

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: COUNTY OF BERGEN**

*Prepared by the Court*

CIVIL ACTION

**FILED**

**AUG 26 2013**

**ALEXANDER H. CARVER, III**

**J.S.C.**  
DOCKET NO.: L-8293-12

BERGEN PASSAIC LTACH, LLC,

Plaintiff,

v.

CITY OF HACKENSACK ZONING  
BOARD OF ADJUSTMENT and  
CITY OF HACKENSACK,

Defendants,

and

PROSPECT AVENUE COALITION, LLC,

Defendant-Intervenor.

**ORDER FOR JUDGMENT**

**THIS MATTER** having come on for trial in the presence of WINNE, BANTA, HETHERINGTON, BASRALIAN & KAHN, P.C. (Joseph L. Basralian, Esq., appearing), attorneys for the Plaintiff, BERGEN PASSAIC LTACH, LLC; and MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP (Thomas P. Scrivo, Esq., appearing), and ZISA & HITSCHERICH, ESQS. (Craig M. Pogosky, Esq., appearing), attorneys for the Defendant, CITY OF HACKENSACK; KIRSCH & KIRSCH, L.L.P. (Laura S. Kirsch, Esq., appearing), attorneys for the Defendant, CITY OF HACKENSACK ZONING BOARD OF ADJUSTMENT; and MCCARTER & ENGLISH, L.L.P. (Gary T. Hall, Esq., appearing), attorneys for the Defendant-Intervenor, PROSPECT AVENUE COALITION, LLC; and the Court having

considered, the evidence, and the argument of counsel, and for the reasons set forth in the Opinion of even date,

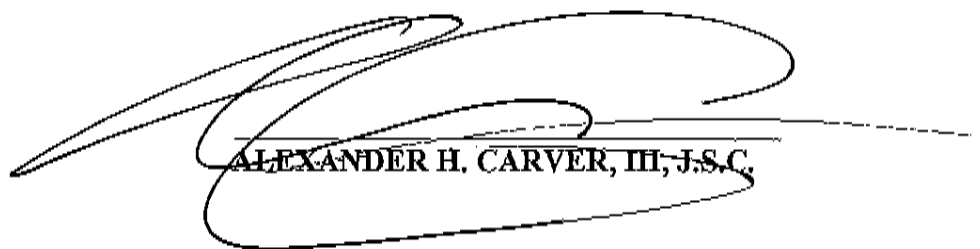
**IT IS** on this 26th day of August, 2013,

**ORDERED and ADJUDGED**, that the action of the Defendant, City of Hackensack Zoning Board of Adjustment, denying the the application of the Plaintiff, Bergen Passaic LTACH, LLC, be and it is hereby affirmed; and it is further

**ORDERED**, that Judgment be and it is hereby entered in favor of the Defendants; City of Hackensack, City of Hackensack Zoning Board of Adjustment, and Prospect Avenue Coalition, LLC, and against the Plaintiff, Bergen Passaic LTACH, LLC; and it is further

**ORDERED**, that Plaintiff's Complaint be and it is hereby dismissed with prejudice; and it is further

**ORDERED**, that a copy of this Order shall be served on all counsel within seven (7) days from the date hereof.



ALEXANDER H. CARVER, III, J.S.C.

NOT TO BE PUBLISHED  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

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: COUNTY OF BERGEN

*Prepared by the Court*

CIVIL ACTION

BERGEN PASSAIC LTACH, LLC,

Plaintiff,

v.

CITY OF HACKENSACK ZONING  
BOARD OF ADJUSTMENT and  
CITY OF HACKENSACK,

Defendants,

and

PROSPECT AVENUE COALITION, LLC,

Defendant-Intervenor.

OPINION

DOCKET NO.: L - 8293-12

**FILED**  
AUG 26 2013  
ALEXANDER H. CARVER, III  
J.S.C.

WINNE, BANTA, HETHERINGTON, BASRALIAN & KAHN, P.C. (Joseph L. Basralian, Esq., appearing), attorneys for the Plaintiff, BERGEN PASSAIC LTACH, LLC.

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP (Thomas P. Scrivo, Esq., appearing), and ZISA & HITSCHERICH, ESQS. (Craig M. Pogosky, Esq., appearing), attorneys for the Defendant, CITY OF HACKENSACK.

KIRSCH & KIRSCH, L.L.P. (Laura S. Kirsch, Esq., appearing), attorneys for the Defendant, CITY OF HACKENSACK ZONING BOARD OF ADJUSTMENT.

MCCARTER & ENGLISH, L.L.P. (Gary T. Hall, Esq., appearing), attorneys for the Defendant-Intervenor, PROSPECT AVENUE COALITION, LLC.

## **I. PROCEDURAL HISTORY**

The Plaintiff, Bergen Passaic LTACH, LLC ("Plaintiff" or "LTACH") made an application before the Defendant, City of Hackensack Zoning Board of Adjustment ("Zoning Board" or "Board") seeking a use variance under and pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the construction of a twenty-four story building inclusive of long-term acute care facilities. The preliminary and final site plan application, subdivision approval to eliminate all lot lines and create one lot, use variance and bulk variance application (the "Application") were all submitted to the City of Hackensack on June 12, 2008.

The Board held twenty-three public hearings on the Project, beginning in April of 2009 and continuing through January of 2012 because of the complexity of the project and the overwhelming public interest. It wasn't until January of 2012 that the Board voted to deny the Application, and on September 20, 2012, the Board issued a Resolution reflecting same. The Board's Resolution stated in part that LTACH was unwilling to accept various conditions that may have mitigated some of the detrimental effects of granting the Application, and that the proposal would have significant negative impacts upon the neighborhood due to parking deficiency, noise generated by ambulances in residential neighborhoods, and unsafe traffic created by fitting three commercial uses in a 50,000 square foot lot, all of which outweighed the inherently beneficial proposed uses.

LTACH filed an action in lieu of prerogative writs challenging the Board's denial of the Application on November 7, 2012. Trial was held in this matter on Friday, August 16, 2013 and Monday, August 19, 2013.

For the reasons that follow, the Board's denial of the LTACH Application is affirmed.

LTACH filed a Complaint in Lieu of Prerogative Writs challenging the Board's denial of the Application on November 7, 2012. Trial was held in this matter on August 16 and August 19, 2013.

## **II. STATEMENT OF FACTS**

LTACH is the owner of contiguous properties located in the City of Hackensack and designated as Block 344, Lots 3, 4, 5 and 14 on the City of Hackensack Tax Map. LTACH applied to the Zoning Board for use variances under N.J.S.A. 40:55D-70(d)(1) to permit construction of a twenty-four story building containing long-term acute care facilities and providing 144 long-term acute care beds, a dialysis unit with 84 kidney dialysis chairs, and an adult medical daycare facility that could accommodate as many as 250 adult daycare clients. The Application envisioned demolishing three separate one-family houses located in the single-family residential zone (R-75) on Summit Avenue, and a fourth single-family house located in the multi-family residential zone (R-3) on Prospect Avenue on a lot backing the three Summit Avenue Houses. At the Board's suggestion LTACH later modified the proposal to reduce the size of the building to nineteen stories with 120 long-term acute-care beds, 63 dialysis units, and 180 adult daycare slots.

Hospital facilities and dialysis units are not permitted uses in either the R-75 or R-3 Zone; adult daycare centers are a conditionally permitted use in the Summit Avenue R-75 Zone. LTACH also sought the following "c" bulk variances in the R-3 Zone: (1) to allow a minimum lot width of 100 feet where 125 feet is required; (2) to allow 19:1 side yard height ratio where maximum 4:1 is permitted; (3) to allow 40.5% lot coverage where maximum 30% is permitted; (4) to permit no buffer where a 6 foot buffer to the edge of the R-3 district is required; (5) to permit a 10-foot driveway width where 18-22 feet is required; (6) to permit paving within a side

yard setback; (7) to provide an 18.5 foot backup where 22 feet is required; (8) to permit a 0 foot sign setback where a 35 foot setback is required; and (9) to permit a 31 square feet sign area mounted on the retaining wall which is part of the structure.

LTACH was also directed by the Board to seek a variance from the total number of required parking spaces; the Board and the City of Hackensack determined that the required parking for the proposed Project was 608 spaces, where LTACH proposed only 417 spaces.

At the first hearing on the Application, the Board of Adjustment invited the Mayor and certain Council members to make public statements on the record before any proofs or testimony were offered, which they did; counsel for LTACH did not object. The officials' statements generally urged the Board to work fairly and diligently and to seriously consider the concerns of the residents testifying at the hearings.

In support of the Application, Richard Pineles testified on the need for a dialysis center and an adult daycare facility, and he stated that there were only six dialysis centers in Bergen County, two of which were free standing. Subsequently, it was submitted that a dialysis center recently opened on Passaic Street in Hackensack, only a few blocks from the proposed LTACH facility.

Additionally, LTACH was issued a Certificate of Need for 72 beds, half of the originally proposed 144. Where 608 parking spaces were required by ordinance, Mr. Pineles testified that he thought that LTACH's Application would require only 405 parking spaces, though he admitted that the Prospect Heights Nursing Home which is located a few blocks away from the proposed Project, has insufficient parking and rents parking space from a local synagogue. He further noted that the facility would employ 500 people and would be a hospital though it would not provide all the facilities of Hackensack University Medical Center. Mr. Pineles and the other experts who testified on behalf of the Plaintiff were unable to point to any authoritative sources

in order to establish the number of parking spaces needed for the three combined uses in the proposed facility. The Plaintiff relied upon Mr. Pineles' estimates, though he has had no experience with acute long-term care facilities, dialysis facilities, or adult day care facilities.

The Board considered the testimony of the Planner and Engineer for the Board, Gregory Polyniak, as it related to the substantial safety issues presented by the Application on both Summit and Prospect Avenues because of the volume of traffic and the configuration of entrances and exits for vehicles. Specifically, both Summit Avenue and Prospect Avenue currently experience high traffic volumes with frequent traffic backups and delays in the areas of the proposed Project. The testimony at the public hearings confirmed that the Project would increase traffic, and that the configuration of the entrances and exits for vehicles would create a number of dangerous traffic situations. Summit Avenue is a minor arterial carrying about 14,000 vehicles a day and Prospect Avenue is an urban collector carrying about 12,000 vehicles a day. Both streets are heavily used by ambulances and emergency vehicles traveling to Hackensack University Medical Center which is a few blocks south of the proposed site.

Mr. Polyniak testified that the Summit Avenue side of the Project presents a circular driveway exiting onto Summit Avenue immediately south of the entrance and an exit ramp to the underground parking garage. Two cars exiting at approximately the same time would not be able to see past each other in order to safely enter the roadway and would have no means to decide which of the two had the right-of-way.

The Prospect Avenue side of the Project creates additional cause for safety concerns. The exit from the parking garage on the southern side of the Project is sloped too steeply to let the vans and trucks that are expected to use this exit move safely across the sidewalk and into traffic. On the north side of Prospect, trucks would be required to backup in order to reach the oxygen

tanks and trash compactor stored at the side of building. In doing so, these trucks would block both lanes of traffic on Prospect Avenue. LTACH proposed that to remedy this potential safety hazard, a staff person could stand in the middle of the street holding up traffic in both directions while the truck maneuvered in and out of the driveway.

LTACH acknowledged that the Application would add 90 to 100 vans entering and exiting the facility per day. Initially, LTACH proposed to have food delivered with large articulated tractor-trailers backing in. At the final hearing however, LTACH suggested it would not use the large food trucks but would use vans that could proceed to the garage in their place. There was no further testimony offered pertaining to the enforcement of this suggestion.

Mr. Polyniak's conclusion was that all of the unsafe traffic movements must be accommodated by a site redesign, and that the traffic issues were created as part of the "overdevelopment" of the site.

The Board also heard testimony from Michael Szerbaty, LTACH's architect, who testified that the proposed building would have a glass façade, and the Board found that both the façade and the 19-story height of the building were out of character for the neighborhood and that the building would not blend in, a finding fully supported by the record below. The Plaintiff's own witnesses admitted that it was unique to put a building such as the one proposed by Plaintiff in a residential neighborhood. Several witnesses testified as to how out of character the Project was for both Prospect and Summit Avenue given the surroundings.

Twenty-three hearings/meetings later, the Board determined that the Application would substantially impair the Master Plan and Zoning Ordinance, would adversely affect the safety and quality of life of the residents in the area, and would be out of keeping with the residential nature of its surroundings.



### III. CONCLUSIONS OF LAW

1. *The Hackensack Zoning Board of Adjustment's Denial of the Application for Variance and Site Plan Relief is Fully Supported by the Record and is not Arbitrary, Capricious or Unreasonable.*

This Court's scope of review is limited. When a reviewing court is considering an appeal from actions taken by a planning or zoning board, the standard applied is whether the grant or denial was arbitrary, capricious or unreasonable. Kramer v. Board of Adjustment, 45 N.J. 268, 296 (N.J. 1965). A reviewing court accords great deference to the expertise and discretion of a municipal board; thus, so long as the governing body's decision is supported by the record and is not so arbitrary, unreasonable or capricious as to amount to an abuse of discretion, the governing body's expertise and discretion will not be reversed. Comm. for a Rickel Alternative v. City of Linden, 111 N.J. 192, 199 (1988); Evesham Twp. Bd. of Adj. v. Evesham Twp., 86 N.J. 295 (1981); Jayber Inc. v. Twp. of West Orange, 238 N.J. Super. 165, 173 (App. Div. 1990). A board's resolution of factual issues must stand if supported by sufficient credible evidence in the record. Rowatti v. Gonchar, 101 N.J. 46, 51 (1985). However, a reviewing court gives no deference to agencies with respect to determinations of issues of law; rather, it applies a de novo standard of judicial review. *See, e.g.,* Abbott v. Burke, 100 N.J. 269, 298-99 (1985); Bonaventure Int'l v. Borough of Spring Lake, 350 N.J. Super. 420, 438 (App. Div. 2002). This applies in the field of land use law where a land use agency's decision regarding a question of law, such as the interpretation of an ordinance, is subject to a de novo review by the courts. *See, TWC Realty P'ship v. Zoning Bd. of Adj. of the Twp. of Edison*, 315 N.J. Super. 205, 211-212 (Law Div. 1998), *aff'd*, 321 N.J. Super. 216 (App. Div. 1999).

The rationale for this standard of review is that a land use agency has “no peculiar skill superior to the courts” regarding purely legal matters. Jantausch v. Borough of Verona, 41 N.J. Super. 89, 96 (Law Div. 1956), *aff’d*, 24 N.J. 326 (1957); Pagano v. Zoning Bd. of Adj., 257 N.J. Super. 382, 396-97 (Law Div. 1992). Additionally, greater deference is ordinarily given to the denial of a variance than to a grant, Med. Ctr. v. Princeton Twp. Zoning Bd. of Adj., 343 N.J. Super. 177, 199 (App. Div. 2001), since grants tend to impair sound zoning more than denials. Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967).

A court will uphold a decision by the board of adjustment, if the latter presents clear and specific findings that the grant of a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. Medici, supra, 107 N.J. at 2-3. Such proofs and findings must satisfactorily reconcile the grant of a use variance with the ordinance's continued omission of the proposed use from those permitted in the zone, and thereby provide a more substantive basis for the typically conclusory determination that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance. N.J.S.A. § 40:55D-70(d).

A quasi-judicial board is bound to consider only those matters which pertain to the application and must limit its review and base its decisions on competent and credible evidence. Tomko v. Vissers, 21 N.J. 226 (N.J. 1956).

N.J.S.A. 40:55D-70(d) authorizes a board of adjustment (or a combined board exercising its powers as a board of adjustment) to grant a variance and permit a nonconforming use of zoned property where “special reasons” exist for the variance (the ‘positive criteria’) and 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 the zoning ordinance (the

'negative criteria'). See, Meridian Hospitals Corp. v. Borough of Point Pleasant, 325 N.J. Super. 490 (App. Div. 1999).

In analyzing a use variance, the Applicant is required to establish "special reasons" for the variance and by an enhanced level of proof, satisfy the board that the variance will not have a substantial negative impact on the public or the municipality's zoning plan and laws. See, Medici v. BPR Co., 107 N.J. 1 (1987). This requirement is known as the "positive criteria." New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 160 N.J. 1, 6 (1999).

"Special reasons" for a variance may be found in three circumstances:

(1) where the proposed use inherently serves the public good, such as a school, hospital, or public housing facility; (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use."

Nuckel v. Borough of Little Ferry Planning Bd., 108 NJ 95 at 102 (2011) (quoting Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 NJ Super. 67, 76 (App. Div. 2006)).

Specifically, "special reasons" are defined by the general purposes of the zoning laws, and can include, among other things, the promotion of health and safety, the prevention of sprawl, and the creation of a desirable visual environment. Burbridge v. Mine Hill, 117 NJ 376, 386 (1990). The positive criteria must be site specific and the applicant must show that the proposed use is peculiarly fitted to the particular location for which the variance is sought. Kohl v. Mayor and Council of Fair Lawn, 50 NJ 268, 279 (1968). This is a difficult burden and requires that the applicant show that the particular site must be the location to promote the general welfare. Fobe Assoc. v. Mayor and Council of Demarest, 74 NJ 519, 534 (1977).

However, if the proposed use is inherently beneficial, an applicant's burden is lessened to a significant degree, and the applicant need not meet the "enhanced quality of proof standard." *See, Smart Smr v. Borough of Fair Lawn Board of Adjustment*, 152 N.J. 309 at 323 (N.J. 1998). An inherently beneficial use presumptively satisfies the positive criteria. *Id.*

LTACH also presented evidence in support of the argument that there is a significant need for acute long-term care beds and facilities in New Jersey, as well as dialysis centers and adult daycare centers, a significant factor considered by the Board in rendering its decision on the Application.

Here, the Board of Adjustment determined that the LTACH facility was an inherently beneficial use and that it met a legitimate public need. Therefore, LTACH did not need to present evidence in support of the satisfaction of the "positive criteria"; instead the Board was obligated to, and did consider, the factors set forth in *Sica v. Bd. of Adjustment* to weigh the positive and negative criteria in determining whether to grant the use variance. 127 N.J. 152 (1992).

In *Sica v. Bd. of Adjustment*, 127 N.J. 152 (N.J. 1992), the court concluded that in analyzing whether a proposed use was inherently beneficial, a trauma rehabilitation center was inherently beneficial because it was "so benevolent a facility, even when operated for a profit" that it would satisfy the positive criteria set forth in the MLUL. *Id.* at 159-60. *See also, Urban Farms, Inc. v. Franklin Lakes*, 179 N.J. Super. 203 (App. Div. 1981), certif. denied 87 N.J. 428 (1981) (holding that a nursing home, whether or not nonprofit, comes within the inherently beneficial category). It is evident, therefore, that the property, a nursing home and long-term care facility which serves the general welfare, satisfies the positive criteria set forth above as it is an inherently beneficial use within the meaning of the MLUL and the case law interpreting the statute.

As to the negative criteria, the Sica court stated that “a too strict reading of the negative criteria can result in the denial of many deserving inherently beneficial uses which should have the right to locate on any appropriate site where the physical impacts of their operations can be alleviated to a reasonable extent by the imposition of suitable conditions and restrictions.” *supra*, 127 N.J. at 160. It is also well-settled that the facts of each case will demonstrate the extent to which an inherently beneficial use compensates for its adverse effect on the neighborhood. Generally, the court in Sica outlined the guide to balancing the negative and positive criteria when deciding inherently beneficial use cases,

First, the board should identify the public interest at stake. Secondly, the board should identify the detrimental effect that will ensue from the grant of the variance. Certain effects, such as an increase in traffic, or some tendency to impair residential character, utility or value, will usually attend any nonresidential use in a residential zone. When minimal, such effect need not outweigh an inherently beneficial use that satisfies the positive criteria... Third, in some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use... Fourth, the board is to weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

Id. at 166.

Here, the Board identified that the public interest at stake was the need for an long-term acute care facility as well as an adult daycare center and dialysis unit. Richard Pineles testified regarding the need for a dialysis center and an adult daycare facility, and he stated that there were only six dialysis centers in Bergen County, two of which were free standing. However, a dialysis center recently opened on Passaic Street in Hackensack, only a few blocks from the proposed facility.

On the detrimental effect of the Application, the Board found the testimony of Mr. Pineles with regard to the number of LTACH beds needed and the number of parking spots required to be less than credible. LTACH was issued a Certificate of Need for 72 beds, half of

the originally proposed 144. Where 608 spaces were required by ordinance, Mr. Pineles testified that he thought that LTACH's Application would only require 405 parking spaces, though he admitted that the Prospect Heights Nursing Home, located a few blocks away from the proposed Project, has insufficient parking and rents parking space from a local synagogue. The Board also heard testimony from Michael Szerbaty, LTACH's architect, who testified that the proposed building would have a glass façade, and the Board found that both the façade and the height of the building were out of character for the neighborhood and that the building would not blend in, a finding fully supported by the record below.

The Board also considered the testimony of Gregory Polyniak relating to the substantial safety issues presented by the Application on both Summit and Prospect Avenues because of the volume of traffic and the configuration of entrances and exits for vehicles. Mr. Polyniak's conclusion was that all of the unsafe traffic movements must be accommodated to a site redesign, and that the traffic issues were created as part of the "overdevelopment" of the site.

Specifically, both Summit Avenue and Prospect Avenue currently experience high traffic volumes with frequent traffic backups and delays in the areas of the proposed Project. The testimony at the public hearings confirmed that the Project would increase traffic, and that the configuration of the entrances and exits for vehicles would create a number of dangerous traffic situations. Summit Avenue is a minor arterial carrying about 14,000 vehicles a day and Prospect Avenue is an urban collector carrying about 12,000 vehicles a day. Both streets are heavily used by ambulances and emergency vehicles traveling to Hackensack University Medical Center which is a few blocks south of the proposed site.

The Summit Avenue side of the Project presents a circular driveway exiting onto Summit Avenue immediately south of the entrance and an exit ramp to the underground parking garage.

Two cars exiting at approximately the same time would not be able to see past each other in order to safely enter the roadway and would have no means to decide which of the two had the right-of-way.

The Prospect Avenue side of the Project created additional cause for safety concerns. The exit from the parking garage on the southern side of the Project is sloped too steeply to let the vans and trucks that are expected to use this exit move safely across the sidewalk and into traffic. On the north side of Prospect, trucks would be required to backup in order to reach the oxygen tanks and trash compactor stored at the side of building. In doing so, these trucks would block both lanes of traffic on Prospect Avenue. LTACH proposed that to remedy this potential safety hazard, a staff person could stand in the middle of the street holding up traffic in both directions while the truck maneuvered in and out of the driveway.

LTACH acknowledged that the Application would add 90 to 100 vans entering and exiting the facility per day. Initially, LTACH proposed to have food delivered in the same manner with large articulated tractor-trailers backing in. At the final hearing however, LTACH suggested it would not use the large food trucks but would use vans that could proceed to the garage in their place. There was no further testimony offered pertaining to the enforcement of this suggestion.

The excavation that was required to construct the parking garage presented two issues before the Board. LTACH introduced evidence that the garage would require excavation 68-70 to seventy feet into the ground, and it would consist of five levels of below-grade garage and a level for the building's mechanical systems. The Board asked for additional geotechnical information to assure that the five level subsurface garage, additional level for mechanicals and any footings could be done safely without endangering the neighboring properties. LTACH insisted on deferring the studies until after approval was granted.

The second issue pertaining to the excavation for the parking garage related to the deleterious effect the construction would have on the residents in the area. In order to excavate the site, thirty truckloads of material would have to be taken from the site every day for ten months according to LTACH. LTACH also acknowledged that they had not yet prepared a staging plan to minimize the adverse consequences of construction.

Several individuals testified that they were concerned about how out of character the Project was for Prospect Avenue, and even more so main public entrance on Summit Avenue, given the residential nature of the neighborhood. The proposed 19-story building is more than twice the height of the adjacent buildings on Prospect Avenue and its façade is out of keeping with the other buildings in the immediate area. The Summit Avenue main public entrance to the facility, access to the garage, and the circular drop-off driveway in the front of the building is out of character with the neighborhood, and would adversely affect adequate light, air and open space for the buildings in the adjoining lots and properties, and the scale of the Project is much larger than what the neighborhood can support.

The Board found based upon all the testimony presented that there would be a significant detrimental effect on the neighborhood in granting the site Application, including the impact on traffic safety and parking, and determined that the proposed uses are contrary to the zone plan and zoning ordinances of Hackensack.

In consideration of the third factor enumerated in Sica, supra, the Board found that certain mitigating conditions could reduce the detrimental effect of granting the Application including reducing the size of the Project to permit adequate parking and avoid unsafe conditions at the site. LTACH did in fact reduce the facility from the originally proposed twenty-four stories to nineteen stories; however, the Board found that this reduction was insufficient to offset the



detrimental effects of the Project or to provide safe and efficient traffic circulation at the site. Additionally, inadequate parking at the site was not addressed by LTACH, nor were the safety concerns for ingress and egress at the site including the dangerous condition at the surface loading zone and the dangerous ramp slope.

Finally, the Board weighed the positive and negative criteria and made the determination that on balance, the granting of the use variance Application would cause substantial detriment to the public good. This finding is clearly supported by the record below, and is based upon significant and credible evidence. The Board made specific findings of fact pertaining to the reasoning for the denial of the Application, including the traffic and parking issues, significant safety concerns, and determined that the proposed uses, though inherently beneficial, did not outweigh the detrimental effect on the neighborhood and were not consistent with Hackensack's Master Plan. This determination is not arbitrary, capricious or unreasonable, and the Court hereby upholds the Board's denial of the use variances and related relief sought by LTACH.

2. The Factual Determination of the Hackensack Zoning Board of Adjustment is Valid and its Denial of LTACH's Application Based on that Determination is not Arbitrary, Capricious or Unreasonable.

The plaintiff has the burden of proving that the Board's determination is arbitrary, capricious and unreasonable. Toll v. Board of Chosen Freeholders, 194 N.J. 223, 256 (2008). Furthermore, the deference accorded to a board's denial of a variance is greater than that given to its decision to grant a variance. Thus, a party seeking to overturn the denial of a variance must prove that the evidence before the local board was overwhelmingly in favor of the applicant. CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 568 (App. Div. 2010).

The Board heard testimony from LTACH's witnesses including Richard Pineles, Michael Szerbaty, Charles Thomas, Kr., Eric Keller and Joseph Burgis all in favor of the Application. The Board specifically found that the testimony of Mr. Pineles, particularly with respect to the number of parking spots required and the number of acute long-term care beds needed to be less than credible. The Board also found the testimony of Mr. Keller as to parking to be less than credible. These findings were based on traffic and parking studies prepared by LTACH's own experts which stated that there was no foundation or existing comparable uses to provide any bases for drawing conclusions as to parking or traffic volumes. The Board, therefore, was clearly justified in rejecting these analyses as unsupported by facts and data.

The Board found the testimony of Gregory Polyniak to be much more persuasive and credible as it related to parking and the traffic situation that would be created in approving the Application. Mr. Polyniak reviewed all parking and traffic data including the testimony from the LTACH's representatives and members of the public and he concluded that the detrimental effects of the Application significantly outweighed its beneficial use because the parking issues and traffic that would be generated in granting the Application would cause a substantial detriment to the neighborhood. This testimony was further supported by the overwhelming testimony of the many residents who experienced traffic and parking problems in the neighborhood on a daily basis. The Board was justified in finding Mr. Polyniak's testimony to be credible.

Boards are free to accept or reject expert testimony presented to them in connection with variance applications. Allen v. Hopewell Tp. Zoning Bd., 227 N.J. Super. 574, 581 (App. Div.), certif. denied 113 N.J. 655 (1988); Klug v. Bridgewater Tp. Planning Bd., 407 N.J. Super. 1, 3 (App. Div. 2009); see also Kaufmann v. Planning Bd., Warren Tp., 110 N.J. 551, 565 (1988)

(finding that expert testimony is not a legal prerequisite to sustain a board finding). Here, the Application involved conflicting expert testimony, and the Board had the authority to accept or reject any or all testimony, and where the choice was reasonably made, the choice is binding on appeal. Board of Educ. of City of Clifton v. Board of Adjustment, 409 N.J. Super. 389, 434 (App. Div. 2009).

The Board cannot rely upon unsubstantiated allegations, nor can it rely upon net opinions that are unsupported by any studies or data. Clifton Board of Ed., *supra* at 434. Because Mr. Keller's testimony was not supported by any studies or data, the Board chose to rely on the testimony of Mr. Polyniak which was supported by traffic and parking data and analyses, and the Board was justified in making that determination.

LTACH alleges procedural errors and criticizes the conduct at the hearings in order to attempt to establish that the evidence before the Board was overwhelmingly in LTACH's favor. Based upon this Court's review of the evidence, LTACH has failed to satisfy that burden. The Board's determination was based upon legitimate land use issues as set forth in the voluminous record below. The Board based its factual findings on significant credible evidence, and found that the detrimental effects in granting the Application outweighed the inherently beneficial use of the Project. The Board appropriately exercised its discretion in making these findings, and these findings are fully supported by the record below. The Board therefore did not act arbitrarily, capriciously, or unreasonably in denying LTACH's Application.

### 3. LTACH Received a Full and Fair Hearing.

LTACH alleges that they were treated unfairly at the Board hearings in four major respects, including (1) allowing the Mayor and Council members to speak at the opening session; (2)

delays and special meetings throughout the course of the hearings on the Application that prejudiced LTACH; (3) that LTACH was charged unnecessarily for fees and expenses without any information regarding these charges; and (4) unfairness in rulings by the Board during the course of the hearings. The Court finds that all of these procedural allegations are unfounded and without merit, and they do not warrant a reversal of the Board.

As to the Mayor and Council members being permitted to speak at the opening session of the public hearings on LTACH's Application, it is notable that LTACH's counsel acquiesced to the request to allow them to speak, and no objection was made until the rise of this litigation. Moreover, there are circumstances in which a member of the governing body may appear before a board of adjustment. Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 60 (1998) (noting that simply because the members of Zoning Board were appointed by the Township did not diminish their ability to act independently). The statements made by the Mayor and Council were short and for the most part urged that the Board to work fairly and diligently. LTACH presents no evidence to support the allegation that the Board did not act independently and/or was in any way influenced by the statements made at the beginning of the first public hearing. Additionally, there was nothing improper about the brief participation by the then current Council members, and Plaintiff's acquiescence to commentary from these individuals is evident of the benign nature of the comments made, therefore precluding any claim of impropriety on behalf of the Board.

With regard to LTACH's allegation as to the special meetings and delays during the course of the proceedings and in adopting the Resolution, it is notable that there was no objection lodged by counsel for LTACH at any time during the special meetings that were held, nor was there any objection at any of the first twenty-one sessions that the hearing was continued.

Furthermore, counsel for LTACH was specifically asked about the special meetings during the first hearing, and counsel agreed to special meetings being held and also agreed to pay the fees for such meetings. Because counsel for LTACH agreed to the special meetings, and did not object to any delay in receiving a written Resolution, counsel for LTACH cannot now claim that LTACH was prejudiced by the delay. Additionally, LTACH failed to avail itself of the remedies set forth in N.J.S.A. 40:55D-10g(2) which allows an interested party to compel a resolution from a municipal agency through application to the Superior Court. Certainly if LTACH truly was concerned about a delay in the issuance of the Resolution and any resulting prejudice to it, it would have made such application to the Court compelling a Resolution. Because it did not do so, and without any evidence to support the contention that it was prejudiced in any way by the delay, the Court finds this argument to be without merit.

LTACH also alleges that it was charged unnecessary fees and expenses for which it was not provided any explanatory information. The fees for special meetings and for deposits for costs of review of applications are set by City Ordinance and are administered by the Chief Financial Officer. All fees and deposits are paid to the City and vouchers are submitted for payment; the Board neither sets the fees nor makes or accepts any payments. At the February 2010 public hearing, counsel for LTACH requested an accounting of all the expenses, to which the Board replied that it was an issue with the City, not the Board, and that the City would have to address any accountings with counsel. There was no further request made by counsel. It is notable that N.J.S.A. 40:55D-53.2a provides a mechanism in the event that an applicant and the municipality cannot resolve a dispute over charges whereby the county construction board of appeals will hear and determine the matter. There is no indication on these facts that LTACH availed itself of this


remedy in the event it had a true dispute with the fees charged, however it is clearly not an issue with the Board, nor is it an allegation with any merit.

Finally, LTACH takes issue with certain rulings that were made during the course of the hearings, none of which have any substantive basis that would warrant overturning the Board's denial of LTACH's Application. A fair reading of the transcripts illustrates that every effort was made by the Board to move the proceedings along as rapidly as possible, and that the Board made several rulings which may have disappointed counsel for LTACH, but did not rise to the level of impropriety such that LTACH was denied a full and fair hearing. The Board attempted to limit public participation to avoid any undue burden on LTACH, and acted promptly to restrain any members of the public from interrupting or interfering with counsel or witnesses for LTACH. The Board granted latitude to counsel for LTACH during the questioning of witnesses and supported the request of counsel to use discovery materials in cross-examining the Board's own witness. The Board also supported LTACH's position with respect to the testimony of the traffic expert when objector's counsel made a motion to suppress the traffic report, and refused to dismiss the Application entirely when counsel for LTACH significantly revised the Application. Based on the foregoing, it is evident that the Board acted fairly and properly during the course of the hearings and LTACH was in no way prejudiced as a result of these hearings. LTACH's allegations are unfounded, and are rejected by this Court. The Board's denial of the Application was proper and based upon a sound factual record below, and LTACH did not meet the burden of proving that the Board's actions were arbitrary, capricious or unreasonable.

#### IV. CONCLUSION

For the foregoing reasons, this Court hereby upholds the Hackensack Zoning Board of Adjustment's denial of the LTACH Application as it was fully supported by a substantial and

credible factual basis, and LTACH did not meet the burden of demonstrating that the Board's actions were arbitrary, capricious or unreasonable. Judgment shall be entered in favor of the Defendants.



ALEXANDER H. CARVER, III, J.S.C.