her June 17, 2009 report that the existing building was four floors in height whereas the present Ordinance now limits the permissible number of floors to three. Thus, with regard to the number of floors,

the existing structure was a pre-existing non-conforming structure. Ms. Vandor noted that the height of the building (37.2 feet) was within the permissible height provisions of Hoboken's Ordinance. She further stated that the existing lot coverage is 81.8%, which exceeds the Ordinance limitations and she went on to note that the proposed construction would reduce the lot coverage to 60%, thereby bringing it into conformance with the Ordinance as well. With regard to the front yard, the existing building is built on the property line and therefore has no front yard setback, whereas the Ordinance now requires a setback of five feet. Again, Ms. Vandor noted that this was part of the pre-existing non-conforming structure. The side yard setbacks were noted to be conforming.

With regard to the rear yard setback, the Ordinance requires 30 feet. The existing structure is setback 15.5 feet but with the proposed addition, it will increase to 40 feet so as to conform with the Ordinance. Accordingly, as indicated above, Ms. Vandor concluded that two variances were required under Subsection C of N.J.S.A. 40:55D-70 of the Municipal Land Use Law, i.e., a variance to expand a non-conforming structure and an "expansion of excess density." See Vandor Letter Report.

Notwithstanding the remonstrances of the objector's attorney to the effect that the relief being sought by the plaintiff constituted D variances under N.J.S.A. 40:55D-70, (T2,

137-17), the Board Attorney, Douglas Bern, Esq., instructed the Board that the variance relief requested were C variances. (T2, 147-13)

Two witnesses, plaintiff's architect and professional planner, testified in support of the application.

Plaintiff's architect, Frank Minervini, described the existing structure and the proposed improvement. He stated that the building was located on a narrow (20 foot wide) lot (T1, 53), that it was three and one half stories in height with a basement level and that it contained four residential apartments, one for each floor (T1, 53-54). He noted that the apartments were "rather small", i.e., all less than 1,000 square feet (T1, 54-16). He described the proposed construction as involving a demolition of a portion of the first floor and a free-standing shed in the rear yard, thereby reducing a non-conforming building footprint to one that would be 60 feet deep and in conformance with the Ordinance. The apartments would be increased in size from 998 square feet to 1,200 square feet, certainly not large, but "more useable, livable" than the existing apartments (T1, 55-2). He emphasized that the height of the building would be unchanged (T1, 55-11) and in conformity with the height restrictions of the Ordinance. He further noted that an additional benefit of the proposal is that the lot coverage would be reduced from 82% to 60% and thereby, again,

bring the property into compliance with the Ordinance. He stated that the existing three and one half stories of the structure (four stories when the basement is included) is a pre-existing condition of this more than 100 year old building. He also testified that the front façade would be modified such that whereas it "presently doesn't really match aesthetically, architecturally, it would, as improved, be more in keeping" with and "match more closely" adjacent buildings (T1, 58). He acknowledged that the proposal represented an extension of the building with existing non-conformities (T1, 59-15), but expressed his surprise when variance relief was required, noting that he previously worked on many similar projects in Hoboken, stating:

> Historically, and I have been working in this town since 1989, Zoning Officers don't have us come to the Board for this kind of project. This is the first time I will tell you that I am here for something like this, which is why I believe that the Zoning Officer – the present Zoning Officer, gave us permission. I know I have had similar projects with the previous Zoning Officer and their interpretation was that this was something that could be handled with the zoning compliance. (T1, 59-22 through T1, 160-6).

His testimony in this regard no doubt demonstrates that the substantial work done on this project by plaintiff before the issuance of the Stop Work Order was done with total transparency, in accordance with the prior approvals, in broad daylight and in a completely above-board manner.

Plaintiff's professional planner, David Spatz, PP, also testified in support of the project. He stated that Bloomfield Street, in the vicinity of the property in question is "primarily developed with multi-family residential buildings," (T2, 55-18) similar to the plaintiff's property, and that on the eastern side of Bloomfield Street, where plaintiff's building is located, "the majority of the buildings, including the ones on either side of us are also four stories in height, nearly identical in height as our existing building" (T2, 55-21) such that the building, as improved, will be "in character with the neighborhood." (T2, 59-11) He noted that the project will "conform to the lot dimension, coverage, rear and side yard setbacks requirements of the Zone" (T2, 56-1) and that the building is placed on the front line, a pre-existing condition. He stated that although the expansion of a non-conforming structure is being sought "the non-conformity (insufficient front yard setback) is not being affected by what we are proposing." (T2, 56-15) The proposed addition is at the rear "so there is no effect at all on the front yard setback, so that non-conformity will remain, but not be affected in any way, shape or form." (T2, 59-14)

He testified that in his opinion the project satisfied the requirements for a c(2) variance in that:

> We meet purpose E [of the purposes of zoning as articulated in N.J.S.A. 40:55D-2] which is the establishment of appropriate population densities in concentrations that contribute to the well-being of person's, neighborhoods and communities and then we also meet Purpose I, which is a promotion of the desirable visual environment through creative development techniques and specific design and arrangement as were shown by the architect.
>
> The existing building has a relatively plain façade. We will be making improvements to put cornice work on top, which better matches the buildings on either side of us, which causes it to blend in and be an aesthetic improvement of what is being proposed.
>
> Likewise, the shed structure in the rear is being removed, as well as providing a greater amount of open space in the rear yard.
>
> Our addition actually covers less lot area than the existing one story addition as well, so we are creating a larger rear yard and reduced lot coverage.

Mr. Spatz further noted that the project involved the rehabilitation of "a building that is in fair to poor condition to an improved building which provides apartments that are attractive, a little larger, towards the larger families that the City desires, especially improving the façade to make it blend in with the surrounding properties. That is certainly an aesthetic improvement to promote the general welfare." (T2, 58-6-15)

Significantly, in response to the question of the objectors' attorney as to whether the proposed addition would "cast shadows and lessen light in the adjacent rear yard, Mr. Spatz replied in the negative, noting that a substantial portion

of the rear of plaintiff's building was being removed (T2, 68-24), thus, providing more light and air to neighboring property owners and that the rear of the building to the left of the subject property "projects beyond our building, so we are not going further back." Moreover, the building to the right of the subject property is within five feet of the plaintiff's proposal.

The testimony of the objectors was vague and unsubstantial. Their attorney attempted to qualify Keith Brown, an owner of the neighboring property to the rear, as an engineering expert, but it was determined that his expertise was in the field of mechanical engineering. The Board Chairman concluded that Mr. Brown had no experience in land use (T2, 84-16), and also that he was not familiar with the Hoboken Zoning Code (T2, 84-4). Ultimately, he was permitted to testify, but only as a fact witness (See Board Resolution, Exhibit F, attached to plaintiff's Complaint at page 7).

Mr. Brown produced a "model" of the building on the property in question and others next to it. It became apparent that the model was substantially inaccurate in its depiction of the buildings. The Board Attorney indicated (perhaps as understatements) that "I think the Board may have a problem with the accuracy of the model" (T2, 91-10) and that "this is an impressionistic model…it is not an accurate model. The

probative weight that you give to that is diminished." (T2, 92-8) Eventually the model was admitted into evidence but only for "conceptual purposes," and despite the comments of the Board Attorney and the Board Chairman referenced above and the comment from the Board Planner that she was "concerned about whether the model showed all of the structures that should be shown within the lot lines that are presented for an accurate depiction." (T2, 104-13)

Benjamin Keith Brown, another owner of the building to the rear testified as to his own impressions of plaintiff's project. He stated that the project makes him "feel a little more closed in" (T2, 125-5), that there is less light in his backyard and "it's not as fun to be in the backyard because it is in a shadow." (T2, 124-9). He complained that "it's kind of hard to barbeque when you don't have sun in your face." (T2, 126-13) Not surprisingly, neither Mr. Brown nor his son were heard to object that plaintiff's project provided a much larger rear yard abutting the Browns' property.

The Board voted to deny the application and a Resolution of denial was thereafter adopted. Plaintiff filed suit on March 2, 2010 in a multi-count Complaint against the City of Hoboken, its Acting Zoning Officer, its Construction Official and the Board of Adjustment. The Court has bifurcated the action, with the claims against the Board of Adjustment to proceed first. The

within Trial Brief is submitted by the plaintiff in support of the cause of action against the Board of Adjustment.

LEGAL ARGUMENT

POINT I

PLAINTIFF CLEARLY SATISFIED ITS BURDEN OF PROOF WITH REGARD TO THE POSITIVE CRITERIA SUFFICIENT TO WARRANT GRANTING OF THE VARIANCE RELIEF SOUGHT.

The variance relief sought in this matter was minimal and the proofs in support of it were strong. It must be remembered in the first instance that the variance to expand a structure that was non-conforming in terms of the lack of a front yard setback relates to the fact that the existing structure, built in 1901, has no such setback whereas the Ordinance requires a setback of five feet. The expansion of the structure does not exacerbate or expand on this non-conformity in any way. While Engleside at West Condominimium Association v. Borough of Beach Haven, 301 N.J. Super. 628 (L. Div. 1997) states that such an expansion should still be the subject of a Subsection C application, the decision of Sherman v. Harvey Cedars Board of Adjustment, 242 N.J. Super. 421, 577 (App. Div. 1990) reduces the significance of the variance request when it states that "where a non-conforming structure is expanded in size and the addition itself does not add to the pre-existing non-conformity, the Construction Official can issue a building permit without the need to apply the Board of Adjustment for a variance." The

Sherman case cites with approval the well-known treatise of *Cox, New Jersey Zoning and Land Use Administration,* in this regard. Thus, it is at least questionable as to whether variance relief is even required as to the front yard setback, and the hesitancy with which our Courts have spoken on this issue demonstrates that the relief sought should not be deemed as something which represents a substantial variance from the Zoning Ordinance. This would seem to be particularly true in the case at hand where, incident to the expansion, the other non-conformities of the property, i.e., lot coverage and rear yard setback deficiency, would be eliminated by the proposed construction, and, to no one's disagreement, the front façade of the building will be updated and improved.

In this matter, plaintiff proceeded under the c(2) criteria of N.J.S.A. 40:55D-70 of the Municipal Land Use Law which provides that "where in an application or an appeal relating to a specific piece of property…the purposes of [the Municipal Land Use Law] would be advanced by a deviation from the Zoning Ordinance requirements and the benefits of the deviation would substantially outweigh any detriment" bulk area variance relief is appropriate.

The purpose of the c(2) provision of the Statute is to alleviate the "very restrictive interpretation by the Courts of the hardship variance power" in c(1) applications. *Cox, New*

Jersey Zoning and Land Use Administration, 2010 Edition, Section 6.32, page 158 and to fulfill the "intent of the legislature…to broaden the "C" variance by adding alternative criteria" (Emphasis supplied.) Trinity Baptist v. Louis Scott Hold, 219 N.J. Super. 490, 500 (App. Div. 1987).

As noted above, the proposed project, both with regard to the front yard setback and the expansion of the four apartment aspect of the building, would eliminate both an existing lot coverage non-conformity and an existing rear yard setback deficiency, and thereby bring the property more into conformity with the Hoboken Zoning Ordinance. Thus, the structure, as added to, will better conform to the zone plan than the existing development on the property. This clearly advances a purpose of zoning and is more than a sufficient basis for granting a c(2) variance. See Kauffmann v. Planning Board for Warren Township, 110 N.J. 551, 564 (1988) in which our Supreme Court approved a c(2) variance for the relief sought which would bring the property "more into conformity" with the Zoning Ordinance. It will therefore advance the purpose of the c(1) zone of conserving the "architecture, scale and grain of residential blocks and street patterns," and reinforcing "the residential character of the district." In so doing, and in providing larger apartments as desired and envisioned by the Master Plan, the project advances the purpose of zoning articulated in

N.J.S.A. 40:55D-2e, i.e., providing housing which will "promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions." The proposal rejuvenates a tired structure in a state of some disrepair and thereby improves the neighborhood in general.

The bonus to the City in connection with this application is that plaintiff proposed to update and aesthetically improve the front façade of the structure, something that becomes financially feasible if the variance relief is granted. Thus, another purpose of zoning is advanced by the proposal, i.e., that of promoting a "desirable visual environment through creative development techniques and good civic design and arrangement." N.J.S.A. 40:55D-2(I)

The objectors to the application, while not disagreeing with the aesthetic improvement that would result from the proposal, decry this arrangement, and assert that plaintiff could make the improvement to the front of the façade without obtaining variance relief. However, such arrangements are made frequently and clearly represent a benefit to the community. Perhaps the most frequently cited example is that found in Burbridge v. Mine Hill, 117 N.J. 376, 381 (1990) in which the Supreme Court approved variance relief for an expansion of an automobile salvage yard where, in the words of the Court, "in

exchange for the variance” Applicant proposed to reorganize and relocate the operation on the property in question so as to make it less visible to the public.

Further, it is clear from the planning testimony of Mr. Spatz that plaintiff’s project will preserve the character of the neighborhood. In Home Builders League of South Jersey, Inc. v. Twp. Of Berlin, et al., 81 N.J. 127, 145 (1979), the Supreme Court held that preservation of neighborhood character is a purpose of zoning notwithstanding the fact that it is not specifically articulated in N.J.S.A. 40:55D-2, because N.J.S.A. 40:55D-62(a) of the Municipal Land Use Law requires that “the Zoning Ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land.”

Accordingly, plaintiff submits that it more than satisfied its burden of proof with respect to positive criteria as it relates to the c(2) section of N.J.S.A. 40;55D-70.

One additional note: The Vander report indicates that an additional variance is required for “expansion of excess density.” It is assumed that this relates to the expansion of the existing four apartments in the building, whereas the present ordinance would only permit three. As such, the variance relief described by Ms. Vandor in this regard has

already been dealt with herein. It is important to note, however, that there is no "density expansion." "Density" as defined by the Municipal Land Use Law relates to the "number of dwelling units." N.J.S.A. 40:55D-4. In this application, there are four existing dwelling units and there will continue to be four dwelling units.

POINT II

PLAINTIFF CLEARLY SATISFIED ITS BURDEN OF PROOF WITH REGARD TO THE NEGATIVE CRITERIA SUFFICIENT TO WARRANT GRANTING OF THE VARIANCES.

Plaintiff is mindful that in all variance applications, the Board must be satisfied that granting the relief requested will not represent a "substantial detriment to the public good and will not substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance." N.J.S.A. 40:55D-70 These factors are generally referred to as the negative criteria.

As can be seen, the negative criteria consists of two separate tests. While they are often spoken of in the same breath, our Courts have, in fact, viewed them as discreet. The first prong of the negative criteria focuses on the impact of the proposed variance on nearby properties. Medici v. BPR Co., 107 N.J. 1 (1987), at p. 22, is instructive in reminding Boards of Adjustment that:

> …the statutory focus is on the variance's effect on the surrounding properties. The Board of Adjustment must evaluate the impact of the proposed use variance on the adjacent properties and to determine whether or not it will cause such damage to the character of the neighborhood as to constitute "substantial detriment to the public good."

The latter test, i.e., without substantially impairing the intent and purpose of the Zone Plan and Zoning Ordinance." Has been viewed by our Courts as being a brake on Boards of

Adjustment being free to grant variance relief. Medici, supra, is, once again, instructive at page 22 where our Supreme Court stated:

> The added requirement that Boards of Adjustment must reconcile a proposed…variance with the provisions of the Master Plan and Zoning Ordinance will reinforce the conviction that the negative criteria constitutes an essential safeguard to prevent the exercise of the variance power.

With these explanations of the negative criteria in mind, it is very apparent that plaintiff has satisfied its burden of proof.

With regard to the impact on the integrity of the Zoning Ordinance, it is clear that the property, after the proposed improvements, will be more in conformity with the Zoning Ordinance and Zone Plan as evidenced by Hoboken's Master Plan. As previously indicated, plaintiff's project results in a decrease in the footprint of the existing structure as well as a decrease in the lot coverage to 60% of the lot area. Thus, existing non-conformities will be eliminated and those aspects of the property will be brought into compliance with the Zoning Ordinance.

The front yard setback variance will not be exacerbated in any way. Moreover, although the four existing apartments will be made larger, the increase in size will only result in very small apartments being brought to a more reasonable size, and as

testified to by plaintiff's architect, the increase size is in accordance with the "Master Plan that Hoboken has recently drafted [which] proposes larger apartments, more generously sized" (T1, 67-2) which will tend to attract more stable and less transient residents.

With regard to the effect on neighboring property owners, the improvement of the front façade will make it more consistent with other buildings in the neighborhood and the rear yard setback will be made larger. The only negative comments heard during the public hearing were in the testimony of Messrs. Brown, the objecting neighboring property owners to the rear. The substance of their comments can perhaps best be described as gossamer. They are supported by no facts and are simply impressions that vaguely refer to their feeling "a little more closed in," that it is "not as much fun" to be in their backyard because of the shadow which they suspect is cast by the plaintiff's building, and their perceived inability "to barbeque when you don't have the sun in your face." Notwithstanding these impressions on the part of the objector, it was not in any way established that these concerns had any substance or that, even if true, they were the result of plaintiff's building. In this regard, plaintiff's planner factually described the building to the left of the subject property as "projected farther beyond our building" such that any shadow on the

objector’s property may well be a function of the location of the neighboring structure. There simply was no foundation or actual basis of the objectors’ remark.

It is to be remembered that plaintiff’s witnesses were both experts whose credentials were recognized by the Board to qualify them as experts in their fields. The objectors were not expert witnesses and were not allowed to testify as such. While the Board has the power to give little or no weight to the testimony of expert witnesses, when any Applicant has supported all aspects of the application with the testimony of experts and the objectors presented only testimony of lay witnesses, the denial of the application by the Board based solely upon such lay testimony (which is the case here) cannot overcome the positive testimony of experts. See New York SMA v. Board of Adjustment, 370 N.J. Super. 319, 338 (App. Div. 2004); Acorn Montessori v. Bethlehem Township, 380 N.J. Super. 216, 231 (L. Div. 2005).

In New York SMA, supra, at 338, the Applicant’s testimony given through its expert was clear, cogent and informative and the Board, as noted by the Court, retained no expert of its own and heard no contradictory expert testimony. The Court went on to say that “moreover, the Board may well find that Applicant’s expert testimony was unbelievable, incompetent and conflicting. While a Board may reject expert testimony, it may not do so

unreasonably based on their allegations or unsubstantiated beliefs." Cohen v. Borough of Rumsen, 396 N.J. Super. 601, 617-618, 621, (App. Div. 2007).

Accordingly, it is clear that the Board's decision was not in accord with the testimony and evidence presented, nor was it in accord with New Jersey Case Law.

Plaintiff has demonstrated substantial reasons with regard to the positive criteria and the benefits to flow from the variance relief requested. It has also demonstrated that there is little, if any, detriment to the proposal. The objectors have added little, if anything, to the equation. Given the nature of the variance procedure, there is always a balancing process that takes place and it is well to note that the statute requires a qualitative analysis in consideration of the negative criteria because, to defeat an application, the Board must find that the detriment to the public good is "substantial" N.J.S.A. 40:55D-70. As stated in the well-respected *Cox Treatise*, at p. 248:

> Substantiality cannot be judged in a vacuum. The greater the benefits…of a project, the greater the detriments must be to achieve the quality of being substantial.

It is submitted that the Board did not satisfy its obligation in this regard. The negative criteria was clearly satisfied and under the c(2) standard of N.J.S.A. 40:55D-70, the

benefits of granting the variance clearly outweigh any detriments.

POINT III

THE DECISION OF THE BOARD OF ADJUSTMENT IS NOT ENTITLED TO A PRESUMPTION OF VALIDITY.

Generally speaking, decisions of Boards of Adjustment are presumed correct. Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268 (1965). However, this presumption does not apply in all cases. Specifically, a presumption prevails, and the Court should defer to the Board of Adjustment's judgment, only "so long as its decision is supported by the record and is not arbitrary, unreasonable or capricious." Kingwood Township Volunteer Fire Company #1 v. Board of Adjustment, 272 N.J. Super. 498, 502-503 (L. Div. 1993), citing Jayber Inc. v. Municipal Council of West Orange, 238 N.J. Super. 165, 173 (App. Div. 1990). See also Yahnel v. Board of Adjustment of Jamesburg, 79 N.J. Super. 509, 517 (App. Div. 1963). In Anastasio v. Planning Board of Township of West Orange, 209 N.J. Super 499 (App. Div. 1986) certif. den. 107 N.J. 46 (1986) the arbitrary and capricious standard was discussed and the Court noted that while the words arbitrary and capricious may sound harsh, they are simply the standard of appellate review, and a decision that the Board has been arbitrary and capricious is simply a finding of error. In Cell v. Zoning Board of Adjustment, 172 N.J. 75, 89 (2002) our Supreme Court indicated that the arbitrary and capricious standard is analogous to the

“substantial evidence” standard. The Cell Court further held that where, as here, the Board rejected unrebutted expert testimony that there would be no detriment to the public good and simply relied on assertions by objectors, such a decision was arbitrary and capricious.

In this matter, the Board simply disregarded the testimony of plaintiff’s witnesses and disregarded the applicable law as well. The resolution of the Board shares the same deficiencies. There is no discussion or evaluation of plaintiff’s proofs and the resolution does little more than recite incantations of the applicable standards, while not correctly applying them. Under such circumstance, the deferential standard of the presumption of validity must give way. The record of the proceedings before the Board is replete with evidence contradicting the Board’s finding. Therefore, the Board’s denial of the Plaintiff’s requested variances any credible evidence in the record let alone any sufficient credible evidence in the record renders the Board’s decision arbitrary, capricious and unreasonable.

As such it constitutes an abuse of discretion by the Board and should be reversed.

CONCLUSION

For the reasons set forth herein, the decision of the Board of Adjustment denying the variance application of plaintiff should be reversed.

Respectfully submitted,

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