NOT FOR PUBLICATION WITHOUT THE WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

Scott A. Magnuson and Mary E. Magnuson, Plaintiff, v. Fair Haven Zoning Board of Adjustment and Dennis Sullivan and Kathleen Sullivan, Defendants.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION DOCKET NUMBER: MON-L-2250-08 OPINION

Argued: December 22, 2008
Decided: December 26, 2008

Bernard M. Reilly, Esq. appeared for the plaintiff, Scott A. Magnuson and Mary E. Magnuson.

Gregory S. Baxter, Esq. (Caruso & Baxter, P.A.) appeared for defendants, Dennis Sullivan and Kathleen Sullivan.

Michael A. Irene, Jr., Esq. appeared for defendant, Fair Haven Zoning Board of Adjustment.

LAWSON, A.J.S.C.

This is an action in lieu of prerogative writs wherein plaintiffs Scott and Mary Magnuson (The Magnusons) are challenging the decision of the defendant Fair Haven Zoning Board of Adjustment (Board) as arbitrary, capricious, and unreasonable in approving the "bulk" variance relief requested by defendants Dennis and Kathleen Sullivan (the

Sullivans) to expand their existing single family home. Specifically, the Magnusons argue that the requested changes required an N.J.S.A. 40:55D-70d variance to expand the Sullivan's house beyond Fair Haven's 2,200 square feet floor area cap. Both the Board and the Sullivans argue that the Magnusons have confused the requirements for Floor Area Ratio (FAR) restriction variances with the variance requirements for floor area cap deviations. Further, both argue that the Board's decision was not arbitrary, capricious, or unreasonable because the decision was well supported by the evidence in the record.

The Court has reviewed the trial briefs and record below, engaged in colloquy with counsel, and accordingly enters the following findings of fact and conclusions of law pursuant to R. 1:7-4.

I. STATEMENT OF FACTS

The Sullivans are the owners of property located at Block 20, Lot 15, as designated by the Fair Haven Tax Map, commonly known as 47 Lake Avenue, which falls in the R-5(Residential) zone. The property currently consists of an existing 1,473 square foot two-story dwelling located on a 7,500 square foot corner lot. The lot has fifty feet of frontage on Lake Avenue and 150 feet secondary frontage/depth on Glen Place.

The Magnusons are the owners of a neighboring property located at Block 20, Lot 14, as designated by the Fair Haven Tax Map, commonly known as 51 Lake Avenue, and also falls in the R-5 (Residential) zone. The Magnuson property currently consists of a single family home which is in close proximity with the Sullivan's home.

The R-5 zone requires a minimum lot size of 5,000 square feet, except for corner lots which require a minimum of 7,000 square feet. The R-5 zone further requires a maximum habitable floor area ratio of .40, with a maximum residential structure limitation of no more than 2,200 square feet. The Development Regulations provide that

> This limitation applies to single-family dwellings. The permitted habitable floor area for any single-family dwelling shall be the lesser of the maximum habitable floor area or the maximum habitable floor area as calculated by applying the maximum habitable floor area ratio to the lot area. For other uses, the permitted habitable floor area is determined by the maximum habitable floor area ratio.

Bulk requirements for the zone require a twenty-five foot secondary front yard, seventy feet of frontage, seven feet sideyard setback, a garage sideyard setback of seven feet, and a garage rear yard setback of five feet.

The Sullivans applied for a building permit to construct a two story addition to their existing home. The

zoning officer rejected the permit request on July 6, 2007 because a number of non-conformities existed which related to the above enumerated bulk requirements. The Sullivans then filed an application to the Board seeking approval to build an approximately 1,000 square foot addition, with five variances for pre-existing deficiencies and one for exceeding the maximum habitable floor area limitation.

Some confusion existed initially amongst the parties based on discrepancies between the newspaper notice provided by the Board and the letter notice provided by the Sullivans to adjoining property owners. The newspaper notice stated that the Sullivans sought a variance of 273 square feet over the permitted habitable floor area cap, while the letter stated the Sullivans were only seeking a variance for building an additional 173 square feet over the permitted habitable floor area cap. Adding to the confusion was the Board Agenda which identified the higher number being discussed at the Board hearing.

The first public hearing took place on February 7, 2008. Kathleen Sullivan had recently been appointed to the Board, and the Board attorney asked the Board members if anyone needed to recuse themselves because they could not impartially decide the matter. No Board members stepped down, and the hearing continued.

Kathleen was offered as the applicant's first witness. She testified that her and Dennis purchased the home in 2004, but now sought to expand the house because they intended to have a second child. They also planned to improve the house aesthetically with new siding and windows. Kathleen introduced a letter from the construction official correcting the amount of habitable square footage sought over the cap. She discussed that the proposed rear addition would extend the length of the house, and would be two stories high. She also stated that the layout of the house as it currently exists restricted the manner in which the home could be expanded, and made necessary the requested variance for exceeding the maximum habitable.

Testimony was next heard from objector/defendant Scott Magnuson. He expressed concern that the Sullivan's home with the proposed addition would loom over his house due to the close proximity of the two homes. Moreover, he objected to the placement of the air conditioning unit, outdoor lighting, and a second floor balcony which would be intrusive to his privacy. Finally, Scott raised the possible conflict of interest that arose from Kathleen joining the Board when she knew her application was pending before the Board. After another neighbor spoke in favor of

the application the Board adjourned the hearing until the following month.

The March meeting began with another discussion of potential conflicts of interest, with the Board finally concluding that they could hear the application. The Sullivans then presented a letter from their architect which stated that he had initially miscalculated the square footage, and a revised zoning schedule was then submitted. Next, two neighbors spoke in favor of the application.

Scott Magnuson then testified that he had measured the floor area based on the Sullivan's application. He concluded that the square footage of the proposal was indeed the higher number originally submitted in the newspaper notice and the Board's Agenda. The Board deliberated and commented that the 176 square foot overage would not be a problem because the Sullivans created a "reasonable house for a reasonable family." The Board also identified the Sullivan's lot as being narrow because of its dual-frontage nature. The Board voted after deliberations and approved the Sullivan's 2,376 square foot proposal with four votes in the affirmative, and one abstention. Subsequent to the adoption of the resolution, the Magnusons filed this Complaint in Lieu of Prerogative

Writs on May 12, 2008 to challenge the Zoning Board's decision to grant the requested relief.

II. APPLICABLE LAW

The governing body has the ultimate authority to establish their municipality's land use character through ordinances. N.J.S.A. 40:55D-62; Dover v. Board of Adjustment, 158 N.J. Super. 401, 411 (App. Div. 1978). The governing body may establish geographical districts with uniform permitted uses and dimensional limitations such as lot size, coverage, and height restrictions in each zone. N.J.S.A. 40:55D-62; Dover, supra, 158 N.J. Super. at 411-12. The Municipal Land Use Law (MLUL) notes that a "zoning ordinance shall be drawn with reasonable consideration of the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of the land." N.J.S.A. 40:55D-62.

The MLUL under N.J.S.A. 40:55D-62 identifies the uniformity of structures and uses throughout a municipality's zones as a goal, and repeatedly identifies structures and uses as separate considerations when articulating zoning guidelines. That section provides in pertinent part:

> a. The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of

> land **and** of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element of a master plan and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element of the master plan or designed to effectuate such plan element; . . . .
>
> The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land. **The regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structures or uses of land**. . . .
> [N.J.S.A. 40:55D-62(a) (emphasis added).]

The goal of creating uniformity by ordinance to establish a community's character has long been identified as important by commentators and the courts alike. See Rumson Estates, Inc. v. Mayor and Council of Fair Haven, 177 N.J. 338, 357 (2003) (citing Robert M. Anderson, American Law of Zoning, § 5.22 at 333-34 (2d ed. 1977; quoting Edward M. Bassett, Zoning at 50 (1940)). In addition to establishing a common visual theme throughout a community, uniformity also provides "assurance to 'potentially hostile landowners that all property which was similarly situated would be treated alike.'" Ibid. The

process established to seek a variance from the uniform standards established by a master plan and ordinance guards against "the arbitrary and unreasonable exercise of the police power." Rumson Estates, supra, 177 N.J. at 357 (citing Roselle v. Wright, 21 N.J. 400, 409-10 (1956)). The uniformity concept is further reinforced by the long established zoning principle that "courts give greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning." N.J.S.A. 40:55D-70; Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adj., 343 N.J. Super. 177, 199 (App. Div. 2001).

Additionally, this goal of uniformity can be achieved when a master plan and zoning ordinance work in unison with the MLUL's goals as enunciated in N.J.S.A. 40:55D-2. These goals are often cited by land use boards as "special reasons" when they grant variances under N.J.S.A. 40:55D-70c(2) and N.J.S.A. 40:55D-70d. See Bressman v. Gash, 131 N.J. 517, 530 (1993) (finding that granting a rear-yard-setback variance satisfied the goals under N.J.S.A. 40:55D-2(i) by creating "a desirable visual environment" characteristic of the zone); Kaufmann v. Planning Bd. for Warren Twp., 110 N.J. 551, 561-65 (1988) (relying on N.J.S.A. 40:55D-2 for identifying "special reasons" related

to the common characteristics of a zone); Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 50 (App. Div. 2004) (stating that a subsection d variance could be granted if the goals of N.J.S.A. 40:55D-2 were satisfied); White Castle System v. Planning Bd. of City of Clifton, 244 N.J. Super. 688, 693 (App. Div. 1990) (explaining that applications under subsection d of N.J.S.A. 40:55D-70 must demonstrate "special reasons" consistent with the purposes of zoning). Specific goals which could be identified as relevant here include

> c. To provide adequate light, air and open space;
> * * * *
> e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;
> * * * *
> g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;
> * * * *
> i. To promote a desirable visual environment through creative development techniques and good civic design and arrangement;

Thus, the zoning ordinance, master plan, and any proposed variances work together with the MLUL's goals to establish the character of the structures and uses in a designated zone.

A. Categorizing Habitable Floor Area Caps

1. Historical development of subsection c and d variances

The preliminary question to be answered by this court is whether floor area cap variance requests should be analyzed as a subsection c or d variance. An analysis of the historical development of these two variances in New Jersey's statutory law, the similar treatment of height variances before the MLUL's amendments creating a subsection c and d height variance, as well as a discussion of the major New Jersey case discussing floor area caps, leads to the singular conclusion that floor area cap variance requests are best analyzed as a subsection c variance under N.J.S.A. 40:55D-70c.

The New Jersey Legislature successfully passed a zoning enabling statute in 1924, L. 1924, c. 146; see Andrews v. Bd. of Adj. of Ocean Twp., 30 N.J. 245, 255 (1959) (Hall, J., dissenting), which provided local boards of adjustment the authority to grant variances to avoid "unnecessary hardship, and so that the spirit of the

ordinance shall be observed and substantial justice done." L. 1924, c. 146, § 7(3). This act was superseded by N.J.S.A. 40:55D-70's historical predecessor chapter 274 of the Laws of 1928. The 1928 Act restricted a board's ability to grant variances to situations where properties were within 150 feet of a zoning district in which the use was permitted, L. 1928, c. 274, § 9(3); N.J.S.A. 40:55-39c, while variances for properties more than 150 feet away were left to the discretion of the governing body. L. 1928, c. 274, § 9(4); N.J.S.A. 40:55-39d; see also Brandon v. Montclair, 125 N.J.L. 367, 368 (E. & A. 1940) (using the language "unnecessary hardship" to define situations where a variance was granted under subsection c or d of N.J.S.A. 40:55-39).

In 1948 the Legislature modified the statutory language in subsection c to include the language now commonly referred to as the "negative criteria":

> provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance."
> [L. 1948, c. 305, § 6.]

At the same time, the Legislature authorized boards of adjustment under subsection d to "[r]ecommend in particular cases and for special reasons to the governing body of the

municipality the granting of a variance to allow a structure or use in a district restricted against such structure or use." Ibid. In 1949 L. 1949, c. 242, § 1, made the negative criteria applicable to both c and d variances granted under N.J.S.A. 40:55-39.

This change in the statutory law presented new questions of interpretation for the courts. The Supreme Court, in Monmouth Lumber Co. v. Ocean Twp., interpreted the "special reasons" language as now removing proof of hardship as a requirement for a use variance. Monmouth Lumber Co. v. Ocean Twp., 9 N.J. 64, 77 (1952); see also Ward v. Scott, 11 N.J. 117, 122 (1952). This new interpretation created the problematic situation of boards having the ability to grant "undue hardship" use variances under subsection c, while recommending the granting of "special reason" use variances to the governing body under subsection d. Monmouth Lumber Co., supra, 9 N.J. at 77. The Legislature resolved this problem by removing a board's authority to grant "hardship use" variances by amending subsection c in 1953 to read: "provided, however, that no variance shall be granted under this paragraph to allow a structure or use in a district restricted against such structure or use." L. 1953, c. 288, §1. The Legislature

presented clarification on this point in a statement explaining:

> At the present time there is considerable confusion throughout the State with respect to the powers of the boards of adjustment as set forth in Revised Statutes, section 40:55-39, particularly concerning paragraphs c and d of the section.
>
> The purpose of the present bill is to clarify such powers.
> [Statement, L. 1953, c. 288.]

The board's remaining authority under subsection c permitted it to "authorize, as variances, departures from setback and rear and side yard depth requirements, or from height and . . . minimum lot size restrictions." L. 1953, c. 288, §1; Roger A. Cunningham, Control of Land Use in New Jersey by Means of Zoning, 14 Rutgers L. Rev. 37, 76 (1959).

The authority to grant variances remained divided between "bulk" or dimensional variances under subsection c, and use variances under subsection d. See DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428, 439-44 (1970) (permitting use variance under subsection d, and height, side-yard, and parking variances under subsection c); Gougeon v. Bd. of Adj. of Stone Harbor, 52 N.J. 212, 218 (1968) (reviewing and remanding denial of variances for lot area and side-yard under subsection c); Harrington

Glen, Inc. v. Municipal Bd. of Adj. of Leonia, 52 N.J. 22, 25-26 (1968) (reviewing and remanding denial of variances for lot area, frontage, and sideyards under subsection c); Place v. Bd. of Adj. of Saddle River, 42 N.J. 324, 330-32 (1964) (affirming denial of side-yard variance for fallout shelter under subsection c, and holding subsection d inapplicable because use was permitted); Russell v. Bd. of Adj. of Tenafly, 31 N.J. 58, 69-71 (1959) (reviewing and affirming grant of setback and area variances under subsection c); Ardolino v. Bd. of Adj. of Florham Park, 24 N.J. 94, 106-07 (1957) (reviewing and reversing denial of frontage variance under subsection c).

The bright line established in the case law through a consistent interpretation of the c and d variances ceased when then the legislature enacted the MLUL in 1975. See L. 1975, c. 291. Although the MLUL and its predecessor contained similar language, two major modifications in the newer law created changes in New Jersey land use practice. Boards of adjustment were granted the authority to grant use variances with the approval of the governing body for the first time since 1924. Cf. L. 1975, c. 291, § 8, with L. 1924, c. 146. Additionally, planning boards were now authorized to approve certain subsection c-type variances for lot area, lot dimensions, setback, and yard

requirements. L. 1975, c. 291, § 47. These new powers were amended in 1979 to permit a planning board to grant any type of subsection c variance, L. 1979, c. 216, § 19, while boards of adjustment could grant use variances under subsection d on their own authority. L. 1979, c. 216, § 23.

The last major modifications made to the MLUL, in 1984, removed all bulk variances from subsection d with two exceptions. See L. 1984, c. 20, § 12. Variances for density and floor-area ratios remained under subsection d which allowed municipalities to maintain control over the number of residential structures per lot, and the size of residential and commercial structures relative to lot area. Ibid. In addition to creating a separation of duties, the Legislature increased the scope of the c variance by including new language under paragraph c(2). Dimensional subsection c variances could now be granted without an applicant being required to prove hardship as long as the proposed deviation would advance the purposes of zoning and the anticipated benefit would substantially outweigh any detriment. See Kaufmann, supra, 110 N.J. at 561-65 (discussing legislative objectives in establishing criteria for c(2) variances).

2. Categorizing Floor Area Caps

The amendments to the MLUL clearly placed floor area ratio variance requests under subsection d. "Floor area ratio" (FAR) is defined by the MLUL as "the sum of the area of all floors of buildings or structures compared to the total area of the site." N.J.S.A. 40:55D-4. FAR restrictions bear a direct relationship to the permitted size—height, width, and depth proportions of structures in relation to the land on which the structure is to be built. Therefore, municipalities wishing to control the intensity or size of residential structures relative to lot area can do so by adopting FAR regulations.

However, no clear assignment of authority is provided in the MLUL for habitable floor area caps. Additionally, the MLUL fails to make a provision for, or define, habitable floor area caps. Fair Haven has defined habitable floor area caps in their ordinance as

> the sum of the gross horizontal area of all the stories and half stories of a building as measured from the exterior face of exterior building walls, or from the centerline of a wall separating two buildings. In residential buildings, garages and cellars shall not be calculated as "habitable floor area."
> [Fair Haven Ordinance § 16.08.40.]

The Supreme Court has recognized that different goals are achieved by adopting FAR restrictions and habitable floor

area cap restrictions. Rumson Estates, Inc. v. Mayor & Council of Fair Haven, 177 N.J. 338, 355 (2003) (noting that the MLUL permits municipalities to adopt a variety of "ratios and regulatory techniques" in addition to FAR restrictions to control the intensity of residential use). Deciding whether floor area cap restrictions are a subsection c or d variance is a case of first impression, but case law exists to provide guidance when one variance request is expressly dedicated to one subsection while another is unenumerated.

The most notable analogous situation which can be identified in case law is the height variance request. Height variances were previously reviewed under N.J.S.A. 40:55D-70c which required a hardship on the part of the applicant to justify a variance. Grasso, supra, 375 N.J. Super. at 50 (citing L. 1991, c. 256, § 21 as the statute which separated height variances into two categories based on enunciated height restrictions). Pre-MLUL height variance cases were decided as a subsection c variance which required a hardship when the use was permitted, but the underlying use was analyzed under subsection d which required a special reason when the use was not permitted in the zone. See Commercial Realty & Res. Corp. v. First Atl. Properties Co., 122 N.J. 546 (1991); De Simone v. Greater

Englewood Housing Corp., 56 N.J. 428 (1970. However, the statute currently requires

> a showing of special reasons, the so-called positive requirement, authorizes a variance to permit the height of a principal structure to exceed "by 10 feet or 10% the maximum height permitted in the district for a principal structure." . . . [T]he applicant must prove that the variance can be granted "without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance," the so-called negative requirement.
> [Grasso, supra, 375 N.J. Super. at 48-9.]

The Legislature recognized that structures exceeding the ten feet/ten percent restrictions were identified as carrying the potential of deviating from a community's character based on the intensity of the new non-conforming use. Id. at 51. The Legislature placed a higher burden on subsection d variances because of the greater threat they provide to disrupting a municipality's master plan. Ibid. They intended that applicants for a (d)(6) variance "show that the property for which the variance is sought cannot reasonably accommodate a structure that conforms to, **or only slightly exceeds**, the height permitted by the ordinance." Ibid. (emphasis added). The subsection d height restrictions limit the intensity of a property's use

and bear a direct relationship on the public welfare by affecting traffic congestion, fire hazards, light and air, and population density. Grasso, supra, 375 N.J. Super. at 52-3.

Commercial Realty, supra, 122 N.J. 546, which was decided before the adoption of subsection d(6), advises that so long as a use is permitted in a zone, a dimensional variance request is handled under subsection c. The plaintiff commercial realty company brought a suit which challenged a planning board's decision to grant a variance to the defendant developer from height limitations imposed by the municipal zoning ordinance. The trial court set aside the planning board's approval after it concluded that the planning board's actions were ultra vires because variances from zoning-ordinance height restrictions must be handled by a board of adjustment under N.J.S.A. 40:55D-70d. The Appellate Division reinstated the planning board's approval of the height variance under N.J.S.A. 40:55D-70c, and the Supreme Court affirmed by holding that variances from height restrictions were dimensional variances cognizable under N.J.S.A. 40:55D-70c. The court reasoned that a structure which was a permitted use, and deviated only from a height restriction in the zoning ordinance,

could not be identified as a non-permitted use which would require a use variance under N.J.S.A. 40:55D-70d(1).

In De Simone v. Greater Englewood Housing Corp. the court sustained the grant of height, side-yard, and parking variances under subsection c, while affirming the grant of a use variance request under subsection d. De Simone, supra, 56 N.J. at 442-44. Additionally, in Isko v. Planning Bd. of Livingston the board of adjustment granted a hospital's request for a height variance under subsection c, which the Court affirmed by concluding that no use variance was required because the requested variance was part of an expansion that that did not exceed the height of the main building which was constructed originally as a permitted use at a permitted height under the Livingston ordinance. Isko v. Planning Bd. of Livingston, 51 N.J. 162, 176-77 (1968). Importantly, the Court discussed in dictum that height variances were cognizable under subsection c so long as the proofs in the record supported a showing of "any exceptional narrowness, shallowness, or shape of the hospital tract . . . which would cause undue hardship." Id. at 174.

This conclusion is strengthened upon an analysis of Place v. Bd. of Adj. of Saddle River, 42 N.J. 324 (1964). In Place the Court examined whether a bomb shelter was a

permitted use, and whether the proper variances were requested by the plaintiff. The board of adjustment and the Court reached the same determination that the fallout shelter was a permitted use, but denied the side-yard variance. Id. at 330. Specifically, the Court found that the underlying use was permitted, so "subsection (d), which permits the board to recommend * * * the granting of a variance to allow a structure or use in a district restricted against such structure or use does not apply." Ibid. (emphasis added).

Several similar facts exist between Commercial Realty and the instant matter. First, both cases involve a permitted use which required a variance request based on the structure's dimensions, and not a use variance request. Second, and most importantly, Commercial Realty was decided, as this case will be, by analyzing a request which is prohibited by ordinance, but not specifically prohibited by the MLUL. The conclusion to be drawn from an analysis of these two cases is that a variance request which deals with a structure's dimension, and not use, will be permissible under subsection c when the variance is not expressly reserved to subsection d, and the requirements of subsection c are supported by the facts on the record.

In the instant matter, the underlying use, a residential structure, is a permitted use which means a d variance is inappropriate unless there is a situation raised by the enunciated uses under subsection d. The proposed addition is conceded to be less than the FAR restrictions for the zone where the Sullivan's home is located, but exceeds the 2,200 floor area cap provided for by ordinance. Because the proposed addition violates the requirements established by Fair Haven's Ordinance, yet no dispensation has been made for this situation, the court will return to its Rumson Estates decision, which was upheld by the Supreme Court, for further guidance.

B. Rumson Estates and Fair Haven's Ordinance

The Magnusons argue that Rumson Estates, supra, is controlling here and was "rightly decide[ed] at the trial court level." That case analyzed the same Fair Haven R-5 zone which is at issue in this case, but instead focused on whether Fair Haven's ordinance thwarted "the notion of 'uniformity in the zone' and thus confound[ed] a fundamental goal of the MLUL" by permitting a municipality to develop its own "ratios and regulatory techniques." Id. at 348-49. The Rumson Estates Court recognized the floor area cap as a separate regulatory technique from FAR restrictions, id. at 356, but the question of how to

analyze floor area caps was not presented to that Court for clarification on whether they are a subsection c dimensional variance or subsection d use variance.

This court, in deciding the Rumson Estates case at the trial level, determined that the plaintiffs were permitted to re-present their application to the Board as a subsection d variance request based on a density issue. However, no density issue exists in this case because density, as defined by the MLUL, controls "the permitted number of dwelling units per gross area of land to be developed." N.J.S.A. 40:55D-4. There is only one pre-existing dwelling unit at issue here, so any subsection d variance for density is irrelevant to this matter.

The Magnusons further argue that FAR restrictions and floor area caps serve the same zoning purpose. However, they serve inherently different purposes based on the controls they establish over a property. FAR restrictions ensure the proportional use of a property with respect to the size of the lot and the size of the structure. This controls the intensity of the land's use. Floor area caps set a uniform standard within a zone that can work in unison with FAR restrictions, or ensure that homes maintain a dimensional uniformity throughout a community by placing a cap on the size of the structure being constructed. In

this case, the size of the property would permit a proportionally larger structure, but the floor area cap maintains the community's atmosphere by placing a firm limit on how large of a structure may be constructed. Thus, while these two zoning "tools" control the size of a structure that may be constructed, they each do so in a different manner and for a different reason.

Although the Legislature has seen fit to include variances from floor-area-ratio among those warranting the more-protective treatment afforded to subsection d variances, N.J.S.A. 40:55D-70d(4), it has not expressly included variances from habitable floor area caps in subsections c or d. FAR restrictions regulate the proportionality of the size of a structure in connection with the size of the land being developed. Overdevelopment of a lot poses a greater threat to a master plan, which establishes the uniformity desired by the planning board and governing body, than technical dimensional variances. However, this court recognizes the important reasons for limiting the size of the structures that may be developed in a zone. Although dimensional variances carry the risk of upsetting the established elements of a master plan, the positive and negative criteria present statutory safeguards to prevent improper application of the law.

The historical development of the c and d variances highlight the legislative intent to separate dimensional variance requests from use variance requests. First, the recognized detrimental effect of subsection d variances versus the goal of dimensional uniformity under subsection c variances is highlighted by the different requirements necessary for the granting of the request. The approval of a use variance requires the affirmative vote of at least five members of the board of adjustment, N.J.S.A. 40:55D-70d, while dimensional variances under subsection c merely require a simple majority of four affirmative votes. This difference in required votes is justified by the commonly recognized idea that a use variance carries a greater risk of disrupting the master plan and zoning ordinances.

Moreover, dimensional variances require problems specifically related to the applicant's land, while use variances under subsection d look for "special reasons" before permitting uses which are forbidden in the zone and unrelated to the land itself. Cf. N.J.S.A. 40:55D-70c, with N.J.S.A. 40:55D-70d. Additionally, subsection d specifically states in the second paragraph that

> If an application for development requests one or more variances but not a variance for a purpose enumerated in subsection d. of this section, the decision on the requested variance or

> variances shall be rendered under subsection c. of this section. [N.J.S.A. 40:55D-70d.]

This statutory separation of the structural dimensional variances and use variances creates the clarity discussed in New Jersey case law and proclaimed by the legislature. See Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 559-63 (1988); see also Statement, L. 1953, c. 288.

That variances from habitable floor area caps are dimensional in nature, and therefore a subsection c variance, is consistent with the MLUL and case law. Support for this conclusion is provided by N.J.S.A. 40:55D-65b which states in relevant part that a municipality may, by zoning ordinance

> Regulate the bulk, height, number of stories, orientation, and **size of buildings** and the other structures; the **percentage of lot development area** that may be occupied by structures; lot sizes and dimensions. . . . [N.J.S.A. 40:55D-65b (emphasis added).]

This separation of the size of a building and the percentage of lot development area is consistent with the MLUL's regulation of use and intensity and regulation based on design elements like bulk and orientation that control uniformity. Cf. N.J.S.A. 40:55D-70c, with N.J.S.A. 40:55D-70d.

The MLUL distinguishes between regulations based on a property's use and regulations based on the dimensions and unique properties of an applicant's land. The court therefore concludes that variances from habitable floor area caps are dimensional in nature, and consequently qualify as a subsection c variance. Thus, this case must be analyzed and decided on the requirements enunciated under N.J.S.A. 40:55D-70c.

C. Applying the Subsection c Variance

The function of the subsection c variance request is to ensure that structures, without examining uses, remain dimensionally uniform within a zone without punishing a property owner who must make due with what he owns. Planning and zoning boards are provided authority under N.J.S.A. 40:55D-70c to grant a dimensional variance:

> (1) Where (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of any regulation ... would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property; [or] (2) where in an application or appeal

> relating to a specific piece of property the purposes of this act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment[.]

With a N.J.S.A. 40:55D-70c(1) variance, the positive criteria is "exceptional and undue hardship." Bressman v. Gash, 131 N.J. 517, 522-523 (1993). The hardship refers to the challenges that affect the property and not to those which are personal to the landowner. See Lang v. Zoning Bd. of Adj. of North Caldwell, 160 N.J. 41, 53 (1993). (stating "Personal hardship is irrelevant to the statutory standard . . . the correct focus must be on whether the strict enforcement of the ordinance would cause undue hardship because of the unique or exceptional conditions of the specific property.")

In addition to the positive criteria under subsection c, N.J.S.A. 40:55D-70 also requires an applicant to satisfy the so-called negative criteria:

> No variance or other relief may be granted . . . without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

See also Lang, supra, 160 N.J. at 57. ("Whether a dimensional variance is sought under subsection c(1) or c(2), the applicant also must satisfy the familiar negative criteria[.]").

It is well-settled that the burden of proving both the positive and negative criteria for variance relief rests with the applicant. Chirichello v. Zoning Bd. of Adj. of Monmouth Beach, 78 N.J. 544, 559-560 (1979); Weiner v. Zoning Bd. of Adj. of Glassboro, 144 N.J. Super. 509, 516 (App. Div. 1976), certif. denied 73 N.J. 55 (1977); Chicalese v. Monroe Township Planning Bd., 334 N.J. Super. 413, 426 (Law Div. 2000). Specifically, an applicant "bears the burden of producing a preponderance of competent and credible evidence to show that he or she meets the statutory prerequisites for a variance, a burden to both the positive and negative criteria." Menlo Park Plaza Assocs. v. Planning Bd. of the Twp. of Woodbridge, 316 N.J. Super. 451, 461 (App. Div. 1998) (citations omitted). It is important that the applicant provide credible and competent evidence of the nature and degree of the zoning burden because "it advances the applicant's burden of convincing the board that the variance should be granted [and] because it provides the factual basis needed by the

board to produce the kind of record that is required for judicial review." Chirichello, supra, 78 N.J. at 559-560.

The Board in this matter granted the Sullivan's variance requests based on both hardship pursuant to N.J.S.A. 40:55D-70c(1), and for special reasons pursuant to N.J.S.A. 40:55D-70c(2). The Board's resolution granting the variance requests highlighted the existing physical non-conformities based on the lots narrow shape. This would be applicable to and permissible for the setback and depth variance requests. However, the shape and size of the Sullivan's lot fails to qualify as a reason to deviate from the floor area cap. To qualify for a c(1) variance the hardship must be based on a unique situation affecting the property, and not to those which are personal to the landowner. Lang, supra, 160 N.J. at 55 (highlighting the repeated use of the phrase "by reason of" to indicate the statutory requirement that c(1) variance requests must be based on a properties physical qualities). However, the uncontroverted testimony in the record shows that the lot's dimensions would permit a larger home to built if the floor area cap did not exist.

The Board cites Lang in support of their argument that their decision was not arbitrary, capricious, and unreasonable. In Lang, the defendant property owner

applied for a variance from a zoning ordinance which required in-ground swimming pools to be set back twenty feet from the rear lot line. The lot at issue was undersized and non-conforming when the property owner purchased it, and the defendant zoning board granted the variance requests under N.J.S.A. 40:55D-70c(1) and (2). The plaintiff, a property owner to the rear of the applicant's lot, challenged the variances. The Lang Court noted that the focus is not solely on the structure to be built, but rather whether the property's features made the structure reasonable or unreasonable:

> That clear demand of the statute does not make irrelevant the size of the structure that the variance is intended to permit. In a given case, the dimensions of a proposed structure may be so unusual or atypical that the applicant will be unable to demonstrate to the board that it is the unique condition of the property that causes the need for a variance. Accordingly, in a c(1) variance context, a board of adjustment or a reviewing court should consider whether the structure proposed is so unusually large that its size, rather than the unique condition of the property, causes the need for a variance.
> [Lang, supra, 160 N.J. at 56.]

The Supreme Court found that the record supported the board's conclusion that the unique conditions of the

property constituted undue hardship under N.J.S.A. 40:55D-70c(1) justifying the need for variance relief. Id. at 61.

The Sullivan's argued that they wish to expand their house based on their desire for a larger family. The Lang Court directed boards and courts to look for "unique or exceptional conditions of the specific property" when analyzing subsection c variance requests. Lang, supra, 160 N.J. at 53. Unlike the undersized lot presented in Lang which created issues related to the setback and sideyard requirements for pools, the Sullivan's lot does not present any issues directly related to the floor area caps. There is no showing in the record of any exceptional narrowness, shallowness, or shape of the Sullivan's lot, or exceptional topographic condition of the land or any other extraordinary physical condition thereof which would cause undue hardship if the floor area cap is enforced. Here, the issue is solely related to the size of the structure, and not the physical features of the Sullivan's lot.

Subsection c's silence on personal hardship variance requests highlights the necessity to relate a subsection c(1) variance request to the lot's physical characteristics. The Sullivans fail to identify a reason related to the floor area cap and their lot's physical features which prohibits them from expanding their house

within the 2,200 square foot limit, and any personal or financial hardships from the denial of the requested floor area cap variance are insufficient under the law. Thus, unlike Lang where the property owner's undersized lot would have prohibited the owner from building a standard-sized pool which was permitted in the zone, the Sullivan's seek to build a house larger than what is permitted anywhere in the zone despite having the requisite square footage to build a larger home under the FAR restrictions. The lot's narrowness may affect sideyard and setback variances, but bear no relationship to the floor area cap variance requested by the Sullivans and approved by the board. Therefore, the Board's decision must be voided.

The Board also relied on N.J.S.A. 40:55D-70(c)(2) in approving Sullivan's application. The statute states, in pertinent part:

> [W]here in an application or appeal relating to a specific piece of property the purposes of this act would be advanced by a deviation from zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow departure from regulations. . .

In analyzing relief pursuant to the above statute, the court must balance the benefits and detriments from the grant of the variance. Bressman, supra, 131 N.J. 523

(citing Kaufmann, supra, 110 N.J. at 558-560). In contrast to hardship, "the focus of a c(2) inquiry will not be on the characteristics of the land that, in the light of the current zoning requirements . . . but on the characteristics of the land for improved zoning and planning that will benefit the community." Smith v. Fair Haven Zoning Bd. of Adj., 335 N.J. Super. 111, 123 (App. Div. 2000).

The Sullivan's floor area cap variance request does not improve the zoning or planning characteristics of the community. Rather, it destroys the uniformity created by the zoning ordinance to further the Sullivan's individualistic goals. The MLUL's enunciated goals in N.J.S.A. 40:55D-2 identify the intent and purpose of the act as:

> a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner **which will promote the public health, safety, morals, and general welfare**;
> b. To secure safety from fire, flood, panic and other natural and man-made disasters;
> c. **To provide adequate light, air and open space**;
> d. To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole;

e. To promote the establishment of appropriate **population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment**;

f. To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies;

g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

h. To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight;

i. **To promote a desirable visual environment through creative development techniques and good civic design and arrangement**;

j. **To promote the conservation of historic sites and districts, open space, energy resources and valuable natural resources in the State and to prevent urban sprawl and degradation of the environment through improper use of land;**

k. To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site;

l. To encourage senior citizen community housing construction;

m. To encourage coordination of the various public and private procedures and activities shaping land development

> with a view of lessening the cost of such development and to the more efficient use of land;
> n. To promote utilization of renewable energy resources; and
> o. To promote the maximum practicable recovery and recycling of recyclable materials from municipal solid waste through the use of planning practices designed to incorporate the State Recycling Plan goals and to complement municipal recycling programs.
> [Emphasis added.]

The Sullivan's floor area cap variance request is contrary to the bolded goals, and fails to encourage or promote any of the others listed.

The Board's attempts at mimicking the language from the purpose and intent section of the MLUL into its resolution places form over function. In one example, the Board noted that the Sullivan's proposal provides more adequate light, air and open space than a larger proposal based on the FAR restrictions. Permitting someone to build a structure larger than what could be constructed by ordinance, while claiming that the proposed smaller structure is better than a larger one which could also not be constructed, would destroy the underlying principles of zoning and planning by removing any uniformity established by ordinance, and would instead permit ad hoc zoning based on the board's personal whims.

The Board also argues that the variance is permissible because it is de minimis. A de minimis argument related to a permitted use is analyzed under subsection c(2) which means the variance request must present a better zoning alternative than the literal enforcement of the law. As previously noted, the Sullivan's request fails to present a better option for the zone than a conforming use. Rather than building a "reasonable home for reasonable people," the Sullivans seek to build an oversized home on a lot that would allow the largest possible conforming home to be constructed. Upholding the Board's grant would expand the definition of "presenting a better option for the zone" beyond the phrase's logical understanding because then anyone who decides to change their siding while building a non-conforming house would qualify. The courts have looked for situations where the goals of the MLUL are advanced by zoning problems being corrected or by a community's characteristics made more uniform to qualify as presenting a better option for the zone. Those situations do not exist here.

As such, while a subsection c(2) variance request would permit the Sullivan's request based on their personal hardships, their failure to satisfy or further any of the MLUL's goals or purposes compels this court's conclusion

that the Board erred when it granted the Sullivan's floor area cap variance request. The proofs presented in the record, the arguments raised by counsel at trial, and the clear jurisprudence interpreting the requirements propounded in subsection c(1) and c(2) constrain this court to invalidate the Board's resolution granting the Sullivan's floor area cap variance request as arbitrary, capricious, and unreasonable.

D. Court Review of a Board's Actions

A court reviewing a planning board's action, like the grant of a use variance, limits its determination of whether the board's decision was arbitrary, unreasonable, or capricious. Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adj., 343 N.J. Super. 177, 198 (App. Div. 2001). The court will examine the board's actions to ensure the board followed statutory guidelines when exercising its discretion. Id. at 198-99. "Courts give greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning." N.J.S.A. 40:55D-70; Medical Ctr. at Princeton, supra, 343 N.J. Super. at 199.

The Sullivan's sought a floor area cap variance as part of their application to expand their currently existing home. They identified a desire to expand their

family as the reason for the addition, and additionally entered proofs to show that it would be difficult to expand their current house based on its current layout. Any home located on the Sullivan's property would face the same physical issues for setback and sideyard requirements. However, not all homeowners would face the issues of an expanding family, or desire the layout proposed. The zone plan and ordinance recognized that the land would best be utilized as a home of 2,200 square feet or less.

The Board's determinations were not supported by the proofs presented to Board that the proposed configuration was a better option for the community rather than a strict adherence to the local ordinance. Although such matters are left to the Board's discretion, it produced a resolution with its findings of fact and conclusions that are contradictory to both the MLUL and New Jersey case law. Thus, the Board's acts were arbitrary, capricious, and unreasonable and the Board's resolution will be voided.

III. CONCLUSION

In conclusion, this court finds that floor area cap variance requests should be analyzed under N.J.S.A. 40:55D-70c. Additionally, this court does not take issue with the Board's resolution granting the Sullivan's sideyard and setback variance requests. There is adequate support in

the record that the conditions existing on the property cannot be rectified to remove the non-conformities. However, no hardship has been shown based on the unique features of the property, or benefits to the community's zoning plan, that would permit the board to grant the Sullivan's floor area cap variance request. Based on the aforementioned reasons, the Board's decision to grant the Sullivan's floor area cap variances is hereby reversed. Mr. Reilly is directed to prepare and submit a proper form of order in accord with this opinion to the court within seven days.