**ORDER PREPARED BY THE COURT**

LISA PATRUNO,

Plaintiff,

v.

BRADLEY BEACH PLANNING BOARD,

Defendant.

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO.: L-3812-16

**ORDER**

**THIS MATTER** having been opened to the Court by plaintiff's action in lieu of prerogative writs.

**IT IS** on this 3rd day of October, 2019 **ORDERED**:

1. That Bradley Beach Planning Board's decision to deny the variances is supported by ample evidence;
2. That for the other reasons stated in the opinion dated October 3, 2019, this matter is hereby **dismissed.**

/s/ Lisa P. Thornton
LISA P. THORNTON, A.J.S.C.

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

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BRADLEY BEACH PLANNING BOARD,

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SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO.: L-3812-16

Decided: October 3, 2019

Martin J. Arbus, attorney for plaintiff (Arbus, Maybruch & Goode, L.L.C.);

Mark A. Steinberg, attorney for defendant.

**THORNTON, A.J.S.C.**

**I.**

In this action in lieu of prerogative writs, plaintiff Lisa Patruno ("plaintiff") challenges the denial of her application for site plan approval and variance relief. Evidence in the record supports the Bradley Beach Planning Board's ("the Board") decision to deny the variances based on N.J.S.A. 40:55-70 (c)(1) because conditions of the property are not the primary reason why the proposed structure does not conform to the zoning ordinance. Lang v. Zoning Bd. of Adjustment, 160 N.J. 41 (1999). Specifically, the property was not particularly narrow, and the topography did not preclude plaintiff from building a structure that complied with most, if not all, of the zoning requirements. In addition, evidence in the record supports the Board's decision to deny variances based on N.J.S.A. 40:55-70(c)(2). The Board concluded that plaintiff could have complied with all or most of the zoning requirements if she reduced the size of development from four (4) townhouses to three (3), or built a single family home. The Board reasoned that the benefits could be realized, with far fewer variances, if plaintiff proposed a smaller structure.

II.

A.

The relevant facts are undisputed. Plaintiff is the owner of 217 McCabe Avenue, Bradley Beach. The 7,500 square foot lot is improved with a fourteen (14) room hotel and is located in the R-T Residential Transition Zone ("R-T"), that permits single family dwellings, public parks and playgrounds, municipal buildings and other public facilities, and townhouses. Two additional bungalows existed on the rear portion of the property, but were damaged by a fire and were removed. The R-T zone does not permit hotels.

Plaintiff filed an application to "demolish and remove all the existing structures on the property and to construct four (4) attached townhouse dwellings with associated parking." According to the Board's resolutions of August 24, 2016 and January 25, 2018, plaintiff's application required relief from Section 450-27(D)(2) which discusses area, yard, and building requirements for townhouses in the R-T zone. Specifically, the application required relief from: 1) minimum lot area of 30,000 square feet where 7,500 feet was proposed; 2) the minimum number of total units of 12, where 4 was proposed; 3) minimum lot width of 200 feet, where 50 feet was proposed; 4) minimum front yard set back of 25 feet where 20 feet was proposed;

5) minimum side yard set back of 5 feet and 10 feet where 5 feet on both sides was proposed; 6) maximum building coverage of 25% where 58% was proposed; 7) maximum impervious coverage of 60% where 60.8% was proposed; 8) maximum average gross floor area per unit of 1,200 square feet where 1,841 was proposed; 9) maximum gross floor area per unit of 1,500 where 1,841 was proposed; 10) minimum parking space size of 9 feet by 18 feet where 9.5 feet by 17 feet was proposed; and 11) the minimum aisle width in a parking lot of 25 feet where 21.67 was

proposed. It is important to note that plaintiff's application failed to state whether relief was sought pursuant to N.J.S.A. 40:55-70(c)(1) or (2) for each variance.

**B.**

The Board conducted a hearing on the application over two (2) days. Plaintiff testified and presented expert testimony from an architect, Frank Aiello, and a planner, Leanne Hoffman. In addition, her attorney, Martin Arbus guided the testimony of plaintiff's witnesses and argued her case before the Board. Following is a summary of the relevant testimony.

Frank Aiello, plaintiff's architect, provided testimony on the design elements of the proposed structure. (T1:11:10-25 – T1:18:1-18). He acknowledged that the ordinance required a maximum gross floor area per unit of 1,500 square feet but stated that units of 1,841 feet were proposed because plaintiff wanted "to provide a lux, more of a luxury unit that was bigger than 1500… [because] [she] was looking for a certain market, and to achieve that market, [she] [needed] to provide more than 1500 square feet." (T1:35:20-T1:36:1). Plaintiff chose to increase the size of the units in excess of the ordinance requirements for "marketability." (T1:35:14-19). Mr. Aiello confirmed that the units were designed to be larger than what the ordinance required because "units that were smaller [were] just not worth it." (T1:37:16-21).

Plaintiff called Leanne Hoffman, an engineer and planner, who was responsible for both the preliminary and final site plan for plaintiff's property. (T1:58:11-13). She confirmed that the property, located in the R-T Zone, is situated "between the higher density residential beachfront zone and the lower density R-1 single-family zone." (T1:59:8-10). She confirmed the existing structure, a fourteen (14) room hotel, did not comply with the ordinance, and claimed that, if approved, the project would bring the property more into conformity with the ordinance. (T1:60:16-18).

Plaintiff's application required the Board to consider variances in five (5) major areas, including: (1) setbacks; (2) coverage; (3) parking; (4) floor area; and (5) number of units. In addition,

of the eighteen (18) requirements included in 450-27(D)(2), plaintiff required relief from at least thirteen (13) of them.

As an initial matter, Ms. Hoffman claimed a variance was not needed for lot size and lot width based on her interpretation of Section 450 of the zoning attachment 1 that stated, "any and all lots existing on February 1, 2003 shall be deemed conforming with respect to lot width, depth, and area." She later acknowledged that plaintiff would need relief from the lot size requirement. (T1:83:4-5). In the alternative, she claimed plaintiff should be granted relief from lot size and width based on a (c)(1) variance, because the lot is "exceptionally narrow...[and] [t]here's no opportunity for the current owner to purchase any additional property on either side of the lot." (T1:81:1-5). In response to her testimony, a board member responded, "Just to make sure I'm following. It's unusually narrow for a townhouse application. It's not unusually narrow, as I understand it, for, residential." (T1:81:19-25). Another board member noted that plaintiff's request for the lot coverage variance was approximately 240 square feet over what was allowed. (T1:105:13-15).

Ms. Hoffman provided testimony to support variances for front, rear, and side setbacks. The existing front yard setback is 7.35 (25 feet required) with 20 feet proposed. (T1:62:1-11). She reviewed an aerial of the neighborhood and claimed the proposal "is more consistent with the block and it's set back further." (T1:67:12-21). She also commented that the proposal is an improvement over the existing front yard setback. (T1:86:11-25). She referenced specific properties in the neighborhood and noted that 217 Newark Avenue, at the corner of Newark and Central, has "no green space in the front and a very minimal setback." There was only a distance of about 10 feet "from the curb line to the face of the building" at 215 Newark avenue. (T1:64:16-23; T1:65:1-25-66:1-5). In addition, 200 Park Place had a front yard setback of "about 10 feet." (T1:66:3-5). Finally, "a green type structure" in the neighborhood that appeared to be a rooming house, had a setback of about "15 feet from the

street." (T1:66:7-22). Ms. Hoffman did not offer testimony regarding if these deviations were as a result of variances or were pre-existing nonconformities.

The ordinance requires side yard setbacks of 15 and 10 feet (3.23 and 4.2 feet existing) where 5 and 5 feet are proposed. Ms. Hoffman testified the proposed setbacks are "more conforming than what's existing, and in line with some of the properties within [the] block." T1:67:12-21. For the rear yard setback of 25 feet required and 20 feet proposed, Ms. Hoffman stated the proposal is more consistent with "some of the other structures...in the neighborhood." (T1:86:1-12).

Regarding lot coverage, Ms. Hoffman admitted that 45% proposed was in excess of the 25% required, but claimed it was "in line...[with] [what] is in the neighborhood between Central and Beach." (T1:89:1-25). She testified that the variance for impervious coverage of 60.8% where 60% is required was "de minimus" and claimed it furthered a purpose of the Municipal Land Use Law ("MLUL") because it provided drainage control where none existed. (T1:90:1-11). She referenced other properties in the neighborhood and testified that a multifamily development on the southeast corner of Newark and Central had a "very small buffer...between the sidewalk and the parking area...[and] the remainder of the lot [was] covered with either asphalt or with building." (T1:66:3-5). In addition, she noted that the rear yard of 215 McCabe, a large apartment building, was "entirely paved with impervious area." (T1:66:7-22).

Maximum gross floor area per unit of 1,500 feet is required where 1,841 feet was proposed. Likewise, the maximum average gross floor area per unit of 1,200 feet is required where 1,841 feet was proposed. In addition, the ordinance requires a minimum number of twelve (12) units.

Ms. Hoffman claimed the variances were needed because larger townhouse units encourage "year-round home ownership" and provide "more conforming hallways, [and] an open type floor plan." She also claimed that balconies on the larger units furthered a purpose of the MLUL by providing "open air and light." Finally, she claimed the four (4) unit development furthered

appropriate population densities, but failed to explain how. She admitted that the lot of "7500 square feet, or 25 percent of the required lot size equates to three units proportionally," although plaintiff is asking for four (4). (T1:114:17-21). She also failed to acknowledge that the positive criteria could be established with construction of a single-family home or a development of three (3) units, that would require fewer variances. (T1:91:1-25).

In response to her testimony, a board member commented that a reduction in the size of the units would eliminate the need for variances from lot coverage and floor area. (T1:105:15-19). Another board member commented,

> [the] units are like 300 square feet over the maximum unit. So even cutting off a hundred square feet, like making them 1700 square feet versus 1800 square feet, which, in my opinion, is not going to damage the marketability of the unit, would at least bring the lot coverage into conformance. But I have a hard time when the units are oversized and then we're asking for coverage requirements. If you met the coverage, I don't know that I would have the same—.
>
> [T1:105:9-22.]

Yet another board member noted "some of this relief is driven from the size of the units that are being proposed. (T1:106:5-7).

Parking and the dimensions of the garage was a highly contested issue before the Board. The ordinance requires a minimum of 2.3 parking spaces per unit where only eight (8) were proposed. Parking spots are required to be 9 feet by 18 feet where 9.5 feet by 17 feet was proposed. Minimum aisle width of 25 feet is required where 21.67 was proposed. In addition, minimum driveway width of 20 feet is required where 10 was proposed.

Ms. Hoffman testified,

> the width of the driveway being 10 feet was somewhat intentional. One for impervious coverage, and one because it's never going to be two-way traffic. You literally have eight spaces there. When you're coming in, you see somebody going out. So there was discussions about some type of mirror being put up. But if you're backing out of

> a space and you see somebody coming in, the person that's coming in is obviously going to have to give way to the person coming out. I mean, it's a small community. That's what it's going to be.
>
> [T1:76:5-14.]

She commented that the parking garage would not accommodate a "larger SUV." (T2:7:2-3). The Board noted that the garage was "both two [sic] narrow and not deep enough." (T2:10:8). The Board also expressed concern that "cars coming in and out of an undersized two-way driveway" would compound traffic issues on the street, (T2:23:21-23) and questioned how feasible it would be for a fire truck to make it to the units at the southern end of the property, should one of the units catch fire. (T1:122:2-4).

Ms. Hoffman commented on the overall benefits of the application and claimed that they furthered several purposes of the MLUL, including "providing a conforming use and additional open space, green space, parking and drainage where currently none exists." (T1:115:6-13). She also presented a spreadsheet that purportedly included variances granted in Bradley Beach to build townhomes. (T2:72:15-21).

Board members noted that the variances granted in other applications would receive little consideration because "each one of those applications would stand on its own merits[.]" (T2:75:11-12). A board member commented on the number of variances and the relevance of development in the neighborhood and stated,

> I understand totally where you're coming from in terms of there are examples in the neighborhood, but every planning board is a snapshot in time. And I think the watermark event for this Planning Board was the Giomanis property, where we went back and went back and went back and said make it fit. And if you were to take this application 20 years back in time it probably would have been rubber stamped. That was a different Board. So I would argue that I could go to each of those examples that you made and say, yeah, they screwed up there, they screwed up there, and they screwed up there. And as to what we're trying o avoid, I's almost as if you're my kid's teacher and you

said, you know what, your kid's got an F, But if we do a bunch of stuff, I can make him a C. I don't want a C. Okay?

[T1:126:1-10.]

The Board was critical of plaintiff's refusal to reduce the size of the project to a single family home or three (3) units and speculated that plaintiff's motivation was solely economic. (T2:37:3-5). Mr. Arbus confirmed this fact and admitted that plaintiff could build a single family home or a three (3) townhouse structure with either fewer or no variances. (T1:129:1-23); (T2:37:6-17; T2:40:6-13). Finally, the Board highlighted a portion of the master plan which states that "many of the existing townhomes, condominiums and apartments exist as a result of receiving conditional use variance relief . . . [and t]he granting of such variances has become problematic and should be discouraged[.]" (T2:50:6-10).

Plaintiff testified and noted that she originally proposed five (5) units. (T2:78:1). She stated that her revised proposal for four (4) units was not only for her personal financial gain, but to reduce the cost to potential buyers. (T2:78:10-11). She claimed that she would be unable to lower the price by building only three (3) units. (T2:78:24-25). When asked what she would do if the application was denied, plaintiff stated that she could repair the non-conforming hotel and resume operations "in two months." (T2:85:23-24; T2:86:15-17).

C.

On August 24, 2016, the Board denied plaintiff's application and adopted a resolution that included the following findings:

4. The Board concluded that the proposed application would adversely impact upon the Master Plan of the Borough of Bradley Beach and does not promote the safety and welfare of the residents of the municipality and accordingly, has not satisfied the requirements of obtaining any and all required variances as herein set forth.

10. The Applicant's Engineer and Professional Planner opined that the aforesaid variances are necessary to build the four units in the size

and proportion requested and would be an improvement over the existing non conforming setbacks on the site.

11. The Applicant could minimize or eliminate several of the variances requested if the number of units proposed were reduced, which may eliminate or reduce the required variances for gross floor area which is required at a maximum of 1,500 square feet and the Applicant seeks 1,841 square feet, and maximum average gross floor area which ii 1,200 square feet and the Applicant seeks 1,841 square feet.

12. The maximum building coverage at 58% is far in excess of the required maximum of 25% which is caused by the size of the building needed to construct the four units in the sizes proposed by the Applicant, but could be reduced if the number of the units was reduced and/or the size of each.

13. The Applicant testified that the size and number of the units were dictated by her personal financial requirements and return of profit and same would not be economically feasible if the number and/or size of the units were reduced; however, when asked the cost and proposed sales price, she failed to have a response indicating that she had not worked out those numbers.

14. The applicant and her Professional Planner indicated that the current use was far more intense than the proposed use which, with 14 rooms, cold accommodate 28 guests with no parking, but insisted on developing the site as proposed without compromise.

15. The parking provided for the units was at the ground level and in accordance with the Board's Engineer, the Applicant provided information as to vehicle movement on site for a medium size car and it is extremely right for vehicles to get into a parking space and does not provide movement leaving the parking space. He finds parking space number one to require several vehicle movements to enter and leave this space.

16. The parking area cannot be expanded, due to the width of the site and cannot be used by large vehicles and is further deficient in parking stall size of 9.5 feet by 17 feet, where 9 feet by 18 feet is required, as well as the drive aisle width of 21.67 feet, where 24 feet is required.

17. The Board's professional does not believe the parking will work for all 8 spaces and the Applicant's response is that the residents will figure it out after living on the site.

18. The height of the garage is also deficient in several locations, but the Applicant could only suggest posting signs for those who enter the garage, rather than find another solution to this problem.

19. The parking area cannot be used by a large SUV, such as an Escalade, and those residents owning that type of vehicle would have to park on the street, which is already burdened with other parking.

20. The number of parking spaces could be reduced, and thus the size and parking lot configuration made safer and more practical if the number of units was reduced or some were made smaller with a reduction in the number of bedrooms.

21. The Applicant is not desirous of reducing the size or number of units and is not concerned with parking deficiencies.

22. The Applicant testified that if the number of units is greater, the price per unit would be less and available to more interested parties, but as above indicated, she had no idea as to the price point to be set for each unit.

23. The proposed development is far in excess of the permitted density and therefore not consistent with the Master Plan.

24. The Applicant is overcrowding the site, evidenced by the 14 variances needed for the development proposed.

25. The development as proposed violates the light, air and open space which needs to be afforded to the surrounding neighborhood.

26. The project seems to be too large for the property and will have a negative impact on the streetscape along McCabe Avenue.

27. The Applicant's Professional Planner failed to prove that there will not be any negative impact on the zone plan if the application is approved.

28. Several adjacent property owners and other concerned citizens appeared and testified in opposition to the development, specifically citing the large mass, substantial density, deficient front, side and rear yard setbacks, as well as the possible on street increase in parking, which is a result of the proposed parking configuration which seems to be deficient.

29. The Board finds that the proposed development would not advance the purposes of the Municipal Land Use Law and be a detriment to the surrounding properties.

> 30. The Board finds that the proposed application would not be a benefit to the area nor be in conformance with the Master Plan, the purposes of the Municipal Land Use Law and the zoning plan of the Borough of Bradley Beach.
>
> 31. On balance, the benefits of granting the required variances do not outweigh any detriments and cannot be granted without substantial detriment to the adjacent property owners.

As an initial matter, the resolution failed to state whether the Board considered a (c)(1) or (c)(2) variance. The resolution also lacked findings of fact and conclusions of law for each variance sought. Consequently, the court was unable to ascertain the basis of the Board's decision and remanded matter. On October 26, 2017, the Board convened and on January 25 2018, adopted a resolution that included the following findings:

> 17. The Board finds that the Applicant could construct a permitted single family residential dwelling on the site as permitted by Zoning Ordinance and can comply with all of the bulk requirements for construction without the need for any variances based on its knowledge of the site, its size and general layout.
>
> 18. The Applicant did not present any testimony that it could not construct a single family residential dwelling on the site without the need for any variances, but only requested relief for the construction of four townhouse units.
>
> ...
>
> 20. The Board finds that the subject property is of average size in the Residential Transition Zone in the Borough of Bradley Beach to be developed without variances for a permitted use in the zone.
>
> 21. As such the Board does not find that the Applicant presented the proofs for the granting of variances pursuant to N.J.S.A 40:55D:70(c)(1).
>
> 23. The Board does not find that a variance from 450-27.D.(2)(a)[4] of the Municipal Ordinance of the Borough of Bradley Beach for minimum required front yard setback of 25 feet where the Applicant proposed 20 feet, advances the zoning ordinance requirements and same does not outweigh the detriment of the mass created by the proposed structure closer than permitted to the front property line, given the area an development of the surrounding properties.

24. Although the front yard setback requirement has changed since the within application as to match the surrounding property front yard setbacks, the information as to same was not presented to the Board and based upon the ordinance requirements at the time of the application, the foregoing conclusion is reaffirmed.

25. The Board does not find that a variance from Section 450-27.D.(2)(a)[5] of the Municipal Ordinance of the Borough of Bradley Beach for minimum required side yard setback of 5 feet and 10 feet where the Applicant proposed 5 feet on both sides. Same does not advance the zoning ordinance requirements and same does not outweigh the detriment of the mass of this building as opposed to what exists and what would be a conforming residential dwelling. The size of the proposed four units and its configuration on this side as proposed would be a detriment to the adjacent property owner.

26. The Board does not find that a variance from Section 450-27.D.(2)(a)[6] of the Municipal Ordinance of the Borough of Bradley Beach for minimum required rear yard setback of 25 feet where the Applicant proposed 20 feet, advances the zoning ordinance requirements and same does not outweigh the detriment of being so close to the rear yard of the adjacent property.

27. The Board does not find that a variance from Section 450-27.D.(2)(a)[8] of the Municipal Ordinance of the Borough of Bradley Beach for maximum permitted building coverage of 25% where the Applicant proposed 58%, advances the zoning ordinance requirements and same does not outweigh the detriment, since a conforming single family dwelling would not require such substantial building coverage. Same creates a density higher than permitted, with no bases shown by the Applicant to permit same, other than her desire to maximize her profit.

28. The Board does not find a variance from Section 450-27.D.(2)(a)[9] of the Municipal Ordinance of the Borough of Bradley Beach for maximum permitted impervious coverage of 60% where the Applicant proposed 60.8%, advances the zoning ordinance requirements and same does not outweigh the detriment and can find no credible testimony presented by the Applicant why this bulk requirement cannot be satisfied, other than the Applicant's immovable position to build what she wants, even if it creates the variances indicated and she failed to mitigate any of same.

29. The Board does not find that a variance form Section 450-27.D.(2)(c)] of the Municipal Ordinance of the Borough of Bradley Beach for maximum permitted gross floor area per unit of 1,500 square

feet where the Applicant proposed 1,841 square feet, advances the zoning ordinance requirements and same does not outweigh the detriment. There was no credible testimony presented by the Applicant that she could not physically comply with the maximum permitted gross floor area, other than her personal economic needs. The increase in permitted gross floor area increases the number of occupants and the density of the use of the units on site.

30. The Board does not find that the variance from Section 450-27.D.(2)(d) of the Municipal Ordinance of the Borough of Bradley Beach for maximum average gross floor area of 1,200 square feet where the Applicant proposed 1,841 square feet, advances the zoning ordinance requirements and same does not outweigh the detriment. The Applicant failed to demonstrate why the increased size of the units far in excess of the maximum permitted would advance the zoning and not be a detriment to the surrounding property owners and general residents of the Borough of Bradley Beach. The increase in size over the maximum could cause the use to generate more than the average number of residents and guests, increasing the parking and other problems in the neighborhood. The Applicant presented no other reason for the granting of this variances, other than her personal economic return.

31. The Board does not find that a variance from Section 450-27.D.(2)(g) of the Municipal Ordinance of the Borough of Bradley Beach for minimum number of units of 12 where the Applicant proposed 4, advances the zoning ordinance requirements and same does not outweigh the detriment. The site is being over used and the project can be more compliant with the zoning ordinance if the number and size of the units were reduced, but the Applicant refused to do so, only citing her personal economic interest as the reason for this and most of the other variances to develop the proposed site in the size and configuration desired.

31. The Board does not find that a variance from Section 450-41.B.(1) of the Municipal Ordinance of the Borough of Bradley Beach for minimum driveway width of 20 feet where the Applicant proposed 10 feet, "advances the zoning ordinance requirements" and same does not outweigh the detriment. The same will create driver conflicts and exacerbate the existing parking problems in the Borough of Bradley Beach.

32. The Board does not find that a variance from Section 450-41B.(7) of the Municipal Ordinance of the Borough of Bradley Beach for minimum distance between drive and property line of 30 feet where the Applicant proposed 8 feet, advances the zoning ordinance requirements and same does not outweigh the detriment. This will

cause safety issues for the surrounding properties, as well as occupants of the subject property.

33. The Board does not find that a variance from Section 450-41B.(8) of the Municipal Ordinance of the Borough of Bradley Beach for minimum aisle width of 25 feet where the Applicant proposed 21.67 feet, advances the zoning ordinance requirements and same does not outweigh the detriment. The proposed site plan will not permit the required number of off street parking spaces nor permit those spaces provided best serve the residents of the townhouse units requested. Same will cause internal conflict and lead to unpredictable consequences.

34. The Board does not find that a variance from Section 450-41.B(12) of the Municipal Ordinance of the Borough of Bradley Beach for minimum off-street van accessible parking of 1 space where the Applicant proposed 0 spaces, advances the zoning ordinance requirements and same does not outweigh the detriment. This prevents the development from ADA compliance, which is a detriment to those occupants and guests in need of same.

35. The Board does not find that a variance from Section 450-45.B of the Municipal Ordinance of the Borough of Bradley Beach for any residential zone, all parking areas to be screened from adjacent properties by a buffer strip of at least 5 feet in width, where the Applicant proposed only landscaping on the east side of the property but no buffer proposed on the west side of the property, advances the zoning ordinance requirements and same does not outweigh the detriment. The same is detrimental to the property owner on the west side of the site, who will be subject to the view of the mass of building proposed, as well as screening from light and noise generated there from.

36. The Board does not find that a variance from Section 450-41.B(11) of the Municipal Ordinance of the Borough of Bradley Beach for minimum parking space size of 9 feet by 18 feet where the Applicant proposed 9.5 feet by 17 feet, advances the zoning ordinance requirements and same does not outweigh the detriment. The variance requested for aisle width combined with proposed parking spaces herein create a possible hazard for residents using the parking area, will create both a safety and security issue and prevent the proposed 8 parking spaces from all being totally usable. The same will place a burden on street parking to the detriment of the residents of the Borough of Bradley Beach.

37. When weighing the existing use if still viable and capable of meeting both zoning and code requirements for refurbishment as

against the proposed 4 townhouses in the size and configuration proposed, the Board finds the existing use more in keeping with the aesthetics of the Borough of Bradley Beach and a use more compatible with the surrounding property owners.

38. The sole basis for the variances requested and the creation of the project at the size and number of the units was dictated by the Applicant's personal financial requirements and return of profit and same would not be economically feasible if the number and/or size of the units were reduced; however, when asked the cost and proposed sales price, she failed to have a response, indicating that she had not worked out those numbers.

39. The Board finds that the proposed townhouse units in the number and size requested will not be in conformance with the surrounding neighborhood and as designed with parking and driveway positions, may cause more conflicts with the adjacent neighbors and surrounding neighborhood and any benefits would be outweighed by the detriment.

40. The Applicant has the burden of proof to establish variances pursuant to the requirements of N.J.S.A. 40:55D:70(c)(2) and the Applicant has failed to prove to the Board that the proposed development with the required variances would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation do not outweigh any detriment.

41. The Board reiterates its findings that the proposed application would not be a benefit to the area nor be in conformance with the Master Plan, the purposes of the Municipal Land Use Law and the zoning plan of the Borough of Bradley Beach.

42. The Board, on balance, finds the benefits of granting the required variances do not outweigh any detriments and cannot be granted without substantial detriment to the adjacent property owners, as well as citizens of the Borough of Bradley Beach.

III.

In support of her complaint, plaintiff contends the denial was arbitrary, capricious, and unreasonable because the Board failed to consider nonconformities in the neighborhood. She reasons that a Board is "not permitted to grant variance[s] on a selective basis, and then deny relief . . . in an

inequitable and unfair manner." She asserts her application would replace a pre-existing, nonconforming use with a permitted one.

In support of her request for (c)(1) variances, plaintiff contends they should be granted based on the narrowness of the lot. She cites Lang v. Zoning Bd. of Adjustment, 160 N.J. 41 (1999), for the proposition that a need not inhibit all uses for the property. In support of (c)(2) variances, plaintiff contends the Board was hostile and disregarded the benefits of her application.

The Board relies on Jock v. Zoning Bd. of Adjustment of Wall, 184 N.J. 562, 597 (2005) and asks the court to afford great deference to their decision. The Board contends that plaintiff failed to establish that the Board's denial was arbitrary, capricious, and unreasonable and reasons that plaintiff failed to satisfy the positive and negative criteria.

**IV.**

**A.**

The R-T Zone permits, "[a]ll uses permitted in the R-1 Residential Single-Family Zone, subject to the requirements and limitations of that zone[, and] Townhouses." Borough of Bradley Beach, N.J., Code, ch. 450, art. V, § 450-27; R-T Residential Transition Zone.

The R-1 Residential Single Family Zone permits:

> A. Permitted Principal Uses.
>
> (1) Single-family dwellings
>
> (2) Public parks and playgrounds.
>
> (3) Municipal buildings and other public facilities providing services essential to the operation of the Borough subject to general review and recommendation by the Planning Board.
>
> [Id. § 450-26.]

The R-T Zone provides the following height, area, and yard requirements for townhouses:

> (a) Area, yard and building limitations:

[1] Minimum lot area: 30,000 square feet.
[2] Minimum lot width: 200 feet.
[3] Minimum lot depth: 100 feet.
[4] Minimum front yard: 15 feet and 25 feet. The front yard depth shall be a minimum of 15 feet on north-south streets and 25 feet on east-west streets or the minimum depth of any front yard within the block and fronting on the same street on which the structure fronts, whichever is the greater. When the prevailing setback of the existing buildings along a block front is less than the setback requirements, the front yard setback distance may be reduced to the average of front yard setbacks of principal structures on all developed properties on the same side of the street within 200 feet of the property as documented by a map prepared by a licensed land surveyor The average depth will be from the front wall of the structure, provided that such setback is not less than 10 feet. Front porches shall also be averaged within 200 feet on each side of the lot and within the same block front.
[Amended 2-28-2017 by Ord. No. 2017-10]
[5] Minimum side yards: five feet and 10 feet.
[6] Minimum rear yard: 25 feet.

. . .

[8] Maximum building coverage: 25%.
[9] Maximum impervious coverage: 60%.

. . .

(c) Maximum gross floor area per unit: 1,500 square feet.
(d) Maximum average gross floor area per unit: 1,200 square feet.

. . .

(g) Minimum total number of units: 12.

[Id. § 450-27.]

§ 450-41 of the Borough of Bradley Beach ordinance sets requirements for townhouse driveways and parking and provides in relevant part:

> [1] Driveways for townhouse and apartment residential uses shall be a minimum width … 20 feet in width for two-way circulation, measured inside the property lines.
>
> …

> [7] No ingress or egress drive shall enter upon a public road or highway at a point closer than 50 feet to any street intersection or closer than 30 feet to any property line. These distances shall be measured between the curbline or pavement edge of the driveway, at the street line, to the nearest curbline of the road or highway in question.
>
> [8] Aisles providing direct access to parking stalls shall have minimum widths as specified herein:
>
> > (a) For 61 [degree] parking up to and including 90 [degree] parking: 25 feet
>
> ...
>
> [11] The minimum parking space size shall be nine feet wide by 18 feet deep, except that handicap accessible spaces shall comply with ADA standards and requirements.
>
> [12] Every parking lot for an apartment or townhouse use shall include at least one off-street van accessible space, in addition to the minimum total number of spaces required under § 450-39.
>
> [Borough of Bradley Beach, N.J., Code, ch. 450, art. VIII, § 450-41. Off-Street Parking, Driveway and Loading Requirements.]

Finally, § 450-45 sets standards for buffers and landscaping and provides that:

> (B) In any residential zone all parking areas, exclusive of the ingress and egress drive, having a capacity of more than four vehicles shall be screened from adjacent properties by a buffer strip of at least five feet in width.
>
> [Borough of Bradley Beach, N.J., Code, ch. 450, art. IX, § 450-45. Landscaping and buffer regulations.]

**B.**

"Provisions in a zoning ordinance that control the size and shape of a lot and the size and location of buildings or other structures on a parcel of property are known as bulk or dimensional requirements." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 28 (2013). Relief from these provisions, also known as variances, is disfavored because they deviate from zoning ordinances, "which presumptively further the purposes of zoning embodied in the MLUL." William M. Cox & Stuart R.

Koenig, New Jersey Zoning & Land Use Administration, § 28-1 at 599 (2019); see also Medici v. BPR Co., 107 N.J. 1, 23 (1987) (holding that there is a "strong legislative policy favoring zoning by ordinance rather than by variance.") Consequently, the fact that "variances have already been granted in the vicinity actually works against the grant of another variance." Cox & Koenig, § 28-1 at 599.

N.J.S.A. 40:55D-70(c)(1) and (c)(2) permit relief from a zoning ordinance under certain circumstances. N.J.S.A. 40:55D-70(c)(1) "permits a variance from a bulk or dimensional provision of a zoning ordinance . . . when, by reason of exceptional conditions of the property," strict application of the ordinance would present a hardship to the applicant. Ten Stary, 216 N.J. at 29. Undue hardship relates to the particular condition of the property, not personal hardship to the property owner. Ibid. (citing Jock, 184 N.J. at 590); Kaufmann v. Planning Bd. for Warren Twp., 110 N.J. 551, 561-62 (1988). More importantly, "in a (c)(1) variance context, a board of adjustment or a reviewing court should consider whether the structure proposed is so unusually large that its size, rather than the unique condition of the property, causes the need for a variance." Lang, 160 N.J. at 56. Stated another way, "the focus of the board's inquiry should be on whether the unique property condition relied on by the applicant constitutes the primary reason why the proposed structure does not conform to the ordinance." Ibid.

When evaluating "hardship," commonly referred to as the positive criteria, "efforts made to bring the property into compliance with the ordinance" are factors that must be considered. Ten Stary, 216 N.J. at 29 (citing Jock, 184 N.J. at 594). When "hardship" is "created by an applicant or a predecessor in title, relief will normally be denied." Jock, 184 N.J. at 591.

N.J.S.A. 40:55D-70(c)(2) permits variance relief if a deviation would advance the purposes of MLUL, and the benefits of the deviation "substantially outweigh any detriment." N.J.S.A. 40:55D-70(c)(2). As an initial matter, an applicant for a (c)(2) variance must first "set forth what purposes of

the MLUL will be advanced by granting the requested variance." Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 198 (App. Div. 2009).

It is important to note that an application for variance relief pursuant to the statute often implicates several purposes of the MLUL, N.J.S.A. 40:55D-1 to -163, including: (1) encouraging a municipality to guide development in a manner that will promote the health, safety, and welfare of its residents, N.J.S.A. 40:55D-2(a); (2) providing "adequate light, air, and open space," N.J.S.A. 40:55D-2(c); (3) promoting a "desirable visual environment"; N.J.S.A. 40:55D-2(i); and (4) establishing "appropriate population densities," N.J.S.A 40:55D-2(e). Ten Stary, 216 N.J. at 31. Consequently, any evaluation for variance relief must analyze the purposes of the zoning in relation to the specific relief requested. For example, "traditional zoning concerns . . . of light, air and open space may be valid inquiries" on an application for relief from setback requirements. Id. at 32. In addition, a property's drainage system and the impact it may have on surrounding properties may be relevant on an application for relief from lot coverage requirements. Ibid. The grant "must actually benefit the community in that it represents a better zoning alternative for the property." Kaufmann, 110 N.J. at 563. "[P]ositive criteria" offered to support a (c)(2) variance may "include proof that the characteristics of the property present an opportunity to put the property more in conformity with development plans and advance the purposes of zoning." Ten Stary, 216 N.J. at 30 (citing Kaufmann, 110 N.J. at 563-64).

In addition to the positive criteria, applicants for both a (c)(1) or (c)(2) variance must demonstrate that the variance can be granted "without substantial detriment to the public good" or substantial impairment to the intent and the purpose of the zone plan or zoning ordinance. N.J.S.A. 40:55D-70. A determination of the negative criteria requires a "balancing of the benefits and detriments, the positive and negative effects, of a given variance proposal." Cox & Koenig, § 36-2.1 at 760.

"Substantial detriment" is determined by comparing the impact of the variance on nearby properties. Id. § 36-2.2 at 760 (citing Medici, 107 N.J. at 23). It follows that a board or reviewing court must consider that the greater the benefits or the hardship, in the case of a (c)(1) variance, "the greater the detriments must be to achieve the quality of being substantial." Cox & Koenig, § 36-2.1 at 760. "Reconciliation of a c variance with a master plan and ordinance is ordinarily an uncomplicated matter" and depends on "whether the grounds offered to support the variance, either under subsection (c)(1) or (c)(2), adequately justify the board's action in granting an exception from the ordinance's requirements." Id. § 36-2.4 at 767 (citing Lang, 160 N.J. at 58). Consideration of a (c)(2) variance requires a balancing of the positive and negative criteria. Wilson, 405 N.J. at 198.

In balancing competing interests, a court should be mindful that "[t]he extension by variance of land use zones is not to be measured by the dollar." Shell Oil Co. v. Zoning Bd. of Adjustment of Shrewsbury, 127 N.J. Super. 60, 65 (App. Div. 1973) (citing Schoelpple v. Woodbridge Twp., 60 N.J. Super. 146, 153 (App. Div. 1960)). Stated another way, "an owner is not entitled to have his property zoned for its most profitable use." Terner v. Spyco, Inc., 226 N.J. Super. 532, 548 (App. Div. 1988) (citing Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 350 (1973)); Shell Oil Co. v. Zoning Bd. Of Adjustment, 64, N.J. 334 (1974).

C.

Because of their familiarity with the "community's characteristics and interests," board decisions are entitled to substantial deference. Jock 184 N.J. at 597. As representatives of the community, board members are "best equipped to pass initially on such applications for variance relief." Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268, 296 (1965) (citing Ward v. Scott, 16 N.J. 16, 23 (1954)). Consequently, a court shall not substitute her own judgment for that of the board. The board's decision should only be disturbed when it is arbitrary, capricious and/or unreasonable.

Kenwood Assocs. v. Bd. of Adjustment of the City of Englewood, 141 N.J. Super. 1, 4 (App. Div. 1976) (citing Stolz v. Ellenstein, 7 N.J. 291 (1951)).

While a decision of a board is generally afforded great deference, the board is required to adopt a resolution that includes their findings of fact and conclusions of law to satisfy a "reviewing court that the board has analyzed the applicant's variance request in accordance with the statute and in light of the municipality's master plan and zoning ordinances." N.Y. SMSA, L.P. v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 332-33 (App. Div. 2004); see also N.J.S.A. 40:55D-10(g) (setting forth the statutory requirement that municipal land use boards must make findings of fact and conclusions of law). "The factual findings set forth in a resolution cannot consist of a mere recital of testimony or conclusory statements couched in statutory language." N.Y. SMSA, L.P., 370 N.J. Super. at 333 (citing Harrington Glen, Inc. v. Bd. of Adjustment of Leonia, 52 N.J. 22, 28 (1968)). "Without such findings of fact and conclusions of law, the reviewing court has no way of knowing the basis for the board's decision." Ibid. (citing Morris Cnty. Fair Hous. Council v. Boonton Twp., 228 N.J. Super. 635, 646 (Law. Div. 1988))

V.

As an initial matter, the Board's January 25, 2018 Resolution is an improvement over their Resolution of August 24, 2016. Unlike their first Resolution, the Board made findings on the individual variances sought. In addition, they provided analysis on whether plaintiff was entitled to a (c)(1) or (c)(2) variance. However, the Board was not as accurate as it could have been on the legal standard for a (c)(2) variance. By way of example, in denying variances, the Board concluded that "a variance from...[did not] advanc[e] the zoning ordinance requirements." N.J.S.A. 40:55D-70(c)(2) actually permits a variance if the purposes of the MLUL are advanced. Despite this court's request, the Resolution failed to state the purpose of each ordinance requirement as part of the Board's analysis. Notwithstanding the Board's error, it is clear they concluded the benefits of the application did not

outweigh the detriments to the community or the zone plan. More importantly, the Board stressed "the sole basis" for the variances was plaintiff's financial needs. See Terner 226 N.J. Super. at 548 (noting that "an owner is not entitled to have his property zoned for its most profitable use").

The evidence in the record supports the Board's decision to deny plaintiff's request for (c)(1) variances. It is undisputed that the lot in question, at 7,500 square feet, is undersized to construct a townhouse development. However, townhouses are not the only permitted use in the R-T Zone. Single family houses are permitted in the R-T Zone, and the lot is perfectly suited for such a use. As the Board members observed, plaintiff's lot is not particularly narrow and "is of average size in the Residential Transition Zone." In fact, plaintiff failed to present any evidence that the lot is narrow compared to other lots in the neighborhood. With the exception of variances for lot size and minimum number of units, the variances were caused by the size of the project rather than the conditions of the property. Lang, 160 N.J. at 591.

In support of her application for (c)(2) variances, plaintiff claimed the proposal would provide several benefits, including bringing the property more in conformity by constructing a conforming use. However, the court notes the proposal, if approved, would have provided a conforming use, but a nonconforming structure. Plaintiff also claimed the proposal would provide more "green space," contribute to appropriate population densities, provide a desirable visual environment and on-site parking and drainage, where none previously existed.

As the Court noted in Ten Stary, the purpose of setback requirements is to promote "light, air, and open space." Ten Stary, 216 N.J. at 32. While the Resolution failed to include the purposes of the MLUL in the analysis of the variances, the record and the Resolution support a finding that the setback variances did not advance development to "provide adequate light, air, and open space." N.J.S.A. 40:55D-2(c). In addition, the Board implicitly concluded the variances did not advance N.J.S.A. 40:55D-2(i), because while the proposal was an improvement over the vacant fourteen (14)

room hotel, it lacked "good civic design and arrangement." The Board repeatedly observed that fewer townhouses or a single family home could have resulted in the same benefits without the need for all or most of the variances. The Board also made findings that setback relief would result in detriments to "the adjacent property owner." Variances requested for the front, rear, and side yard setbacks were not insignificant (20 feet proposed where 25 feet required for front and rear, and 5 feet and 5 feet proposed where 5 feet and 10 feet required for side yard). Because the Board found the variances did not support a purpose of the MLUL, they were not required to offer an exhaustive list of detriments to support the denial. Cox & Koenig, § 36-2.1 at 760.

"A property's drainage system" is relevant on a variance for lot and impervious coverage. Ten Stary, 216 N.J. at 32. In denying relief from these requirements, the Board rejected plaintiff's argument that the variance "promote[d] the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities, and regions and preservation of the environment." N.J.S.A. 40:55D-2(e). They noted that the deviation requested was more than twice what was permitted. While it is undisputed that the application provided plans for drainage where none previously existed, the Board concluded that "a conforming single family dwelling" or fewer units would not "require such substantial building coverage."

Plaintiff failed to meet the positive criteria to support a variance for minimum total number of units. No evidence or testimony was offered to support plaintiff's claim that a variance for this requirement would lead to appropriate population densities. No testimony was offered that would indicate a particular need in Bradley Beach for townhouses that would sell for an unspecified price. The Board concluded that "the site is being over used and the project can be more compliant with the zoning ordinance if the number...of...units were reduced."

The evidence in the record supports the Board's denial for maximum gross floor area and maximum average gross floor area. Plaintiff failed to provide an argument to support the positive

criteria. In addition, the Board commented that plaintiff gave no reason why she could not comply with the ordinance requirements other than "her personal economic needs."

Plaintiff failed to satisfy the positive criteria for a (c)(2) variance for parking. A (c)(2) variance may be granted if it encourages the "location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes that will result in congestion or blight." N.J.S.A. 40:55D-2(h). While the application would provide on-site parking where none existed, the Board found that the size of the project resulted in the plaintiff's inability to provide an adequate number of conforming spaces and an insufficient buffer, in a garage that was too small and ill designed. They further concluded that the proposal would result in "driver conflicts" and noise exposure to neighbors. The Board did not find a benefit from relieving plaintiff of the obligation to provide a van accessible spot and noted that a variance would result in "a detriment to those occupants and guests in need of same."

The Board found it failed to provide proof that the application for four (4) townhouses was not "in conformance with the surrounding neighborhood." While plaintiff argued that setbacks for the existing and proposed structure were consistent with surrounding properties, testimony provided by plaintiff's expert did not support that conclusion. Ms. Hoffman testified that four (4) properties, located at 213 Newark Avenue, 217 Newark Avenue, 200 Park Place, another "green type structure" had front setbacks that were either consistent or smaller than what was proposed. The list did not include properties adjacent to plaintiff's property or any on McCabe. She failed to elaborate on specific properties in her testimony regarding rear and side setbacks and simply stated the proposal was "in line with some of the properties within [the] block" and neighborhood. In support of the variances for lot coverage and impervious coverage, Ms. Hoffman provided examples of one (1) property on McCabe and one (1) elsewhere in the neighborhood that were non-conforming for lot coverage. Based on the testimony of plaintiff and her experts, the Board concluded that plaintiff failed

to "prove...that the proposed development...would be advanced by a deviation form the zoning ordinance requirements and [that] the benefits" of the application did not outweigh the detriments to the community and the zone plan.

**VI.**

For the reasons stated above, plaintiff's complaint is dismissed.