HARTZ RAYMOND BOULEVARD LIMITED PARTNERSHIP, A New Jersey Limited Partnership,

Plaintiff

v.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF NEWARK, and 28 MCWHORTER STREET, LLC,

Defendants

-and-

ADA CARO, CAROLINA CISNEROS, JENNIFER GIRARDIER, STEFANIE GOMES, EVELYN KALKA, LISA DEWEY-MATTIA, BENNETT A. MEDOFF, SCOTT MICHALCZYK, MICHAEL PANZER, MATEO PINTO, JASON STEFFENER, ANKER WEST,

Plaintiffs-Appellants

v.

28 MCWHORTER STREET, LLC and THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF NEWARK,

Defendants-Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-003648-13T3

On appeal from the Superior Court of New Jersey, Law Division, Essex County
No. ESX-L-8161-12 and
ESX- L-8484-12

Sat below:
Hon. Stephen J. Taylor, J.S.C.

CARO PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR APPEAL

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PRELIMINARY STATEMENT

To paraphrase William Shakespeare, "Something is rotten in the Ironbound District of Newark." Failing to heed the plea of one of its Commissioners, who feared "compromising the future zoning plan of the City of Newark,"(Pa122:10-12), the Newark Zoning Board of Adjustment (the "Zoning Board") continued its attack on the City's planning and zoning process by granting for the 13th time a d(1) use variance for a paid surface parking lot within a half-mile radius of Penn Station (Pa49:15-16); a use not permitted in Ironbound, nor anywhere in the City, unless permitted by a specific redevelopment ordinance. For years, Newark's planners, its residents and other stakeholders who have participated in the planning process have articulated a vision of urban design whereby commercial parking lots, in particular surface parking lots (distinct from underground garages and structured parking decks), are not considered the solution to the parking and transportation needs of the City's residents, businesses, institutions, and visitors. The Zoning Board turned a blind eye to this central fact, mischaracterized relevant planning documents in doing so, and ignored the City's own professional planner, who opined unequivocally that the Zoning Board should deny this application.

Instead, the Zoning Board, with subsequent court approval, continued its trend to rezone by variance a significant sliver

of Ironbound, turning it into a surface parking lot (to be used primarily by commuters who leave the City by evening). It did so based on the testimony of the applicant's planner, who failed to provide sufficient credible evidence to satisfy the applicant's burden of showing "special reasons" and proving the statutory negative criteria, by an enhanced quality of proof.

The Zoning Board's Resolution lacks detailed factual findings that either distinguish the property at issue from numerous sites located in proximity to "Penn Station, the Prudential Center and Ferry Street," (Pa145, ¶13), or prove that additional parking for local businesses located on Ferry Street is best accomplished by permitting yet another commercial surface parking lot at this specific site. Though the planner testified that the property's condition as a large parking lot (permitting full circulation of the site and self-parking, with accessibility from two streets) distinguished the property from other surface parking lots in the vicinity (not properties)(Pa51:16-25), he also acknowledged that its large size, 1.25 acres, made it particularly suitable for development of various conforming uses (Pa54:9-10). On the other hand, objectors turned the "particularly suited" prong of the positive criteria on its head, when they established that the proposed site would be the only surface parking lot in the neighborhood that was directly surrounded by residential properties on at

least three sides, thus rendering the property particularly unsuitable for use as a paid surface parking lot.

Similarly, the Zoning Board's findings of fact with respect to the negative criteria were based on the net opinion of the applicant's planner of "no substantial harm," and were directly contradicted by the testimony of the City's planner, and the testimony of many of the 17 individuals who appeared at the hearing as objectors. The approval also contradicted the intent and purpose of the Zoning Ordinance, the 2004 Future Land Use Element of the Master Plan, and the 2012 Master Plan by ignoring the explicit direction of Newark's Planning Board with respect to this nascent, middle-class residential neighborhood to build on its "walkability," encourage "pedestrian-oriented development," and reduce the impact of parking on the quality of the "pedestrian landscape." (Pa458). Here, as in the seminal case of Medici, the deliberate inaction of the governing body in not amending the Zoning Ordinance to permit paid parking lots as a primary use, and the deliberate action by the Planning Board in its specific zoning recommendations make it unequivocally clear that they, and all the stakeholders who participated in the planning process, do not want commercial surface parking lots in this zone and neighborhood, especially because of its proximity to a major transit hub. In this way, the Zoning Board arbitrarily sided with the applicant and has unfairly threatened

the urban fabric of this revitalizing neighborhood, while undermining the democratic process inherent in New Jersey's municipal land use procedures.

PROCEDURAL HISTORY

In January 2006, the applicant, 28 McWhorter Street, LLC, ("McWhorter" or "Applicant") received preliminary and final site plan approval from the Newark Central Planning Board ("Planning Board") "for the demolition of an existing one-story building on a 54,399 square foot lot [at 28-50 McWhorter Street, 39-83 Union Street] and for the re-grading and construction of a mixed-use 7-story building that would include a two-deck parking garage, 18,671 square feet of retail/commercial area and 150 one- and two-bedroom residential units." (Pa230-235). The Planning Board held, that the "project redevelops underutilized land to provide a residential use that is more compatible with the neighborhood than its current Industrial use." (Pa233) No further action was taken on that application.

Six years later, on May 30, 2012, the same Applicant filed a significantly different application with the Zoning Board; also to demolish the existing building on the its property, but this time, solely to construct "a new paid public parking lot with 158 spaces." (Pa145). This application, the predicate for this appeal, requested a use variance, as well as bulk variances for the proposed fence height, proposed signage height and area,

the extent of lighting and landscaping, and the site plan approval. Id.

On September 6, 2012, the Zoning Board conducted a public hearing with regard to the application, and that same night, 5 members of the Zoning Board adopted a Resolution of Approval, which was memorialized on October 11, 2012. (Pa145-146). A group of twelve objectors (hereinafter, the "Caro Plaintiffs"), two of whom actually spoke at the hearing (though all were present), filed a Notice of Appeal on October 15, 2012, with the City of Newark's governing body, requesting the Council's review of the Zoning Board's decision. (Pa131). The City of Newark's Municipal Council did not hold a hearing within the statutory time period thereby affirming the action of the Zoning Board. (Pa135-136).

On November 9, 2012, Hartz Raymond Boulevard Limited Partnership ("Hartz"), as the original developer and partial owner of One and Two Penn Plaza on Raymond Boulevard (known as the Blue Cross/Blue Shield and the NJ Transit Buildings) filed a Complaint in Lieu of Prerogative Writ against McWhorter and the Zoning Board seeking a judgment vacating the action of the Board. On November 21, 2012, the Caro Plaintiffs filed a separate Complaint in Lieu of Prerogative Writ, (Pa137); and the Newark Board of Adjustment filed an Answer to the Caro Complaint on January 31, 2013. (Pa154). The Hartz and Caro actions were

consolidated by Order (Pa178) dated March 22, 2013, pursuant to a Notice of Motion to Amend the Complaint filed by the Caro Plaintiffs, to include the City of Newark as a defendant, and to consolidate the two actions. (Pa158). The Applicant filed its Answer to the Caro Plaintiffs' Amended Complaint on May 16, 2013, and the City of Newark never responded.

On August 15, 2013, the Caro Plaintiffs filed an application for relief by Order to Show Cause seeking a stay on the construction and/or operation of the commercial parking facility on the relevant property. (Pa186-221). Demolition of the industrial building located on McWhorter's property had already been completed in or about the first two months of 2013. The trial court denied their application for preliminary relief in an Order dated October 15, 2013. (Pa311). A settlement agreement was reached between Hartz and McWhorter prior to the final hearing on the matter (T3:9-13),[1] which was held on January 9, 2014, and a final Order (Pa664) and Decision (Pa666) denying the Caro Plaintiffs' request for relief was filed on March 5, 2014.

Caro Plaintiffs filed their Notice of Appeal and Case Information Statement on April 15, 2014 (Pa682-686), which was

[1] Citations to the trial court transcript are noted as "T" Because the transcript of the Zoning Board hearing is included in the appendix, reference to that transcript includes the actual page number of the appendix rather than the page number of the transcript.

revised on April 30, 2014,(Pa687); and McWhorter, the Zoning Board and the City of Newark filed their respective Case Information Statements on May 12th, May 13th and May 13th (Pa691-698).

STATEMENT OF FACTS

THE PROPERTY, THE PROPOSAL, AND THE CITY PLANNER'S REPORT

This matter arises from McWhorter's appeal to the Zoning Board, Appeal NO.: 15-12-C for premises located at 28-50 McWhorter Street in Newark's Ironbound section (Pa145). The Resolution adopted by the Newark Zoning Board explains that the appeal is to permit the following: "In the First Industrial (I-1) District, proposed demolition of an existing building and construction of a new paid public parking lot with 158 spaces. Public parking is not permitted in this zone." Id.

The lot is 1.25 acres, which is approximately 54,399 sq.ft. -- almost the size of a football field. The building is described in the Resolution as an "existing light industrial building." Id. It was once owned by Goldbar Electric and used as an electric warehouse (Pa28:10-16). McWhorter purchased the building in approximately 2005, and leased it for 5 years to a church (Pa28,Pa30). Mr. Jose Lopez, the Applicant's principal testified to his company's efforts to develop the property as a "call center together with office building." (Pa31:4-7). When asked by a Commissioner what he was currently asking for rent,

he dodged the question and responded "[h]ow much you want to charge on the property right now is a warehouse with a leaking roof." (Pa38:8-18). But, the Applicant's architect testified that the existing 30,000 square foot, one-story masonry building was in "good condition" and "maybe need[ed] a new roof." (Pa5:14-24,Pa15:19:22). Based on the record, it is apparent that the Applicant was proposing to demolish the building, in part because it did not want to replace the building's roof. (Pa15:19-22).

The Applicant's site is bounded on Union Street to the east, Hamilton Street to the south, and McWhorter Street to the west. The Resolution states that the site is "generally" bounded by Ferry Street. (Pa145). However, McWhorter's aerial photographs (Pa247-248) and the City Planner's Report (Pa413) indicate that the site is bounded primarily by residential properties on three sides, one of which is the north end of the property, where there are several residential lots serving as a barrier to the Fornos of Spain restaurant, which is located on Ferry Street, and its accessory parking lot.

The City Planner's Report, which was submitted to the Zoning Board and made available to the public prior to the hearing, describes the neighborhood and Applicant's proposal as follows:

> The site is located in the East Ward in the Ironbound neighborhood. Land use along Union Street, to the east of the site, and Hamilton Street, to the south of the site, is primarily multifamily residential, with several professional offices and ground floor retail establishments along Union Street. There is a surface parking lot along McWhorter Street, to the west of the site, as well as a child care center and what appears to be a vacant light industrial building. There are several residences directly north of the site, beyond which is a surface parking lot that appears to be associated with Fornos of Spain restaurant on Ferry Street. The site is proximate to the Central Business District, Newark Penn Station and Ferry Street, one of the City's commercial rows. . .
>
> The applicant is proposing to demolish the existing building and construct a new surface parking lot with 158 parking spaces and a control booth. The proposed hours of operation are Monday through Friday from 7:00 am to 9:00 pm and Saturday and Sunday from 8:00 am to 5:00 pm. It is expected that there will be two (2) employees.
>
> Access to the site will be provided via two (2) entrances, one (1) along McWhorter Street and one (1) along Union Street. . . Tubular fencing measuring five (5) feet in height is proposed to surround the entire perimeter of the site.
>
> * * *
>
> The lighting plan proposes 11 pole-mounted "Holophane Polestar II" lights to be located throughout the parking lot area; lights will be mounted at 12 ft. in height.

(Pa412-413). In addition, the Applicant testified that, despite the regular hours of operation, holders of monthly parking permits would be able to enter and exit the lot 24 hours a day, 7 days a week with an electronic card, (Pa79-80); at the same

time, the lights would not be kept on when attendants were not present (Pa37-38), creating a dark, empty space overnight.

Based on the application submitted to the Zoning Board, the City's Planner concluded:

> The Future Land Use Plan of the 2004 Land Use Element of the Master Plan designates the site as S-T "Transitional", which is intended to encourage the redevelopment and revitalization of areas within the City that are adjacent to the Central Business District. The primary focus for this area is on mid-rise residential, mixed use, office and retail uses. While the Future Land Use Plan acknowledges the need for parking to accommodate the demand from potential new residents and guests, it recommends below-grade garages and off-site locations, where appropriate. Moreover, the provision of parking garages at street level is strongly discouraged. As such, this site does not appear to be an appropriate location for a surface parking lot. The establishment of a surface parking lot at this location is not consistent with the City's vision and goals for the redevelopment of this area, as demonstrated by its position set forth in the 2004 Future Land Use Plan.
>
> Though several previously established surface parking lots exist proximate to the site, it is the City's position to discourage such uses in this area and, instead, build upon the walkable, mixed use nature of the neighborhood, as laid out in the Future Land Use Plan. While there is a demand for additional convenient parking in the study area, as determined by the applicant's traffic study, these conditions are not unexpected in a thriving urban area. Furthermore, it is important that the demand for parking be balanced with the vision and goals for the area in the Future Land Use Plan and the overall good of the neighborhood. It is the opinion of the City that a surface parking lot in this location would detract from the walkability of the neighborhood, create a hazard to pedestrians, and otherwise negatively impact the quality of life for residential and institutional uses (i.e., Presbyterian Community Church and

associated child care center) in the vicinity of the site.

The applicant has stated that "there will be no increase in traffic volume on the premises" as a result of the proposed project. It is unclear as to how the conversion of the site from its present condition (i.e., a one story light industrial building) into a surface parking lot with 158 parking spaces would not result in an increase in traffic volume on the premises. The applicant must provide testimony in support of this statement.

* * *

The applicant must [also] demonstrate to the Board that the site is so unique as compared to other lots in the vicinity, that would make this particular location suitable for a surface parking lot. The applicant must discuss why the proposed use may be more appropriate than the uses permitted as-of-right in the First Industrial (I-1) District. The applicant must also demonstrate to the Board that there would be no detriment/negative impacts to the neighborhood or the intention of the zone plan. We do not recommend this project because, per our analysis, it appears to be detrimental to the neighborhood and the zone plan.

(Pa414-416) (emphasis added)

THE ZONING BOARD HEARING

Ignoring the City's Planner request for certain testimony, McWhorter relied almost exclusively on the testimony of its planner, Mr. John McDonough, who fell short of addressing the Planner's concerns. There was no expert testimony offered at the hearing on the environmental impact of the project on air quality or the City's sewer system, its impact on crime and security issues, or the impact of the parking lot on pedestrian and vehicular traffic in the area.

Mr. McDonough testified generally as to the need for more off-street parking in the area, based on his walk "through the neighborhood." (Pa56:11). He did not, however, offer any survey results that indicated that the need he observed would be solved by offering residents or customers of local businesses paid parking options at the proposed location. Regarding the "positive" criteria, he testified that the proposed parking lot satisfied the "efficient use of land" insofar as "[i]n this economy [it] makes good planning sense to do this type of land use," (Pa56:22); promoted "a desirable visual environment" by "comparing . . . what's there now against what the Applicant is looking to propose,"(Pa56-57) and was "particularly suited for a surface parking lot because when "cleared," it is "flat" without any "retaining walls or anything of that effect." (Pa57:6-12). With respect to the negative criteria, Mr. McDonough stated that a parking lot was not an unsafe land use, but rather a "benign" one. (Pa57:22-23). He seemingly based his opinion on the report of a traffic engineer, who did not appear at the hearing to testify. (Pa61:23-24). The report focused almost exclusively on the alleged need for more parking in the neighborhood surrounding the proposed lot; yet, it limited its study to paid parking lots west of the proposed site closer to Penn Station, including one located in the Downtown Business District, and did

not study parking lots located on or adjacent to Ferry Street farther away from the transit hub. (Pa247).

In any case, the Applicant's planner testified that the report stated that there would be "no unsafe traffic movements or conflicts with pedestrians." (Pa60:16-19. No such conclusion is contained in the report. See (Pa252-257). Instead, the consultant reached the conclusion that "the site has been designed to provide for safe and efficient access and circulation." (Pa254). The report does not look beyond the site; it looks only at driveway size and the opening dimensions of the curbline and concludes that they satisfy "standard driveway size design criteria." Id. The consultant took no traffic counts on any of the surrounding streets, particularly Union Street, which permits vehicles to move only in one direction towards a traffic light at the street's intersection with Ferry Street. The consultant similarly did not calculate vehicle usage projections for the parking lot, and did not appear before the Zoning Board to be qualified as an expert in traffic-related issues, to answer any of the Commissioners' questions, and to be cross-examined by any of the objectors or their counsel. Instead, the planner relied on the net opinion of this consultant, whose report was presented on a hearsay basis. Based upon objections of counsel for the owner of Fornos Restaurant, the Zoning Board refused to allow Mr. McDonough to continue to testify about the

conclusions presented in the report, but the Zoning Board accepted the hearsay report into evidence. (Pa61-62).

Seventeen local residents appeared as objectors to the application (Pa3); seven got up and spoke in opposition to the application. The Chairperson warned people not to be repetitive, and limited their speaking time to 2 minutes each. (Pa85).

Together, the objectors gave testimony about the harm this project would bring them, based on their experience with other surface parking lots in the area. The harms they discussed ranged from flooding, reduced air quality, increased crime, increased traffic to perceived destruction of the increasing residential fabric of their community. For example, Caro Plaintiff, Mr. Anker West (Pa86-88) noted that:

> A parking lot will cause "destruction of the urban fabric coming into this prime neighborhood of Newark which we're [all so] heavily invested in." (Pa86:15-18).

He also highlighted Mr. McDonough's lack of information or counts as to the cars using the lot and at what times:

> The environment of justice in this neighborhood with cars that this planner does not know how many cars are going to be coming and going during the day, the noise, the exhaust, the car alarms we are. . .going to be bombarded with it. Why do we have to be the armpit of America, I am putting it in a nice way. (Pa87:16-23).

He further remarked that the project was "ugly", bringing crime and litter, and creating a pedestrian "hazard" with "people

rushing to get out of the parking lot at 5:00pm." It's a "park and ride" for New York commuters, without "benefit to the neighborhood." (Pa88:1-15). Caro Plaintiff, Evelyn Kalka (Pa89-91), an architect/urban designer (Pa89:5) focused on the walkability of the neighborhood. She noted that the proposed surface parking lot "destroys the urban fabric" and is "against the walkability of the neighborhood." (Pa89:8-11), and expands the "wedge . . . between Penn Station and the residential neighborhood." (Pa89:11-13). Ms. Kalka then read part of the City Planner's report into evidence since she agreed with several of its conclusions. Primarily that

> The City discourages surface parking lot uses in favor of building a walkable, mixed use neighborhood (Pa90:20-22); This parking lot creates a hazard for pedestrians (Pa90-91); It is detrimental to the neighborhood and will negatively impact the quality of life (Pa91:2-5); and the proposal is contrary to the current zoning and the Master Plan and future zoning plan that will be enacted to implement that plan. (Pa91:5-9).

Another objector, Joseph Narbine (Pa91-94) focused on increased crime and pollution. He noted as follows:

> Monthly parkers will be coming and going late at night and they will be at risk for crime because there will be no security when the lot is unattended. (Pa92-93); and
>
> Newark has one of the highest asthma rates in the country because of pollution. The proposed parking lot will make pollution worse, because cars on Union Street will back up waiting for the traffic light on Ferry Street. (Pa93-94).

Ken Walker (Pa94-96) limited his comments to a discussion of the likelihood of increased crime in the neighborhood (*i.e.* parking lots encourage "smash and grabs," Pa94-95). Nonetheless, he also expressed outrage at the inequities inherent in the project: benefit for "suburbanites" at the cost to neighborhood residents. (Pa96). Mr. Thomas (Pa96-99), another adjacent resident focused his remarks on the contradiction between the proposed project and the neighborhood's designation as a transportation hub (Pa96:5-6), and the crime problem that "already exists around other parking areas. (Pa99:1-14). He also questioned the Applicant's decision to raise other permitted uses, such as "strip joints," to justify approving a variance for a parking lot. He opined that it was a "scare tactic."

Madeline Ruiz (Pa100-103) questioned the Zoning Board's apparent priorities of putting property ahead of residents, and stated that the Board seemed more concerned about the cars of visitors than the "residents that are working everyday to make this a better place." (Pa101-102). Mr. Borges (Pa104-105), a former resident on Union Street, and current owner of two properties located on that Street (Pa104:1-5), indicated that the traffic generated by this lot will be "extremely bad for the residen[ts]." (Pa105:4-5) He stated as follows:

> The parking lot will have "150, 100 cars" and the traffic is already horrendous between five, six and 7:00." The "traffic light on Ferry and Union is - I

> believe two cars—by the time two cars go through the-the-its red again." (Pa104:10-25). He also expressed concern that parkers going to Arena events would bring more traffic into the area. Even on Hamilton and McWhorter Streets it "is going to have traffic like crazy." (Pa105:16-21).

Only two citizens spoke in support of the McWhorter application. The pastor of a local church noted the need for parking, and said about Penn Station that "it's not going away" and is needed for those who want to drive to Newark to get to New York. (Pa107:9-13). He also revealed that the Applicant's principal had allowed his parishioners to park for free in yet another parking lot that he owned (Pa107:9-13). The President of the Business Improvement District, also spoke, but not in his representative capacity. (Pa111:3-8). Surprisingly, he did not support the project. Rather, as a restaurant owner he felt that there was a need for additional parking during the day, but as someone who had lived in the area his entire life, he stated that "this parking lot is going to create a problem." (Pa109:10-14). The Zoning Board Chairperson noted that his testimony was "just like we heard from the [other] objectors." (Pa111:1-2).

It seems that two of the objectors who were included in the count of 17 were represented by counsel, including the owner of the Fornos restaurant located on Ferry Street. In summation, this attorney made several points in support of his clients' opposition to the proposed project. First, he attacked the

application for failing to count the thousands of surface parking spaces that were already in the neighborhood. (Pa113:3-17). Second, he reminded the Board that although the City Planner had requested an explanation of how a conforming use would not produce any additional traffic once the building was demolished and replaced by 158 parking spaces, no such explanation had been forthcoming. (Pa113:18-25). He reiterated the testimony of Mr. Borges regarding the short light at the intersection of Union Street and Ferry Street, and the "absolute traffic nightmare this parking lot would cause during rush hour." (Pa113:18-114:13). Third, he noted, referring to the aerial photographs in evidence that this proposed parking lot was different from the other parking lots in the area, since it was bordered on three sides "strictly" by residential buildings. (Pa114:14-115:11). He also repeated the quality of life and safety issues that other objectors raised. (Pa114:24-115:11).

In conclusion, the one attorney representing any objector emphasized to the Board that the owner had bought the property knowing what the Zoning Ordinance allowed and what the 2004 Future Land Use Element of the Master Plan envisioned for this neighborhood. Now, he wants to change his plans allegedly because of the economy; that is "to take the easy way out," but "doing it off the backs [of] the residents in this area." (Pa115:21-25). Finally, based on his many years of practicing

land use law, he stated that the City's Planner "came out as strong [as] I have ever seen a planner come out to say a particular plan should not be approved." As counsel for an objector, he concluded that the application if approved would cause "substantial detriment to the public good and would impair the zone plan." He reasoned that the proposed parking lot, rather than making the neighborhood walkable, is going to create a situation in which residents are "going to be trying to dodge the cars that are coming in and out of the that lot all day long." (Pa116:2-22).

Less than three weeks after the hearing, on September 24, 2012, the Newark Central Planning Board adopted the 2012 Newark Master Plan. (Pa438) This Plan continues to carve out the area in which the subject site is located from the larger 1st Industrial District, and recommends rezoning it for mid-rise residential use (R-MM or R-5). The Plan includes specific design criteria for parking, but keeps parking an accessory use. (Pa456-57). The 2012 Master Plan, like the plans before it, does not provide for paid surface parking lots in this new zone. Id.

On October 11, 2012, the Zoning Board adopted the Resolution now on appeal.

GOVERNING LAND USE FRAMEWORK FOR THE CITY OF NEWARK

In its decision, the trial court stated:

> After hearing evidence, the Zoning Board concluded that the proposed development of the site as a surface parking lot would promote the general welfare because the proposed use advanced the goals of the City's 2004 and 2012 Master Plans, both of which acknowledged that surface parking lots serve an important land use purpose.

(Pa673)(emphasis added). Although no such conclusion appears in the Resolution, if it did, such conclusion would be fundamentally wrong. Notwithstanding the trial court's mischaracterization of the Resolution, in order to determine whether the applicant satisfied its burden to show special reasons and prove the second prong of the negative criteria, by an enhanced quality of proof, one must understand the governing land use framework that actually applies to the City of Newark, as it relates to the specific property at hand. The transcript of the Zoning Board hearing and the trial court's written opinion are, unfortunately, replete with mischaracterizations of several documents that were referred to by the Applicant's planning expert, the City Planner (in her report), and some of the objectors; and an accurate description of what these documents actually say or do not say is warranted to properly evaluate the validity of the Zoning Board's grant of a d(1) use variance in this case, and the trial court's approval of that decision.

In Newark's 2009 Master Plan Re-examination Report, Mayor Booker noted that the last comprehensive revision of all

elements of the Master Plan was in 1990. (http://www.ci.newark.nj.us/government/city_departments/economic_housing_development/newarks_master_plan.php at 1) At the time of the 2009 report, only the Land Use Element of the Master Plan had been updated in 2004 "to align with current conditions," but the City had not acted to adopt or implement the necessary zoning code changes. Id. "Newark's Zoning Ordinance (the set of regulations that establishes the type and amount of development that is permissible in areas of the City) dates to 1956 and has not been comprehensively examined in more than one-half century." Id. Though the City has made amendments to that Ordinance over the years, and has been engaged in rezoning whole areas of Newark through the redevelopment process,[2] in February 2009 a comprehensive re-examination of the Ordinance had not taken place. That was about to change.

Soon thereafter, the City's Administration "set in motion a city-wide process for citizens to participate and plan for the

[2] There is no redevelopment ordinance applicable to the Applicant's property. The enactment of an Ordinance in 2000 to create the Ferry Street Business Improvement District ("BID") for the Ironbound is not equivalent to such an ordinance.(Pa493) Rather, the Ordinance creating the BID imposes a special assessment on property within the District, and empowers the Improvement Management Corporation to, among other things, design and enforce environmental and building design criteria, provide temporary decorative lighting in the district and provide special parking arrangements; it has little relevance to the Zoning Board's implementation of Newark's land use and zoning regulations.

future of [the] city." (Pa441-442). The culmination of that extensive participatory process (that included stakeholders like the Caro Plaintiffs, residents that spoke at the Zoning Board hearing, and representatives of the business community, such as the Ferry Street BID) was the Newark Master Plan of 2012 (the "2012 Master Plan", (id.), elements of which, such as the Mobility Element Report, were published throughout the year prior to its official adoption by the Central Planning Board in September 2012. Accordingly, at the time McWhorter's application for a use variance was heard on September 6, 2012, the 2004 Land Use Element of the Master Plan (the "2004 Master Plan") governed the proposal, although McWhorter, the Zoning Board and the public were aware of the goals and specific recommendations of the 2012 Master Plan that was soon to be adopted by the Central Planning Board.

The Zoning Ordinance of the City of Newark, N.O. §40:1-1.1 *et seq.*, which governs this application to the extent it is not inconsistent with the 2004 Master Plan, designates the McWhorter property as within the I-1 District. The Ordinance does not permit public parking as a principal use in that District (Pa308-310), although it contains detailed regulations concerning off-street parking, N.O. §40:3-7 (applying provisions

required by N.O. §40:5-1 et seq.), which is permitted as an accessory use.[3]

In accord with the 2004 Master Plan, the McWhorter property falls within the S-T District. "The S-T transitional designation is a medium density, mid-rise residential and mixed-use designation providing for a transitional density adjacent to downtown Newark and within the heart of the Ironbound, in close proximity to mass transit opportunities." (Pa424). A key strategy of the Plan, with implications for its land use element, is to "provide adequate dedicated parking or on-street parking for residents and visitors." (Pa430); notably, however, the Plan continues Newark's policy of making off-street "Parking" solely an accessory use. Id. There is no doubt that the Plan acknowledges that parking is an important existing use, (Pa427) but not because the City wants to create more of it. To the contrary, a key goal and policy of the 2004 future land use

[3] Although the City of Newark has yet to adopt a new zoning ordinance that reflects and implements the directives of the 2012 Master Plan, a draft of those regulations was published on June 25, 2014. http://planning.ci.newark.nj.us/zoning_revision/ According to the draft zoning and use regulations, commercial parking continues to be prohibited in the Ironbound, both in the R-5 District in which the relevant property is located as well as in the C-N (Neighborhood Commercial) or C-1 District that surrounds it. Id. at 80, 82. Structured parking and parking garages are permitted in the R-5 District as accessory uses, and in the C-1 District Detached or Attached Private Garages are permitted as an accessory use. Id. at 81, 83. These zoning regulations clearly affirm the 2012 Master Plan's hostility to surface parking lots, especially as a principal use.

plan as explicitly stated in the 2004 Master Plan is "to reduce the presence of surface parking lots and multi-structured parking garages by providing incentives for developers to locate parking underground" and to "encourage current underutilized surface parking lots in the downtown to be developed with higher-density development so as to enhance the City's tax base, employment base and to provide services to the City's population." (Pa430).

This policy to decrease stand-alone surface parking lots is similarly reflected in the 2012 Mobility Element of the Newark Master Plan. First, the Mobility Plan laments the significant "under-performance and underutilization" of the "robust local and regional transit infrastructure" due to "the provision of significant quantities of parking" in the City. (Pa300). And, although it permits "surface parking as a conditional/interim uses as properties are assembled for higher use development" that provision governs only the Downtown area.[4] Instead, the report's strategy to provide a sufficient parking supply to adequately and appropriately support neighborhood commercial areas throughout the City is satisfied by "creat[ing] on-street

[4] See also NEWARK The Living Downtown Plan 2008 (a plan in which "surface parking lots" are "a prohibited use," may be approved as a "conditional interim use" for "no longer than one year" (Pa346) and may be consolidated into shared parking facilities since such lots are considered "disruptive" as they currently exist) (Pa336).

parking regulations," "develop[ing] a Smart Card parking system. . .for metered parking," "evaluat[ing] metered parking time restrictions," and "creat[ing] appropriate on-site parking standards for large-scale commercial land uses" (Pa303); not expanding the number of stand-alone surface parking lots. Accordingly, nothing in the document supports the trial court's finding that the Mobility Plan "provides that the City must permit `surface parking as a conditional interim use'" in the Ironbound neighborhood. (Pa675).

In accord with Newark's now decade-long push to encourage transit-oriented development, the Central Planning Board in 2012, as indicated above, recommended in its new Master Plan to rezone the Applicant's property as mid-rise residential. The properties to the west of the site, and immediately to the north share that designation whereas the properties to the east and south of the site were designated as Neighborhood Commercial, still permitting residential dwellings, but not on the ground floor. (Pa453) Although "[r]eliev[ing] congestion through off-street parking garages, resident permit parking and improved public transportation and bike lanes" is a goal of the Ironbound Neighborhood Plan, included in the 2012 Master Plan, (Pa192), nothing in the Master Plan's Recommendations for the Ironbound neighborhood support the expansion of stand-alone commercial

parking facilities; parking is simply not mentioned as a neighborhood priority. (Pa193).

Rather, in order to promote a more "walkable city" in a residentially-zoned area, as Applicant's property was designated to be in the 2012 Master Plan, off-street parking requirements are to be "reduced" for sites along commercial corridors, and "sites within a 1,200-foot radius of a rail transit station." (Pa458). The Plan states that all efforts should be "to reduce the impact of parking on the quality of the pedestrian streetscape." Id.

Within this framework it becomes apparent that the Zoning Board is working against Newark's efforts to revitalize itself as a pedestrian-friendly, vibrant City with an active street life. Instead of reducing the number of surface parking lots around the Penn Station transit hub, as directed, the Zoning Board, with its approval of its 13th use-variance for a surface parking lot in the area, is expanding that number, and is moving such use further into the area of Ironbound that the Central Planning Board has most recently designated as residential. For the reasons below, this Court must stop the spread of surface parking lots in Newark, and jump-start the remission process so desired by Newark's planners and its residents.

LEGAL ARGUMENT

I. USE VARIANCES SHOULD BE GRANTED ONLY SPARINGLY AND WITH GREAT CAUTION.

This Court's standard of review for the grant or denial of a variance is the same as that applied by the Law Division. Bressman v. Gash, 131 N.J. 517, 529 (1993). Its review is therefore limited to whether the board's decision was arbitrary, unreasonable or capricious. Kramer v. Bd. of Adjust., Sea Girt, 45 N.J. 268, 296 (1965). Like the trial court, this Court may not "substitute [its] own judgment for that of the municipal board," Kenwood Assoc. v. Bd. of Adjust., 141 N.J. Super. 1, 4 (App. Div. 1976); but, grants of a use variance, under N.J.S.A. 40:55D-70d(1), are accorded less deference than denials. Beirn v. Morris, 14 N.J. 529, 536 (1954)("[M]ore is to be feared from . . . ill advised grants of variances than by [denials]."); Galdieri v. Bd. of Adjust. of Morris, 165 N.J. Super. 505, 515 (App. Div. 1976)(same). Because there is a strong legislative preference favoring land use planning by ordinance rather than variance, approval of a use variance is considered "exceptional" relief. Elco v. R.C. Maxwell Co., 292 N.J. Super. 118, 126 (App. Div.1996); see also Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95 (2011)(acknowledging this preference); Kinerkamack Road Assocs., L.L.C. v. Mayor and Council of Borough of Oradell, 421 N.J.Super. 8, 21 (App. Div. 2011)(same). Because

use variances tend to impair sound zoning, they should be granted only "sparingly and with great caution." Kohl v. Mayor and Council of Fairlawn, 50 N.J. 268, 275 (1967). Such exceptional relief is only appropriate where the justification is clear," Elco v. R.C. Maxwell Co., 292 N.J. Super. at 126; and thus, applicants seeking use variances have significant hurdles to overcome.

The Zoning Board's conclusions of law are not entitled to any deference and are subject to *de novo* review; whereas, deference is accorded its factual findings only when they are adequately supported by sufficient credible evidence in the record. Manalpan Realty v. Township Comm., 140 N.J. 366, 378 (1995). Thus, if the Board's Resolution is legally insufficient, either because it misapplies the law or lacks sufficient facts to support its decision, the presumption of validity is overcome, and the Court should reverse the grant of the variance. See, e.g., Wajdengart v. Broadway-Thirty-Third Corp., 66 N.J. Super. 346 (App. Div. 1961)(reversing grant of variance to permit off-street parking lot in a residential zone); Suesserman v. Newark Bd. of Adjust., 61 N.J. Super. 28 (App. Div. 1960)(same for a catering business). Moreover, courts must be particularly vigilant in their review of use variance approvals for commercial non-inherently beneficial uses such as here. Medici v. BPR Co., 107 N.J. 1, 25 (1987).

Because only exceptional cases warrant use variances, a municipal board of adjustment may permit "a use or principal structure in a district restricted against such use or principal structure" only where the applicant demonstrates "special reasons" for the variance. N.J.S.A. 40:55D-70(d)(1). Over the years, this requirement has become known as the "positive criteria." In addition, a variance application must satisfy the statutory "negative criteria," by "showing that [the] variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70(d). In this case, the Applicant failed to meet its burden to prove both statutory criteria; and the Board's skimpy Resolution reflects that failure.

II. THE ZONING BOARD'S GRANT OF A USE VARIANCE UNDER N.J.S.A. 40:55d-70d(1) WAS ARBITRARY AND CAPRICIOUS BECAUSE THE APPLICANT FAILED TO PROVIDE SUFFICIENT CREDIBLE EVIDENCE TO SATISFY THE POSITIVE CRITERIA.

Because McWhorter's proposed use as a paid parking lot is not an inherently beneficial use, it was required to prove that the site is "particularly suited" for the proposed use in order to satisfy the positive criteria. The determination of "particular" suitability for a proposed use is "inherently fact-specific and site sensitive." Price v. Himeji, 214 N.J. 263, 292 (2013). An applicant need not establish that a property is

either "uniquely" suited or "the only possible location for the use," but must demonstrate that "it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone." Id. at 292. Whether a proposal meets the test will depend on the "adequacy of the record presented to the zoning board" and the "sufficiency of the board's explanation of the reasons" on which it based its decision. Id. at 293.

As part of its burden, an applicant "must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use." Medici, 107 N.J. at 4. Such showing is necessary to ensure that the benefit arises not from the use itself, but rather is directly tied to the development of a site that is particularly appropriate for that use (due to its physical characteristics including its location).[5] However, characteristics common to all properties in a zone, rather than

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[5] Applicant's planner testified generally as to the need for more off-street parking in the area, based on his walk "through the neighborhood." (Pa55-56). He did not, however, offer any survey results that indicated that the need he observed would be solved by offering residents or customers of local businesses paid parking options at the proposed location. Furthermore, neither the President of the BID nor the representative for the Fornos restaurant, located on Ferry Street, near the residences adjacent to the property, testified that their respective businesses "were not viable without additional parking," let alone, parking at this location,(Pa108-116);although Mr. Yglesias, stated that "As business owner , , , in Ironbound . . . I absolutely feel that there's a need for more parking during the day."(Pa109:8-10). Counsel for the owner of Fornos restaurant objected to the use variance.

peculiar to the specific site at issue, do "not constitute a special reason sufficient to sustain a use variance." Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555, 565 (App. Div. 1996)(citing Medici, 107 at 24).

In Vidal v, Lisanti Foods, the board's resolution included the statement that "[t]he subject property is particularly suitable for the proposed use because of its terrain, its proximity to Route 10, and its proximity to an industrial zone." 292 N.J. Super. at 565. The Appellate Court rejected this reason expressly because "these characteristics are common to all properties in the PB-2 and PB-1 zones rather than being a peculiar feature of any specific property." Id. Similarly, in Medici, the N.J. Supreme Court rejected the assertion that a site might be "particularly suited" for a motel simply because it was near an interstate highway. 107 N.J. at 24. According to the Court, "[t]he fact that the site is near an interstate highway does not distinguish it from any other property in the vicinity of the highway." Id.

Forgetting the lessons of Medici and Lisanti Foods, this Board explicitly relied upon the fact that the site was near Newark Penn Station, the Prudential Center, and the Ferry Street commercial corridor thus "making it particularly suited for a surface parking lot." (Pa145,¶13). Applicant's aerial photographs, however, indicate that this site's proximity to the

named "attractions" is a common characteristic that is shared by almost all the other properties in the neighborhood. This is not a distinguishing feature of the property, and therefore it was inappropriate for the Board to rely upon this fact to meet the positive criteria. See Saddle Brook Realty v. Bd. of Adjust., 388 N.J. Super. 67, 77 (App. Div. 2006)(fact that drive-through window would reduce parking demand did not prove "particular suitability" because it did not distinguish the site from other locations).

The Applicant's planner also testified that the condition of the property made it particularly suited for a parking lot. "I believe it is particularly suitable by virtue of the condition of the site. Cleared, flat, ideally suited for this type of a land use, we don't [sic] retaining walls of anything to that effect."(Pa57:8-12). However, his photographs reveal that over half the existing site was covered by a 30,000 sq. ft. warehouse building. (Pa248). The site was neither clear nor flat. Moreover, this allegedly "peculiar" feature could be said for any of the neighborhood's properties provided the owners were willing to demolish the existing buildings. Similarly, the planner testified that the property's condition as a large parking lot (permitting full circulation of the site and self-parking, with accessibility from two streets) distinguished the property from other surface parking lots in the vicinity.

(Pa51:16-25). The trial court accepted this design feature as a basis for finding particular suitability. (Pa676) Though this feature may distinguish the proposed use from other parking lots, it does not distinguish it from many other property lots in the neighborhood. Indeed, size works against the Applicant. As the planner acknowledged, the lot's large size, 1.25 acres, made it particularly suitable for development of various permitted uses, not just a parking lot.(Pa54:9-10). See Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 212 (App. Div. 1999)(where court found typography and shape of lot not any more peculiarly well-suited for a funeral home than a permitted use).

In general, McWhorter did not offer any evidence as to why this property was not just as suitable for a permitted use. Instead, the Applicant's planner attempted to show "inutility of the property for a permitted use" (Medici, 107 N.J. at 14) by naming several permitted uses in the I-1 zone, such as "lumberyards," "disco-techs," and the like (none of which had ever been contemplated by the Applicant for the site), which he argued would constitute a "nuisance" to the community relative to a surface parking lot. (Pa54). This "scare tactic," as one resident objector referred to it (Pa98:8-13) did not prove that the property could not be used for a permitted use, such as a

warehouse, as it had been in the past, or as a church, as it had been used more recently. (Pa28:10-16; Pa28:20; Pa30:22-23).

In short, there is nothing particular about this lot, as distinct from any other site in the zone, that makes it any more suited, much less "especially well-suited" for a paid parking lot use. Price, 214 N.J. at 293. In this way, the Board erred as a matter of law in determining that McWhorter's application satisfied the "special reasons" requirement of the positive criteria; and, the trial court's ratification of that determination has unfortunately given Newark's Zoning Board a green light to continue its transformation of this neighborhood into one large parking lot.

III. THE ZONING BOARD'S GRANT OF A USE VARIANCE UNDER N.J.S.A. 40:55d-70d(1) WAS ARBITRARY AND CAPRICIOUS BECAUSE THE APPLICANT FAILED TO PROVIDE SUFFICIENT CREDIBLE EVIDENCE TO SATISFY THE NEGATIVE CRITERIA.

A. Yet Another Surface Parking Lot Will Result in Substantial Detriment to the Public Good.

To meet the first prong of the negative criteria, an applicant for a use-variance has the burden of proving by substantial evidence that the variance can be granted "without substantial detriment to the public good." N.J.S.A. 40:55D-70d. The focus of this public good prong of the test, as set forth in the seminal Medici case, is "on the surrounding properties." The Court held that

> [T]he 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 upon the adjacent properties and determine whether or not it will cause damage to the character of the neighborhood as to constitute "substantial detriment to the public good."

Medici, 107 N.J. at 22 n.12 (emphasis added). A review of the Board's Resolution, specifically paragraphs 13 and 18 (Pa145-6) indicates that the Board improperly focused on the alleged need of Ferry Street businesses, Penn Station commuters and Prudential Center event goers for more parking and ignored the negative impacts on the property's adjacent neighbors. One must assume that it did so based on the Applicant's planner's testimony that there was a "need" for parking, and the statement of Mr. Yglesias, the BID President, that more parking was needed during the day. The Resolution does not specify on what evidence the Board relied.

With respect to the public good, the Board implicitly accepted the opinion of McWhorter's planner that surface parking lots are a relatively "benign" land use, (Pa57:22-23)), and his assertion that they are less "intrusive" than some of the uses permitted under the current Zoning Ordinance (Pa146); though he did not opine as to whether the uses he did mention would still be permitted under the land use elements of the 2004 Master

Plan.[6] The Board additionally accepted his unsupported conclusions regarding traffic volume based on the hearsay report of a traffic engineer, even though Mr. McDonough did not know how many cars would be coming in and out of the proposed lot on a daily basis (Pa73:1-6). The record indicates that he had done no studies on the impact the lot would have on pedestrians in the neighborhood (Pa75:22); nor did he support his opinion that the proposed lot is not a "significant pollution generator" (Pa74:7) with any air quality studies, storm water impact studies, or even professional literature on the matter.

On the other hand, the Board was provided with an overwhelming amount of direct evidence that the project would have a severe negative impact on the people who reside or work in the immediately surrounding neighborhood. First, the City's Planner concluded that the project was a substantial detriment to the public good. She stated:

> It is the opinion of the City that a surface parking lot in this location would detract from the walkability of the neighborhood, create a hazard to pedestrians, and otherwise negatively impact the quality of life for residential and institutional uses (i.e., Presbyterian Community Church and associated child care center) in the vicinity of the site.

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[6] Cf. Victor Recchia Residential Construction, Inc. v. Bd. of Adjust. of Tp. of Cedar Grove, 338 N.J. Super. 242, 250-252 (App. Div.2001)(where town adopted new Master Plan and had not yet changed its zoning ordinance, one had to first determine whether the ordinance was substantially consistent with the master plan to determine its validity).

> The applicant has stated that "there will be no increase in traffic volume on the premises" as a result of the proposed project. It is unclear as to how the conversion of the site from its present condition (i.e., a one story light industrial building) into a surface parking lot with 158 parking spaces would not result in an increase in traffic volume on the premises.
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> * * *
>
> We so not recommend this project because, per our analysis, it appears detrimental to the neighborhood and the zone plan. (Pa265-267)

As previously noted, seventeen objectors appeared at the Zoning Board hearing (Pa3), and seven testified as to why they believed the project, if approved, would negatively impact the surrounding residential neighborhood and thus would be "detrimental to the public good." (Pa86:6-106). Several objectors were concerned with "the destruction of the urban fabric coming into this prime neighborhood of Newark which we're all so heavily invested in." (Pa86:15-18; Pa89:9-11). Others raised a litany of issues associated with unenclosed parking lots, including crime, noise, exhaust fumes, care alarms, and the hazard posed to children "by people rushing out of the parking lot at 5:00pm."(Pa87-88). One objector, an urban designer and developer herself, talked about the "sea of parking" pedestrians would have to walk through to get to Penn Station, and corroborated the City Planner's opinion that the project "is against the walkability of the neighborhood." (Pa89). Concerns about the projects' negative impact on personal

safety was expressed by another objector (Pa92); whereas one objector discussed the increasing levels of pollution that surface parking lots are bringing to neighborhood, thus implicating public health issues, like asthma. (Pa93). One resident in an adjoining building testified regarding "smash and grabs" associated with surface parking lots and how they attract crime. (Pa94:23). Mr. Thomas, another objector spoke to the fact that this parking lot would serve suburbanites, not residents like himself who do not drive, and would add to the flooding problems in his basement and side-yard that he has experienced due to surface parking lots in the area. (Pa97-98). One of the last objectors to speak, emphasized to the Board that it should be protecting the residents in the community, not visitor's cars. (Pa102:1-4).

The Resolution's silence as to City Planner's findings and the harms associated with surface parking lots that were raised by the objectors concerning their neighborhood, homes and lives speaks volumes about the Board's priorities. While this Court in Funeral Home Management, acknowledged that there may be changes "in the character of the surrounding neighborhood" that would make the non-permitted use more acceptable, such is not the case here. Indeed, the neighborhood is becoming more residential, as former industrial buildings convert to condominiums, making it more difficult to reconcile the

increased traffic, noise, towering lights and crime brought by the placement of yet another unenclosed parking lot in this neighborhood. 319 N.J. Super. at 214.

Contrary to Medici, the Board did not focus on the impact the variance would have on adjacent properties, as it is required to do. 107 N.J. at 22 n.12 (the board "must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute 'substantial detriment to the public good.'") It instead ignored credible evidence of severe detriment in order to appease the alleged parking needs of suburban commuters and out-of neighborhood customers of Ferry Street businesses. (Neighborhood customers can walk). For this reason, the Board erred as a matter of law, and the applicant did not satisfy the first prong of the negative criteria.

B. Permission to Build a Surface Parking Lot as a Principal Use Impairs the Intent and Purpose of the Zone Plan and Zoning Ordinance, Especially in This Area of the Ironbound.

To satisfy the second prong of the negative criteria, an applicant has the burden of proving by "an enhanced quality of proof," that the variance requested is not inconsistent with, and will not "substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70d; Medici,

107 N.J. at 3-5. In some instances, such burden can be met based on the factual circumstances and the language of the controlling documents; however, under the circumstances in this case, the governing land use documents should have rendered that task impossible.

In Medici, the Court found a presumption of planning continuity between the municipalities's planning agencies and their governing bodies based on the statutory provisions that require planning boards to reexamine their Master Plan and Zoning Ordinance every 6 years, and zoning boards to submit annual reports to the governing board specifying their decisions on variances and appeals. 107 N.J. at 20-21. Both boards are to recommend changes so as to ensure that the zoning ordinance keeps current with changing conditions. Id. This presumption of continuity thus gives rise to the need for the applicant's proofs and the board's findings to "reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district." Id. at 3-5. In this case, it is equally clear that such presumption arises not only because the City Council has not amended the Zoning Ordinance for several decades with respect to parking, but also because the Planning Board's specific Master Plan zoning recommendations seek to maintain the current Zoning Ordinance's directive against paid parking lots as a permitted principle use.

Most prominently, the Master Plans of 2004 and 2012 depart from Newark's 1990 Master Plan by recommending mid-rise residential and other mixed uses for a newly created zone, which includes the subject property. (Pa435,436;Pa453,456-57). This new zone is located near Penn Station in the Ironbound section of the City, and it is much smaller than the current I-1 zone. Id. Residential is the primary use contemplated in both Plans, and parking facilities, even structured ones, are strongly discouraged in the proposed S-T zone (Pa436), and "the impact of parking on the quality of the pedestrian streetscape" is to be reduced in all residential zones under the 2012 Master Plan (Pa458). As a result, McWhorter's proposed surface parking lot is even more incompatible with the intent and purpose of these Master Plans than it is with the intent and purpose of the Zoning Ordinance, which just limits all parking to an accessory use.

Based on these same documents, the City's Planner came to the same conclusion. She stated in her report to the Zoning Board the following:

> The Future Land Use Plan of the 2004 Land Use Element of the Master Plan designates the site as S-T "Transitional", which is intended to encourage the redevelopment and revitalization of areas within the City that are adjacent to the Central Business District. The primary focus for this area is on mid-rise residential, mixed use, office and retail uses. While the Future Land Use Plan acknowledges the need

> for parking to accommodate the demand from potential new residents and guests, it recommends below-grade garages and off-site locations, where appropriate. Moreover, the provision of parking garages at street level is strongly discouraged. As such, this site does not appear to be an appropriate location for a surface parking lot. The establishment of a surface parking lot at this location is not consistent with the City's vision and goals for the redevelopment of this area, as demonstrated by its position set forth in the 2004 Future Land Use Plan. (Pa414-415)(emphasis added)

The Board in its Resolution seemed to forget the "enhanced quality of proof" standard, and its obligation to address the issue of why the Newark City Council has taken no action to amend the Zoning Ordinance to permit the non-conforming proposed surface parking lot use. The Resolution makes no findings regarding the intent and purpose of the Master Plan, as it relates to the subject property, parking facilities generally, or surface parking lots specifically, except to mention that the Future Land Use Plan of the 2004 Element of the Master Plan "acknowledged the need for parking." (Pa145). But parking where? Downtown? In all residential neighborhoods? The Applicant's planner, on the other hand, attempted to justify the inconsistency between the 2004 Master Plan's S-T transitional zone planning requirements, the Zoning Ordinance and the proposed project, by alleging "changed [economic] circumstances."(Pa59:7). That effort must be deemed futile as a matter of law.

The N.J. Supreme Court's decision in Medici is again instructive on this prong of the negative criteria. In Medici, as is the case herein, the applicant asserted a general need for a non-permitted use. 107 N.J. at 4-9. There, it was an alleged need for good motel accommodations, id. at 24, whereas here it is an alleged need for more paid parking spaces. As was the situation in Medici, the proposed use in this case is not permitted in any zone of Newark, and McWhorter sought a use variance after the zoning board had approved similar use variance applications. Id. at 3-9 (in Medici, the board had approved three other motel use variance applications). Justice Stein, writing for the Court, remarked that it was "inconceivable" that the governing body was not aware that motel construction, inconsistent with the zoning ordinance, was occurring in the municipality. Nonetheless, it took no action. Id. at 24-25. Under such circumstances, the Court held that the governing body's failure to amend the zoning ordinance evidenced its intent to omit that use from those permitted. 107 N.J. at 20-21 ("When an informed governing body does not change the ordinance, a board of adjustment may reasonable infer that its inaction was deliberate."). And, because the governing body took no action to amend the zoning ordinance to permit motel construction in face of such knowledge, the applicant had the "formidable burden of proving that the grant of another use

variance for a motel at this site was not inconsistent with the intent and purpose of the zoning ordinance" Id. at 25.

Although the Court in Medici also recognized that "changed circumstances" might explain such governmental inaction, two of the examples it listed are not present here (*i.e.*, a new use not previously common; and proximity to major construction or commercial development efforts in adjoining municipalities); and the third, changes in the character of the neighborhood, in this instance, supports a finding of deliberate inaction. 107 N.J. at 21,n.11. That is, the growing residential nature of this once industrial neighborhood explains the City Council's "decision" not to amend the Ordinance to permit parking lots as a principal use in the zone governing the site.

The Applicant's planner, on the other hand, argued that the economic downturn since 2007 constitutes a changed circumstance that reconciles the governing body's failure to amend the zoning ordinance with the proposed project. (Pa59:8-23). It is hard to believe that a court would hold that an economic cycle, which by nature fluctuates, would justify the grant of a use variance, which is permanent. See Industrial Lessors, Inc. v. City of Garfield, 119 N.J. Super. 181, 183 (App. Div.)(noting that a variance shares "characteristics of a vested right running with the land" even if it may be abandoned), certif. den., 61 N.J. 160(1972), cited with approval, Stop & Shop Supermarket Co. v.

Bd. of Adjust. of Township of Springfield, 162 N.J. 418, 432 (2000). Therefore, unless this Court acts, nothing will prevent McWhorter from permanently operating a paid parking lot, and jeopardizing the intent of Newark's City Council and its planners to spur a new, type of residential development on the subject site.

This conclusion is also supported by the stark differences between the proposed use and the 2004 Master Plan (Pa436), and now the 2012 Master Plan (Pa456-7). As discussed in the section entitled, GOVERNING LAND USE FRAMEWORK FOR THE CITY OF NEWARK, infra., the 2004 Master Plan, explicitly states that "Parking is an accessory use that will be further addressed in the future Zoning Ordinance." (Pa430). Among the goals of this Plan is the desire "to reduce the presence of surface parking lots and multi-structured parking garages by providing incentives for developers to locate parking underground to the extent possible." (Pa433). The site is included within the proposed S-T district, as part of a zone described as a "special purpose district," with one of those purposes being the provision of residential development near Penn Station and other public transportation hubs in the hope that car ownership would be reduced as well as the associated need for more on-site parking. Parking, to the extent provided, should be in "below-grade garages" and street level parking garages are to be discouraged

unless "those portions of the building facing onto streets are occupied by retail uses or by residential apartments." (Pa436).

In face of Newark's governing land-use documents, McWhorter's proof's fall seriously short of satisfying the enhanced quality of proof standard. Similarly, the Zoning Board's Resolution is deficient, for failing to even mention, let alone reconcile, the inconsistency between the requested variance and (1) the governing body's failure to amend the Zoning Ordinance, and (2) the 2004 and 2012 Master Plans' S-T and mid-rise residential zoning (and apparent hostility to surface parking lots as a solution to Newark's need to accommodate cars). The Board's assiduous avoidance of its obligations under Medici should not be sanctioned, and, McWhorter's use variance approval under the Resolution should be vacated. See Medici, 107 N.J. at 3-5, 8-9.

IV. THE ZONING BOARD'S RESOLUTION APPROVING McWHORTER'S APPLICATION IS LEGALLY INSUFFICIENT BECAUSE ITS DETERMINATIONS ARE CONCLUSORY AND NOT SUPPORTED BY THE RECORD.

Whether the Zoning Board's Resolution in this matter is legally deficient is a question of law to be determined by this Court. New York SMSA v. Bd. of Adjust. of Tp. Of Weehawken, 370 N.J. Super. 319, 334 (App. Div. 2004). As stated in Point I, infra., this Court will not defer to the legal determinations of the trial court or the Zoning Board. It is the Caro Plaintiffs'

position that the Resolution they challenge is seriously deficient and should be found invalid.

Pursuant to N.J.S.A. 40:55D-10(g),

> a municipal agency shall include findings of fact and conclusions based thereon in each decision on any application for development and shall reduce the decision to writing.

It has been established that zoning boards must review their "resolutions with care in order to verify that they adequately set forth the findings and conclusions required to sustain the board's action." Medici, 107 N.J. at 24 n.13. Most recently in Price v. Himeji, the N.J. Supreme Court repeated this obligation when noting that (in the context of the "particularly suitable" standard) a lack of "detailed factual findings that distinguish the property from surrounding sites and demonstrate a need for the proposed use" at the site "may be fatal when tested on review." 214 N.J. at 288.

The bottom line is that legal sufficiency rests on the inclusion of findings of fact and conclusions of law that are tied to the evidence submitted at the hearing, and which clearly delineate the board's reasons for granting the variance. Harrington Glen Inc. Bd. of Adjust. of Leonia, 52 N.J. 22, 28 (1968). "[M]ere recital of testimony or conclusory statements is not permitted, New York SMSA, 370 N.J. Super. at 333-334, because a reviewing court must be able to evaluate whether the

application was analyzed in accordance with the Municipal Land Use Law (the "MLUL"), the municipality's Master Plan and its Zoning Ordinance. Ibid. Without such detail, there is no way to understand the grounds on which the board relied. It is not for the court, as the trial judge did here, to go searching through the record to determine whether there is any statement that could support a particular finding; since it is for the board to identify what evidence supports which finding and to determine whether that evidence is sufficiently credible.

In this matter, the Resolution is seriously deficient, providing few detailed factual findings, no references to the hearing record, and minimal insight into the Board's reasoning as to the positive and negative criteria. Unlike the board's resolution in Scully-Bozarth Post #1817 of Veterans of Foreign Wars v. Planning Bd. of Burlington, 362 N.J. Super. 296, 316-318 (App. Div) certif. den., 178 N.J. 34 (2003), where the board cited case law and specific testimony to explain why the applicant did not meet the negative and positive criteria, the Board's Resolution in this case is skimpy; indicating that it is not supported by "substantial evidence," and should be reversed.

Each alleged "finding" of fact or conclusion will be considered in the sequence it appears in the Resolution.

> 12. The project will eliminate an unsightly light industrial building in which other uses may be permitted as part of zoning, along with the negative

impacts associated with those types of uses, including noise, truck traffic, and lengthy hours of operation. (Pa145).

Here, the Board implies that the project will bring a benefit to the community by eliminating an "unsightly industrial building" along with the negative impacts associated with the permitted uses found in such building. Regardless of the fact that the Board ignored testimony that the building had recently been used as a church, and testimony from the objectors that they would welcome the "activity" associated with a nightclub, office space, or several other permitted use, the Board improperly tied elimination of the building to the establishment of a surface parking lot. Notwithstanding, mere beautification of a building cannot satisfy the "special reasons" requirement of the positive criteria. Burbridge v. Mine Hill Tp., 117 N.J. 376, 387-388 (1990). The Applicant controlled the building's condition, and its own architect testified that it was unwilling to spend the money to fix its roof (Pa5:14-24; Pas15:19-22) or make any other changes that could have improved its condition. Caro Plaintiffs assert that McWhorter cannot use its own conduct, which allowed the building to deteriorate, to justify a use variance for a non-conforming use. To do so would effectively reward such behavior contrary to the policies of the MLUL. It goes without saying that renovating the existing building would have had the same result, but could have

preserved a conforming use without causing the harms the Board conjured up. See, e.g., Degnan v. Monetti, 210 N.J. Super. 174, 185 (App. Div. 1986)(demolition of sewer plant did not support approval of use variance where development of a permitted use could have had the same effect).

> 13. The property is situated in close proximity to major transit hubs and attractions, such as Newark Penn Station, the Prudential Center, and Ferry Street making this location particularly suited for the proposed use.

This fact embeds the legal conclusion that proximity to the listed venues satisfies the "special reasons" test. But as discussed in Point II, infra., paragraph 13 is contrary to the Price and Medici decisions insofar as this property is no more particularly suited for a surface parking lot due to its location than any other property in the neighborhood. It also highlights the fact that the Board did not make any additional findings of fact regarding the size, typography or other feature of the lot to support its determination of "particular suitability." Accordingly, there is no indication in the Resolution that the Board accepted the Applicant's planner's testimony regarding "flat and clear" or even size and access on two streets. Accordingly, the trial court inappropriately searched through the record to find some reasons, other than those set forth by the Board, to justify approval of the variance. (Pa11)

14. Permit parking for residents in the adjacent streets eliminates the availability of on-street parking in the area for non-residents.

Paragraph 14 is simply inaccurate. Pursuant to N.O.§23.5-5.1 on-street parking adjacent to the site limits non-residents to 4 hours,[7] long enough for most visitors to access nearby shops and restaurants. Furthermore, this finding is problematic for two related reasons: First, while the Applicant presented the parking lot as a benefit to residents to meet their alleged parking needs, the Board seemingly found that it was needed for commuters, sports fans, and other visitors to Ferry Street, not the residents. Second, there is no credible evidence in the record to support any finding that there is not enough parking to meet the demands of such outsiders, nor that a paid parking lot at this location would attract people who want to patronize the restaurants on Ferry Street, or other businesses for free. The Applicant's parking/traffic consultant did not testify, but even his hearsay report, which was submitted to the Board, only studied parking lots close to Penn Station; other large parking

[7] It should be noted that in October 2013, the Newark City Council amended and supplemented N.O. §23:5-14 (Parking by Permit Only, in Designated Residential Neighborhoods) to add Section 23:5-14.2 School Permit Parking permitting "school parking on certain residential streets adjacent to the Lafayette Street School, in order to avoid parking on the playground." This enactment, though one year after the Board held its hearing indicates the City Council's willingness to address parking issues in the Ironbound neighborhood through parking regulations, not zoning changes.

lots serving Ferry Street were not included (Pa110:3-10). The report's on-street parking counts were taken during cleaning hours, which also skewed its results.

> 15. There is a significant shortage of parking in the area and the Future Land Use Plan of 2004 Element of the Master Plan acknowledges the need for parking.

There is still an open question as to whether there is a "significant" shortage of parking in the area that can be solved by adding more parking spaces, rather than imposing different regulations; but, this "fact" is nonetheless irrelevant. Both the 2004 and 2012 Master Plans see parking as a land use need that must be addressed. However, this general need to deal with parking does not trump the planning recommendations that apply to this area. As indicated by the City Planner,

> The establishment of a surface parking lot at this location is not consistent with the City's vision and goals for the redevelopment of this area, as demonstrated by its position set forth in the 2004 Future Land Use Plan. (Pa414).

Although McWhorter's planner hammered home the need for parking, he did not deal with the actual words of the 2004 or 2012 Master Plans. The Board's reliance on his testimony with respect to the second prong of the negative criteria thus seriously misplaced.

> 16. The applicant's testimony discloses that there will be no increase in traffic volume on the premises. The project will draw from existing traffic in the area to alleviate the parking shortage.

This paragraph indicates that the Board found that Applicant's testimony disclosed that yet another parking lot to the neighborhood would not increase traffic volume. As previously stated in this brief, his actual testimony did not support such conclusion. Specifically, he opined that the proposed parking lot was a "relief valve" from other parking lots and insufficient on-street parking opportunities. But he did not have any traffic counts to support his conclusion nor expert testimony. (Pa48-52). The traffic expert did not testify, rendering his report hearsay; the report nonetheless, did not conclude that additional parking spaces would not result in increased traffic. Accordingly, Mr. McDonough's opinion regarding traffic volume lacked substantial factual support in the record, and constituted nothing more than a bare conclusion. Such opinions are "worthless," Buckelew v. Grossbard, 87 N.J. 512, 524 (1981), and it should have been rejected by the Board as a net opinion. See Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344, 373 (2007)("the substantial evidence standard is not met if a municipality's decision is supported by only the net opinion of an expert.").

On the other hand, the Board ignored the credible testimony of certain objectors regarding traffic, (*e.g.*, Pa104-105), the City Planner's report, and common sense. Its one-sided prism on this issue was clearly unreasonable.

17. Applicant's planning testimony demonstrates that the proposed use will be less intrusive than many of the uses permitted in the first industrial district, which permitted uses would have a far more detrimental effect on nearby residential residences than proposed parking lot.

In paragraph 17, the Zoning Board discloses that it committed a cardinal sin when granting this variance: In violation of its institutional role as set forth in the MLUL, it arrogated to itself the power to zone by rejecting the existing zoning (by ignoring the inaction of the City Council in changing it) and substituted its own ideas as to the value of surface parking lots (by ignoring the actions of the Central Planning Board, which specifically rejected the notion that surface parking lots are a "benign" land use). Furthermore, speculating as to the harm that might be created by a "hypothetical" permitted use (one that is not even contemplated by the owner) rather than focusing on the harm that will be created by the proposed use is improper reasoning. The Resolution's failure to even mention the City Planner's testimony on this issue, let alone state the reasons why it did not find her report credible (if that is the case), renders the decision legally insufficient. Similarly, the Resolution omits any discussion of the objectors' credible evidence of negative impact on crime, urban design, walkability and traffic (based on their current experience with other surface parking lots in the area).

Judicial review cannot sanction such lack of detail. Price v. Himeji LLC, 214 N.J. at 288.

> 18. Testimony discloses that retail businesses in the Ferry Street commercial corridor require more parking to insure their continued viability.

This "factual" finding represents a gross misrepresentation of the actual evidence in the record. The language in the paragraph seeks to mimic the language found in the 2004 Master Plan, which states,

> Parking does not account for a large proportion of the City's developed land, but it is important for two reason: first, without it many of the office and retail establishments it serves would not be viable. (Pa427).

This document merely states the obvious - that parking serves a business purpose; this statement says nothing about the continued viability of any given business in any given neighborhood nor does it say anything to indicate that such business needs cannot be satisfied by accessory parking only. Indeed, as previously explained, the entire document in which this quote is included, expresses a hostility to surface parking lots that the Board chose to ignore.

Furthermore, not one person at the hearing testified that the economic viability of businesses on Ferry Street would not continue, let alone be threatened, if the proposed parking lot would not be built. Neither Mr. Yglesias, the President of the BID, nor the Applicant's planner made such an assertion.

Accordingly, no link between the "continued viability" of Ferry Street's businesses and the McWhorter parking lot was ever established. It therefore, follows that it cannot be the basis on which the Board rested its tacit conclusion that the "need" required to sustain satisfaction of the positive criteria has been met. See Medici, 107 N.J. at 4 (stating that an applicant "must prove and the board must specifically find that the use promotes the public welfare because the proposed site is particularly suitable for the proposed use).

Following paragraph 18, the Zoning Board concludes that it can grant the applicant a use variance for the surface parking lot "without substantial detriment to the public good and without substantially impairing the intent and purpose of the Zone Plan and the Zoning Ordinance of the City of Newark."(Pa146). It grounds this legal conclusion with respect to the negative criteria in its finding that the site will (1) be "utilized to enhance the surrounding business corridor" and (2) that it will "have less detrimental effect on surrounding area than many uses" currently permitted in the zone in which the site is located. (Id.) However, as shown above these two facts do not adequately support the statutory legal standard for satisfying the negative criteria, let alone granting a d(1) use variance.

As the above analysis makes clear, the Board's resolution is woefully inadequate. It fails to identify which facts support its implicit conclusion that the positive criteria was satisfied; it fails to identify portions of the record that support each of the so-called facts; and it fails to explain its reasoning as to why it determined that the variance could be granted without impairing the Zoning Ordinance and the Master Plan. Notwithstanding its failure to denote what testimony supports which fact, and what fact supports which conclusion, these so-called facts and conclusions, as enumerated in the Resolution and discussed above, do not support the Resolution's determination to grant the use-variance. They are nothing more than a "mere recital of testimony or conclusory statements couched in statutory language." See Cox & Keonig, New Jersey Zoning and Land Use Administration, §28-5, at pp. 693-698 (2013). Because they do not "constitute the deliberative and specific determination" the courts require, Medici, 107 N.J. at 23, this Court should declare the Resolution invalid.

V. THE ZONING BOARD'S APPROVAL IS INVALID BECAUSE IT CONSTITUTES IMPROPER ZONING BY VARIANCE.

This appeal discloses that a grave injustice has been done to the residents, taxpayers, citizens and other stakeholders of the City of Newark; and will continue to harm them unless this Court puts an end to the Newark Zoning Board's "way of doing

business." For years, it appears that the Board has been granting use variances for surface parking lots in the Ironbound section of Newark, despite the Municipality's clear policy to the contrary.

It is a central tenant of zoning law that the authority to zone rests exclusively with the governing body, not an appointed board like the zoning board. Paruszewski v. Tp. Of Plainsboro, 154 N.J. 45, 51-53 (1998). Furthermore, although the Central Planning Board is responsible for preparing and adopting a city's Master Plan with the participation of the public,[8] it is still the City Council that gets to implement that Plan through the Zoning Ordinance. In this way, the City's Land Use structure remains democratic, and responsive to its residents.

But something has gone wrong in Newark over the past few years. Although the record does not indicate exactly when the Zoning Board granted the use variances for the many surface parking lots in the Ironbound, it does reveal that 12 had been granted prior to the approval of the use variance here. What was the Zoning Board thinking? Over the entire period of time, the City Council never amended the Zoning Ordinance to permit paid parking as a principal use, and in face of that deliberate

[8] It should be noted that the preparation of the 2004 and 2012 Master Plans in Newark involved a very intense and inclusive process in which many community activists, like some of the Caro Plaintiffs participated.

inaction, the Zoning Board continued to hand out use variances for such purpose as if they were candy. On what basis? Its sympathy to the property owners who wanted to make a quick profit with little investment? Its sympathy to suburban commuters and others who wanted to visit Newark's cultural attractions located in the Downtown? Its view that surface parking lots are a "benign" land use?

In any event, based on the paragraphs 12 and 17 of the Resolution, and the one rationale the Board offered for its decision to grant the use variance (Pa145-6), it is clear that the Board has been in the process of rejecting the Zoning Ordinance for years; and instead, substituting its own judgment as to what it thinks is an appropriate use for the Ironbound area that is located near Penn Station. For years, no one said anything, or at least, did not garner the resources to challenge the Zoning Board's decisions. But now, things are different. The planning process in which the City has been engaged since 2004, has energized residents and has given them the hope that they can have a say on how their urban environment looks as well as functions.

Because the Zoning Board does not have the authority to arrogate to itself the power to zone by rejecting the existing zoning and substituting its own ideas as to what is and is not an appropriate land use, its approval herein constitutes

improper *de facto* zoning and should be reversed. See Cox, Land Use, §7-4.2 at p. 196. (failure to consider the negative criteria's demand for planning and zoning consistency in granting use variances "amounts to an *ultra vire* zoning, even if done incrementally").

As presented throughout this memorandum of law, the situation here is particularly egregious and demands judicial action. Both the 2004 and 2012 Master Plans envision the neighborhood implicated in this matter as residential. But, a residential community that has an active street life, where cars have only a secondary role, if any role at all. Both Plans see surface parking lots as a threat to this nascent, middle-class residential neighborhood, where "walkability," and "pedestrian-oriented" and "public-transit-friendly development are key strategies to revitalize the zone.

It is apparent from the analysis in previous sections of the brief, that the Zoning Board's action in this case is inconsistent with the vision articulated in both Master Plans. Its defiance of the City Council, the Planning Board and the public is brazen; if not stopped now, it will continue to unfairly threaten the urban fabric of this revitalizing neighborhood, while at the same time undermining the democratic process inherent in New Jersey's municipal land use procedures.

CONCLUSION

For all the foregoing reasons, the Caro Plaintiffs respectfully request that this Court reverse the trial court's approval of the Zoning Board's October 11, 2012 Resolution; declare that Resolution null and void in its entirety; and direct the Applicant to cease operating the site as a paid parking lot and to remove any and all structures and improvements installed pursuant to the Zoning Board's approval.

Respectfully submitted,

NEW JERSEY APPLESEED PILC

Renee Steinhagen, Esq.

Date: August 10, 2014