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MEMORANDUM

TO: CHAIRMAN AND MEMBERS, RIDGEWOOD ZONING BOARD OF ADJUSTMENT

FROM: BRUCE E. WHITAKER, ESQ., MCDONNELL AND WHITAKER, LLC

RE: APPLICATION OF OUTFRONT MEDIA, LLC FOR VARIANCES TO ERECT AN ELECTRONIC BILLBOARD IN THE O-2 COMMERCIAL ZONE

DATED: JULY 9, 2024

THE APPLICATION

Before the Board is an application by OutFront Media to erect a billboard on property at 517 S. Ridgewood. More specifically the applicant proposes a double-sided, electronic digital sign having dimensions of 10.5 feet wide by 36 feet high. During the course of the hearings the applicant proposed to modify the height of the sign and the size of the sign and final dimensions will be confirmed by the Applicant at the final presentation.

The property is located in the OB-2 Zone of the Village. The Board has been presented with requests for three subsection d variances: 1) as noted, the billboard use is not permitted in the zone; 2) this use is proposed for a site which currently has another non permitted, nonconforming use on it, namely: an auto repair facility. 3) for excessive height under subsection d-6 to allow a sign structure 40 feet where 30 feet would be the maximum allowed in this zone district. In addition, there is also a subsection c variance, what is commonly known as a dimensional or bulk variance related to the setback from the Exxon site: 12 feet is the minimum required while 10 feet is what the applicant is proposing.

The application was presented over a total of ten hearings. Several fact and expert witnesses were presented who testified as to operations, general engineering, traffic engineering and view technology. That testimony will not be reiterated or summarized here. However, this memo will address the critical testimony of expert planning witnesses both on behalf of the applicant and on behalf of AK Realty, LLC and Bergen Convenience Flagship, Inc., objectors.

THE STATUTORY CRITERIA FOR

THE GRANT OF VARIANCES

The central issue before the Board in determining whether a variance or variances should be granted is whether the applicant has presented sufficient evidence to prove both the positive and negative criteria of N. J. S. A. 40:55 – 70 (d) (hereinafter referred to as “the statute”.) Since the Board is obviously very familiar the law in this area, the statutory criteria will be discussed briefly. This memo will summarize the expert planning testimony presented in light of the statutory criteria. In addition, it will review pertinent case law discussing the statutory criteria as applied to a use variance application of the type presented by the applicant.

The authority for the grant of the use variance is set forth in the statute. It states that; “The board of adjustment shall have the power to: (d) in particular cases for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit: (1) a use or principal structure in a district restricted against such use or principal structure, (2) an expansion of a nonconforming use...(emphasis added). This is referred to as the positive criteria for the grant of a use variance. The negative criteria are set forth at the end of the statute where it is stated: “No variance or other relief may be granted under the terms of this section... 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.”

An extensive body of case law has developed over the years as to the meaning of the statutory language cited above. Briefly stated, specifically as to the positive criteria, the case law has recognized three categories of special reasons. One is where a use inherently serves the general welfare. A second is where, although the use does not inherently serve the general welfare, it serves the general welfare to some extent and is particularly well-suited to the property or site on which it is to be developed. The third category is where a property owner would suffer an extreme or undue hardship if the variance were not to be granted. An example of an undue hardship would be where the subject property could not feasibly be developed for a permitted use or stated in somewhat different language, if the use variance were not granted the property would be zoned into in the utility.

The instant application was presented under the second category, namely: that the proposed electronic billboard is a use which is particularly well-suited for the site on which it is proposed to be developed.

THE EVIDENCE PRESENTED BY THE

APPLICANT IN SUPPORT OF THE APPLICATION

The applicant presented John McDonough as a planning expert. In testifying as to the positive criteria to support an outdoor advertising sign or billboard as a non-permitted use, he first addressed the question of how this proposed use would promote the general welfare. It is generally

recognized that a use will promote the general welfare if it advances the purposes of the Municipal Land Use Law (hereinafter, MLUL), N.J.S.A. 40:55D-2.

In his opinion, the purposes of the municipal land-use law advanced by this application are: (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, (g.) to provide for a variety of uses in appropriate locations, (i) the promotion of a desirable visual environment and (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 a more efficient use of land.

His essential point was that: as a message board, the use promotes the general welfare as a “form of communication.” More specifically, he stated:

- “The use will promote brand awareness and will let customers know that if these businesses are out there.”
- “The use not only creates awareness of products but also places, services, events, and news. The very nature of the use is informative and provides a mechanism for outreach.”
- Billboards also promote other categories that are not business related. They are generally institutional in nature. And our case law would consider them inherently beneficial. [An example would be a billboard which advertises a hospital.]
- Although a board by itself is not inherently beneficial, when it advertises higher education, healthcare organizations or religious organizations, these businesses and companies rely on billboard advertising to the message out.
- The billboards contain public service announcements.
- Digital advertising also provides a benefit of real-time messaging, which is an arm of law enforcement and emergency services [such as amber alerts]

The witness next addressed the question as to whether the proposed site is particularly suited for the proposed use. He stated that;

- It is a site that fronts on a commercial highway with commercial uses on this side of the highway.
- There are no homes lining the opposite side of Route 17 for one half mile. There are no homes lining Route 17 for 1200 feet from the site to the Racetrack Road exit ramps.
- To the south there are no homes lining Route 17 for 1200 feet from the site to the Franklin Turnpike ramp.
- The homes on the east side of Route 17 are well buffered from the highway and the site, which goes to the negative criteria as well.
- As to site suitability, it requires minimal earthworks on the site, no tree clearing for an established, developed site, and it fits in a “pocket” where it does not interfere with any of the operations on the site that presently exist.
- The site has been determined to be a permitted location under the outdoor advertising regulations, as determined by the NJDOT.

- The Department will only issue a permit if a billboard is in a non-residential area along a state highway. This is a nonresidential area along a State highway which meets the State's criteria.
- The site is on a straight stretch of road with clear lines of sight for ease of sign readability. The site has extensive highway frontage.
- The proposed use will not interfere with any of the existing uses on the site.
- The site can accommodate dual use. Neither use impedes nor interferes with the other. The billboard use is distinctive in that it is inert and generates no traffic activity.
- This proposed use will not introduce any traffic or circulation problems or conflicts or any over-intensification of the property.
- Previous testimony established that the use is functionally benign, creates no traffic, population, or water/sewer demand problems. It is in the O-2 zone district which permits a wide variety of uses that could generally impact in that area such as traffic, population, and water/sewer demand.

Further on the issue whether the proposed use is particularly well-suited for the site, plaintiff's planner added the following reasons or justifications:

- This land use is not permitted in residential areas. Since the applicant has limited opportunity for this use, the logical location is the upper right-hand corner along that 1 mile stretch along Route 17. The site is located in the OB-2 district, which is equidistant from the municipal boundaries to the north and the south.
- This is a land use which serves a purpose. It serves a good function. It does belong somewhere. This type of land use follows a highway. This is where the highway is in your community.
- As to the master plan, the master plan states: "ordinance recommendations should consider limitations on the placement of billboards." It mentions evergreen plantings and appropriate landscaping as a mitigative measure in that regard.
- The witness acknowledged that the master plan also states: "development that would be out of scale with the existing as built environment along the developed portions of the Route 17 corridor should be restricted." and that "among possible intrusions that should be regulated include billboards." He noted that, importantly, the language does not say "prohibited."

Significantly, the witness was asked by the Board Attorney whether the proposed site was selected by the applicant prior to his engagement as a planning expert. In answer to the question, the witness stated that "The site has been carefully reviewed and analyzed, and from a pure, physical planning standpoint the site selection is appropriate." That statement did not answer the question. Upon being asked the question again, the witness admitted that the applicant selected the site without his involvement and that he was engaged after the site was selected. In other words, he was not engaged by the applicant for the specific purpose of selecting a suitable site from a planning perspective for the erection of the billboard in Ridgewood. Also, he did not consider alternate sites focusing on whether this was appropriate from a physical planning point of view.

Finally, the witness offered his opinion on the Medici proof requirements as to the negative criteria of the statute. These proofs require a reconciliation of the omission of the use from the zone under the master plan and zoning ordinance.

- There are no articulated reasons as to why this use is not permitted under the zoning ordinance.
- The only NJDOT permit for a sign on Route 17 is the subject sign, which is a multi-message permit.
- The zone plan recognizes the Route 17 corridor of the community.
- The 2022 master plan references ordinance recommendations that impose limitations, but not an outright ban on the placement of billboards along Route 17. “So, we can surmise from a planning standpoint that a zoning ordinance, if adopted, would support a billboard at this location since this side of Route 17 is only non-residential as the others side is not.”
- As to the compatibility of this use with surrounding uses, this is a highway commercial use, and a commercial highway, surrounded by other highway commercial uses.
- The other uses in the zone are several stories high. A billboard does not have the bulk of a building that could be 30 feet high. The adjacent cell tower is 130 feet high.
- “The use is functionally less intense than the many permitted uses in the zone and visually less bulky than many structures that the zone allows. [*This testimony ignores the fact that because this is a proposed second structure on a property, no such building would be permitted*]
- The town has a historic preservation ordinance. As part of outside agency approval requirements, the applicant is obligated to comply with the New Jersey State Historic Preservation Office (SHPO) authorization. The project will not have any direct or indirect effects on any historic structures based on all the evidence in the record.

The applicant’s planning expert also testified briefly as to the subsection (d) (2) variance. Specifically, this pertains to the proposed billboard being developed as a second, non-permitted use on the site where there presently exists a nonconforming use, thereby going against the prohibition of only one use on a property. He stated;

- The existing auto repair shop use has not been changed or expanded in any way;
- Although the auto repair shop is not being expanded, the amount of property devoted to or available for this use is being reduced by the proposed installation of the billboard and;
- This land is currently used by the auto repair business and so it has no effect on operations.

The applicant also requires a dimensional or bulk variance under subsection (d) 6 for the height of the proposed billboard. Although there is a 30-foot height limitation in the zone, the applicant has requested permission to erect the billboard to a height of 40 feet. The applicant’s planner testified that a height of 40 ft. is necessary for this land use to effectuate its purposes and all of the public benefits that he mentioned. Other reasons offered by Mr. McDonough were as follows:

- The grant of summary similar relief in the case of the New Brunswick Cellular case, which was for a cell tower.

- The added height will not block scenic views or create negative shadow effects. The added height will not create additional population density or traffic generation. The added height does not create an imposing structure, especially in view of the much taller cell tower next to the site which was found to be suitable here.

[However, there is a big difference between the public benefit conferred by a cell tower compared to little or no public benefit conferred by an electronic billboard. That use primarily benefits only the interests of the company owning the billboard and the businesses using the billboard to advertise their products and services.]

The witness also addressed the additional setback variance required. In this zone, the minimum setback is 12 feet while here only 10 feet is provided. In his opinion, a 2-foot variance is relatively minor. The widening of the panels and the position of the sign are what triggers the request for additional relief.

Plaintiff's planner stated that this dimensional variance would come under section (c) (2) of the statute. His view was that the variance meets the "balancing test," in that the benefits of the application as a whole substantially outweigh the detriments.

THE EVIDENCE PRESENTED BY THE OBJECTORS

IN OPPOSITION TO THE APPLICATION FOR VARIANCES

After the applicant rested, the objector presented two planning experts in opposition to the application. Joseph Burgis, P.P. and Bridgette Bogart, P.P. both testified as planning experts. Mr. Burgis testified with regard to whether, in his opinion, the applicant established the statutory criteria to warrant the grant of the variances applied for. Much of this testimony centered on a review of the application in light of the Village's master plan. Ms. Bogart testified in large part with regard to the applicant's contention that the use was particularly well suited to the site, thereby satisfying the positive criteria under the statute.

After explaining the statutory criteria, Mr. Burgis offered an opinion containing the following points:

- There are three goals in the master plan which merit attention. 1) one of the goals says that the municipality's intent is to work to keep the small-town village feel in the community and adapt to change in ways to maintain or complement that feel.
- Secondly, there is a goal that is stated with respect to the Route 17 corridor in the vicinity of the subject site and specifically the cemetery, the Schedler property and the Old Paramus Reformed Church. The master plan indicates that this area represents an important part of the Village's history and, consequently, the views associated with these properties should be protected from visual intrusion.
- The master plan then defines what is a visual intrusion; it specifically identifies billboards, powerlines and poorly designed and inappropriately located and inadequately screened and unsightly land uses as visual intrusions.

- Billboards are specifically identified as a form of visual intrusion, which is discouraged in the master plan. That goes to the heart of the negative criteria of the statute with respect to the prong that says an applicant has to show there is no substantial impairment to the intent of the zone plan.
- The zoning ordinance, which is intended to implement the master plan, places the site in the OB-2 office buildings zone. That zone identifies a variety of permitted principal uses allowed as of right.
- The existing site contains a pre-existing, nonconforming garage of area and bulk standards which do not comply with the zoning ordinance, particularly with regard to impervious coverage.
- The ordinance permits a maximum of 70% of the site to be devoted to impervious material. The site plan filed by the applicant indicates that 76.2% of the site is covered by building and other impervious material.
- References are made to Mr. McDonough's opinion as to special reasons. Mr. Burgis particularly focused on the four specific purposes of the municipal land-use which the applicant's planner suggested. In Mr. Burgis's opinion, Mr. McDonough's opinion "fell short."
- As to the argument that the applicant's proposal advances the general welfare and promotes a form of communication, Mr. Burgis opined that this was an overly broad generalization of what that term actually means. [*In other words, graffiti could be considered a form of communication that promotes the general welfare*].
- Mr. Burgis rejected the argument that because an inherently beneficial use (such as a hospital) can be advertised on the billboard, this would make the billboard an inherently beneficial use. In other words, under the MLUL, a subsection (d) variance is for the structure itself, that is the billboard. It is not for any particular message that is being delivered on that billboard.
- The applicant's expert also opined that the existence of the billboard created an opportunity to extend the central business district of the Village of Ridgewood. Mr. Burgis considered this opinion "a stretch."
- Mr. McDonough stated that, under the authority of the case of Bell v Stafford, a municipality must permit a billboard somewhere within its boundaries. But Mr. Burgis opined that same is a policy determination and that zoning boards do not have the authority to develop land use policy.

In addition to the general welfare provisions of N.J.S.A. 40:55D-2, Mr. McDonough referred to three other provisions of the act, which were addressed by Mr. Burgis

- Mr. McDonough pointed to language in the statute which says the provision of a variety of uses has been affirmed by this application. (subsection g). Mr. Burgis opined that this subsection was not applicable because the zoning ordinance of the village identifies a whole host of permitted uses that are allowed in this zone. There is no rule that says that a zoning ordinance has to permit everything in the municipality in a particular zone. Here,

the governing body chose to identify a select number of particular uses that they felt appropriate for the zone.

- Mr. McDonough referred to a provision in the MLUL that talks about promoting a desirable visual environment. (subsection i) and compared the impact of the proposed use to numerous permitted uses. Mr. Burgis felt that such opinion ignores the comment in the master plan where it is specifically said that billboards are an intrusive feature in this segment of the Route 17 corridor because of its physical relationship to the historic character of other properties.
- The applicant's planner also referred to that provision of the statute regarding the promotion of an efficient use of land and offered the opinion that the applicant's proposal would promote the efficient use of land. However, Mr. Burgis noted the site is already developed with a pre-existing nonconforming use. The application is proposing an additional use which is not allowed as of right and which the master plan says that the governing body does not want to see happen here.
- In addition, the zoning ordinance only allows one principal use on a property. This application, if granted, would result in two uses on the same property, both of which are not permitted.

Mr. Burgis concluded that the grant of this application would cause a substantial impairment to the intent of the master plan. He also offered the opinion that, based on his evaluation of the application and the testimony, the applicant failed to establish both the positive and the negative criteria of the statute.

In response to questions by Board members and members of the public, Mr. Burgis reiterated his testimony that the master plan speaks in terms of restricting certain intrusive uses anywhere near the historic designated area and amongst the other uses that they have identified, the very first one was billboards. So, it is made clear in the master plan as to where they placed billboards in relation to an adverse impact on that historic district.

In response to questions by the Board Attorney, the witness specified that he also prepares master plan for communities in his capacity as a planner. In preparing a particular master plan in a community in which he saw that there was a historic district, it would be his recommendation that billboards be prohibited in the historic district.

Mr. Burgis further stated that, from a planning perspective, it would be improper to permit billboards in a historic district where there is an ability to erect them in another district. They are incompatible uses.

Finally, the objector's expert also testified as to the prohibition against two uses on the same piece of property. Here since the main use is nonconforming, a second nonconforming use would be a negative. The present use on the property exceeds the maximum coverage. Therefore, a second use on the property would only increase the excess coverage.

Brigette Bogart, P.P. also testified as an expert witness for the objector. Her testimony focused on the issue of site suitability. One of the areas of her testimony related to traffic conditions on Route 17 in the vicinity of the site. She stated as follows as follows:

- This portion of the Route 17 corridor has always been a problem, because there are a number of entrances and exits immediately adjacent to Route 17 with a 90-degree angle to get into and out of the property.
- An exhibit from the Village master plan shows numerous traffic accidents along this portion of Route 17, which contradicts the applicant's traffic expert who said that there would not be a significant increase in traffic issues along this corridor.
- She referred to the report of the applicant's traffic engineer, which stated on page 33 that there were 13 accidents within a period of 3 and a half years.

As to site suitability, Ms. Bogart stated the following:

- In her opinion the site is not suitable for a number of reasons. One is the impact upon nearby historic preservation areas. She pointed to exhibits in both the land-use element and historic preservation element of the master plan illustrating that the site is not suitable for the proposed use.
- Pointing out specific exhibits in the Village master plan, she referred to historic properties on the other side of Route 17 shown in the master plan, specifically the Old Paramus Reformed Church and cemetery and the Schedler property.
- Ms. Bogart quoted from a portion of the master plan as follows: "The Route 17 corridor in the vicinity of Valteau Cemetery, the Schedler property and the Old Paramus Reformed Church is an important part of the Village's history. The views associated with these sensitive properties should be protected from out of scale visual intrusions. Developments that are out of scale with the existing built environment along the developed portions of the Route 17 corridor should be restricted. Among possible intrusions that should be regulated include billboards, power lines, poorly designed and inappropriately located buildings and inadequately screened unsightly land uses." (emphasis added.)
- The land-use element of the master plan also mentions these scenic corridors along Route 17 coupled with a recommendation to protect the Village's scenic character and charm and to prevent disruption. It recommends that the zoning ordinance should be amended to regulate and restrict development that may be potentially harmful or incompatible with these important resources.
- Further in her opinion, the proposed billboard is also not suitable from a traffic impact or safety impact point of view because there is presently an existing nonconforming use on the property and the applicant is proposing an additional nonconforming use for the same site.
- Ms. Bogart opined that there was also an issue regarding the proximity of the site to residential properties. Several photographs marked as exhibits showed that there are residential properties within 200 feet of the subject site.
- In her opinion, the use will be a potential eyesore particularly, when you look at the historic corridor and its relationship to the master plan goals and objectives which is directed toward preservation and preventing the impact and intrusion to the historic nature of the Village.

- Ms. Bogart referred to the applicant’s planner’s answer to the Board Attorney’s question as to whether he was hired before or after the selection of this particular site. Mr. McDonough confirmed that he was hired after the selection of the site and, therefore, he did not take into consideration any of these master plan issues for traffic conditions in determining whether the site is suitable.

In conclusion, as to the negative criteria, based upon the information and evidence presented, as summarized above, in her opinion there would be a substantial impact and impairment to the master plan and a substantial detriment to the public.

THE APPLICABLE LAW

The “Site Suitability” Standard

Outfront Media contends that it has established a special reason for the grant of the use variance, thereby satisfying the positive criteria, on the grounds that its proposed use is particularly suited to the site on Route 17 where it intends to erect its digital billboard. As will be subsequently discussed, it claims that its project will advance one or more of the principles of zoning.

Merely demonstrating that a particular use promotes one or more purposes of zoning listed at N.J.S.A 40:50 5D- 2 is not enough to satisfy the positive criteria. Where the use is not inherently beneficial, it must also be shown that the use promotes the general welfare to some extent and the site is “peculiarly fitted” or “particularly suitable” for the proposed use.(commonly referred to as the site suitability standard). Fobe Assocs. v. Mayor and Council of Demarest 74 N.J. 519 (1977). There the board of adjustment denied a variance to permit a developer to build an apartment building in a single-family district. The court held that the board’s decision was not arbitrary, capricious, or unreasonable.

In Fobe, a majority of the court held that the rule of Kohl v. Mayor and Council of Fair Lawn, 50 N. J. 268, 279 – 280 (1967) was applicable in that it must be shown that even where there was a need, the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought.

In the context of the positive criteria, site suitability focuses on: (1) why the location of the site within the municipality or region is particularly suited to the use despite the adverse zoning and/or 2) what unique characteristics of the site itself make it particularly appropriate for the proposed use rather than a permitted use Cox& Koenig New Jersey Land Use Administration, section 32-4, page 706, GANN, (hereinafter referred to as Cox.)

The leading case is Yahnel the Board of Adjustment of Jamesburg 79 N.J. Super. 509 (App. Div.) certif. denied 41 N.J. 116 (1963). There, a telephone wire center was permitted in a residential zone not merely because telephone facilities in general serve the public welfare but because the facts showed that suitable service could be provided only by establishing the wire center at that particular location.

In Ward v. Scott 16 N. J. 16 (1954) the Supreme Court approved a variance permitting construction of a supermarket in a residential zone. The use was permitted not because a supermarket per se

serves the general welfare but because a supermarket at that particular location did “meet current needs of nearby areas which have already been developed and future needs of other areas which have not yet been developed.”

There is a distinction between the site suitability test under the positive criteria and the site suitability test under the negative criteria. With respect to the latter, it must be shown by an applicant that, in addition to the site being particularly suited for the proposed use, such a use would not significantly impair the zone plan and zoning ordinance. This is the same negative criteria that applies to the grant of any variance under N.J.S.A. 40:55D-70.

Cases involving billboards.

Although there are a number of New Jersey zoning cases (both published and unpublished opinions) involving billboards, there are very few such cases involving the grant or denial of variances with respect to billboards, let alone electronic billboards. One such case is Elco v. RC Maxwell Co., 292 N.J. Super. 118 (App. Div. 1996). There a local board of adjustment granted a use variance for a billboard in a marine commercial zone. The applicant argued that the proposed billboard would have a less significant impact on state designated wetlands than did other permitted uses in the zone where all the surrounding properties had commercial establishments such as gasoline stations. The court found unpersuasive the board’s findings that the billboard would have little or no impact on homes or commercial establishments in the area. The applicant there also contended that the site was particularly well suited for the proposed billboard use because of the existence of wetlands. The court did not address that issue but did state: “There is no strong state policy encouraging the development of billboards.” at 133.

Another case is Inter-Vine Outdoor v. Gloucester City Zoning Board, 290 N. J. Super. 78, 87 (App. Div.), cert. denied 146 N.J. 68 (1996). There the applicant sought use and bulk variance approval to construct freestanding billboards on property adjacent to the Walt Whitman Bridge. The board of adjustment rejected the application on the grounds that there was no special reason for the grant of the variance and that such approval could not be granted without substantial detriment to the public good. The trial court upheld the board’s action as not having been arbitrary, capricious, or unreasonable and further held that the record did not support the application. (This case is not particularly illuminating because the court did not specifically recite the record before the board and there was no discussion regarding either the special reason presented by the applicant or the site-specific standard.)

Cases involving cell towers.

There is obviously a substantial difference between a billboard and a cellular communications tower. However, since variance applications for cell towers also present the special reason that the use is particularly well suited to the proposed site on which the structure is to be erected, it is worthwhile to consider by analogy cases involving cell towers.

By analogy, a comparison of the instant application involving a commercial billboard may be made to a case involving a wireless communication tower. With respect to proof of the positive criteria to support an application for a use variance, it has been held that cell tower uses are not inherently

beneficial. Therefore, it must be proven that the use promotes the general welfare. Our courts have held that if a tower receives an FCC license it will be deemed to have satisfied this prong of the positive criteria test. New Brunswick Cellular v. Board of Adjustment, 160 N. J. 1, 14 (1999)

Most cases involving cell towers are presented on the basis that such use is particularly suited to the proposed site. New Brunswick Cellular v. Board of Adjustment, *supra*, was such a case. There, the court ruled that in order for a use variance to be granted for a proposed telecommunications facility or cell tower it must be shown that there was a need for the facility at that particular site or that the site was suitable for the use. The court there stated that to do this the applicant must “initially” show the need for the facility at that location. In that case, the court determined that the applicant showed site suitability by competent expert testimony that its existing capacity to serve the public in this area was inadequate and that the monopole at issue would redress this lack of capacity. The applicant also demonstrated that it could not use other existing facilities and that the site chosen was in an industrial zone.

However, it need not be shown that the proposed site is uniquely suited to such use. Medici v. BPR Co. 107 N.J. 1, 9. (1987) In other words, it need not be the only site available for the project. See also Omnipoint v. Board of Adjustment, 337 N. J. Super. 398, 416-422 (App. Div.) certif. denied 169 N.J. 607 (2001) involving a local board’s rejection of a monopole applicant where it had failed to demonstrate site suitability.

In Northeast v. West Paterson Zoning Board of Adjustment, 327 N. J. Super. 476, 497-498 (App. Div 2000) the court held that the site’s suitability was to be determined both from the viewpoint of the applicant and from the viewpoint of the municipality. There the question was whether a telecommunications tower was suitable in a residential zone.

In AWACSV Clementon Zoning Board 160 N. J. 21, 25 (1999) the court held that the applicant had established that the site was particularly suited for a telecommunications facility by showing that it was in a commercial zone, adjoined a major highway and was well situated within the applicant’s system to deliver the necessary service. However, the court further found that proofs regarding the negative criteria were lacking and remanded the matter to the board for further consideration.

In N.Y. SMSA v. Bernards Board of Adjustment, 324 N. J. Super. 149 (App. Div.) certif. denied 162 N.J. 488(1999) the court held that the applicant did not pass the site suitability test for the following reasons: the zone for which the tower was proposed was not commercial or industrial but rather a “public use” zone permitting public institutional uses, residential uses were close by and encouraged by the master plan, the topography precluded effective screening, and the proximity of a school for disturbed boys raised unanswered safety questions. In addition, the applicant did not claim or demonstrate that there was no other suitable or adequate site that could meet its needs.

The law applied to the facts of this case.

The first issue to be considered by the Board is whether the proposed electronic billboard would advance one of the statutory purposes of zoning. As previously stated, the applicant’s expert

testified that: 1) the proposed use promotes the general welfare because it is a form of communication that promotes economic development, provides opportunities for institutional and public uses to disseminate messages and offers a venue for public service and emergency announcements; (subsection a); that it provides a variety of uses in appropriate locations (subsection g); that it promotes a desirable visual environment (subsection i); and that it promotes the efficient use of land. (subsection m).

As a Board Member you need to determine if the commercial billboard would advance any of these purposes. It is recognized that the billboard may be a form of communication in that it may publish public service announcements and the like. It is recognized that this is a very small part of the function of the billboard. This form of communication is essentially advertising by which an individual or company promotes its goods or services.

As a Board Member, you need to determine if the billboard provides a variety of uses in appropriate locations.

This subsection of the statute speaks to a municipality's establishment, by zoning ordinance, different zones for different uses, such as single-family residential zones, multifamily residential zones, commercial zones, and industrial zones. You need to determine if it is applicable to the proposal of a disparate in a zone in which such use is prohibited. Moreover, the phrase "in appropriate locations" presents the question as to whether a particular piece of property on Route 17 in Ridgewood near this Historic District is appropriate for the erection of a digital billboard.

You must determine if the billboard would promote a desirable visual environment. Historically, billboards have not been a favored use. While modern electronic billboards today are not the eyesores that static billboards were in the past and continue to be in the present, they are not the type of use which have a positive impact on the general visual environment of the municipality. This is why under most municipal zoning ordinances billboards are highly regulated and usually limited to certain nonresidential zones or portions thereof. At the risk of being repetitive, that is also why the court in Elco, supra, recognized that "There is no strong State encouraging the development of billboards."

Finally, as to the efficient use of land, it may be the case that in certain areas such as wetlands or steep slope properties billboards may be permitted because no conventional development of such areas is practical or possible. Here, a nonconforming auto repair facility exists on the proposed site and exceeds the maximum coverage permitted. You need to determine if there is a legitimate need for another non-permitted use to be developed at that location, and for the lot coverage to further exceed the ordinance limitations. The existence of two different uses on one piece of property is prohibited by ordinance.

The next and central issue to be considered is whether the subject site is particularly fitted or particularly suitable for the proposed use. The applicant's expert offered several reasons why the billboard would pass the "site suitability test," thereby constituting a special reason to satisfy the positive criteria under subsection d of the statute. For example, it was contended that the site fronts on a commercial highway there are no homes for a certain distance lining Route 17, the homes on the east side of Route 17 are well buffered, development would require "minimal earthworks", the

site can accommodate dual use, the proposed use will not interfere with the existing uses on site, and the site has been determined to be a permitted location under the outdoor advertising regulations as determined by the New Jersey State DOT.

The objectors' experts offered the following reasons why the site is not particularly suitable for the proposed use. They stated that the proposed billboard would have a negative impact upon nearby historic structures and historic preservation areas, the Village master plan states that the views associated with the historic properties should be protected from out of scale visual intrusions including specifically billboards, the proposed use is not suitable from a traffic impact or safety point of view because there is presently an existing nonconforming use of property and there have been a number of traffic accidents in the vicinity, and there is a significant issue regarding the proximity of the site to residential properties, some of which are within 200 feet of the subject site.

You need to determine if the negative implications that have been set forth far outweigh any contention that the site is particularly suitable. Has the applicant satisfactorily addressed the following questions:

- 1) why the location of the site within the municipality or region is particularly suited to the use despite the adverse zoning, or
- 2) what are the unique characteristics of the site which make it particularly appropriate for the proposed use rather than a permitted use. While a billboard might be an appropriate use on either side of Route 17, there were no reasons presented why the billboard had to be at this particular site in order to serve its commercial advertising function or, in other words, why it would not serve such function in any of a number of other Bergen County municipalities fronting on Route 17. Further with respect to the question of particular suitability, you need to determine if this site is unsuitable for the erection of the use not permitted in the zone simply because of the fact that an unpermitted, but nonconforming use presently exists on the property.

You must determine if the applicant has demonstrated that there are no other suitable or adequate sites within the vicinity.

With respect to the negative criteria, the applicant's expert planner attempted to explain the reasons why variances for the subject billboard could be granted "... without a showing that such variance (s) 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." Mr. McDonough stated that there were no articulated reasons as to why this use is not permitted under the zoning ordinance, that the zone plan recognizes the route 17 corridor of the community, but does not specifically mention billboards, that the use is compatible with surrounding uses because it would front on our commercial highway and, ignoring the fact that there is presently a nonconforming use on the property that the use is less intense than other uses which could be present.

The objectors' experts presented proof that the applicant had not satisfied the negative criteria because the proposed use would substantially impair the intent and purpose of the zone plan and zoning ordinance. In addition to the reasons referred to above as to why the site was not particularly

suited for the proposed use, evidence was presented to indicate that the master plan reflected three goals: 1) to keep the small-town village feel in the community and adapt to change in ways to maintain or complement that feel, 2) specifically with regard to the Route 17 corridor and the historic properties adjacent thereto, the views associated with such properties should be protected from visual intrusion. Indeed, the master plan specifically defines or identifies visual intrusions **such as billboards**, powerlines and other uses that are poorly designed and inappropriately located and inadequately screened. Significantly the zoning ordinance only allows one principal use on a property and this application, if granted, would result in two non-permitted uses on the same property.

Please note the Medici case stands for the proposition that even where a special reason is established, the applicant must present “enhanced proof” explaining why the non-permitted use is not inconsistent with the master plan. You must determine if the applicant’s proof passed that test. Based on the testimony of the objectors’ experts, the applicant’s proofs did not pass this test.

The same type of proof is needed to establish the positive and negative criteria of the statute with respect to the (d) (1) variance (to permit a billboard as a non-permitted use in the zone, equally applies to the (d) (2) variance to permit the non-permitted billboard use on a site which already has another non-permitted, nonconforming use on it.

If the Board concludes that the applicant has failed to prove its entitlement to the use variances mentioned above, it need not reach the question whether the applicant has presented sufficient proofs to warrant the grant of a height variance under subsection d (6) of the statute.

With respect to the height variance the applicant proposed a 40-foot-high billboard in a zone with a height limitation was 30 feet. The applicant’s expert testified that the height of 40 feet is necessary for this land use to be effective and to promote the purposes of zoning under N.J.S.A. 40:55D-2, to which he testified. It is understood that the applicant has eluded to the fact that it is going to provide the Board with a final height of the billboard which will be less than what was initially requested.

He also stated that the added height will not block scenic views, create negative shadow effects, or create an imposing structure. However, since a height variance is a subsection d variance under the statute, the applicant here also had the burden to prove that special reasons existed for the grant of such variance. You need to determine if the applicant’s expert established a special reason. If the billboard at this location does not satisfy the site suitability standard, then the billboard higher than the maximum allowed for a permitted use, also does not meet the test.