

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2435-11T4

HARBORHEAD CONDOMINIUM  
ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

ZONING BOARD OF ADJUSTMENT OF  
POINT PLEASANT BEACH; ANTHONY  
STORINO and FRANK STORINO  
d/b/a JENKINSON'S INLET BAR &  
GRILL, a/k/a JENKINSON'S  
PAVILION and JENKINSON'S NORTH,

Defendants-Respondents.

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Argued October 9, 2012 - Decided November 28, 2012

Before Judges Parrillo, Sabatino, and Maven.

On appeal from the Superior Court of New  
Jersey, Law Division, Ocean County, Docket  
No. L-773-11.

Roger J. McLaughlin argued the cause for  
appellant (McLaughlin Stauffer & Shaklee,  
P.C., attorneys; Jeff Thakker, of counsel;  
Mr. McLaughlin, on the brief).

Dennis M. Galvin argued the cause for  
respondent Zoning Board of Adjustment of  
Point Pleasant Beach (The Galvin Law Firm,  
attorneys; Mr. Galvin, on the brief).

R.S. Gasiorowski argued the cause for  
respondents Anthony Storino and Frank  
Storino (Gasiorowski & Holobinko, attorneys;  
Mr. Gasiorowski, on the brief).

PER CURIAM

Plaintiff, Harborhead Condominium Association, Inc. ("Harborhead"), appeals from the Law Division's order sustaining variances and site plan approval issued to the owners of an adjacent beachfront restaurant. The Zoning Board of Adjustment of Point Pleasant Beach ("the Board"), had granted the restaurant's land use application, over Harborhead's objection, following nine public hearings. We affirm.

I.

A.

In 1976, Pasquale Storino purchased property in Point Pleasant Beach which is now used as a restaurant and bar called Jenkinson's North Pavilion ("Jenkinson's"). The Storino family has always operated the property as a restaurant. As of December 2008, it was owned by the Storino family (the "Storinos") in trust and managed primarily by Frank and Anthony Storino.

Jenkinson's is on property located in the "RC" (Resort Commercial) zone of Point Pleasant Beach. It sits primarily on Lot 3, Block 180. Jenkinson's also has a small seasonal stage area on its south side on Lot 2, Block 212, and a deck extending eastward onto the beach. The deck area consists of an upper portion and a lower portion. The upper deck has a bar area, and

the Storinos have proposed to replace one of the two bars there. The lower deck is used for banquet-type operations.<sup>1</sup>

The west side of Jenkinson's runs along the boardwalk. Across the boardwalk from the restaurant is a parking lot located on Block 180, Lot 1.<sup>2</sup>

Harborhead is located to the north side of the parking lot, on Block 180, Lot 2, and sits diagonally across the boardwalk from Jenkinson's. It consists of numerous condominium buildings.

#### B.

In January 2008, a Point Pleasant Beach zoning officer sent a violation notice to the Storinos, asserting that the lower deck at Jenkinson's was in violation of local ordinances.<sup>3</sup> In

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<sup>1</sup> The lower deck is roughly fifty-seven feet wide, as measured north to south, and extends fifty feet onto the beach. There is an extension on the lower deck for a buffet table, which is approximately twenty-five feet wide going north to south, and extends another twelve feet onto the beach. The lower deck is surrounded by a series of posts and roping to prevent beachgoers from entering private parties on the deck.

<sup>2</sup> The parking lot is also apparently owned by the Storinos, although that is not documented in the record.

<sup>3</sup> The letter communicating the violation notice itself has not been produced in the record. Although the letter, as it is described, appears to only have referred to the beach deck area and its use for banquets, the upper deck area also became a part of the hearings before the Board, over the objections of counsel for Jenkinson's.

response, the Storinos filed a request for an interpretation of the relevant Point Pleasant Beach ordinances, 19-8.4(a) and 19-14.2(b). Ordinance 19-8.4(a) prohibits structures on the beach east of the boardwalk, except pre-existing nonconforming buildings.<sup>4</sup> Ordinance 19-14.2(b)(1) requires site plan approval for expansions to existing uses and structures. Although apparently not referenced in the zoning officer's letter, Ordinance 19-9.6(b)(2) allows restaurants in RC zones, "provided the condition and operation of any restaurant will not result in reduction of any existing off-street parking serving uses in the RC Zone."

The Board held five public hearings on the interpretation request between December 2008 and November 2009. Harborhead participated in those initial hearings as an "interested party," pursuant to N.J.S.A. 40:55D-4, and presented objections.

John Maczuga, a licensed planner, testified as an expert for Harborhead. Maczuga noted that the subject property had been rezoned in 1993. According to Maczuga, as a result of that rezoning, bars and restaurants in the Borough became conditional uses, and subsequent expansions to restaurants required a conditional use permit or a variance under N.J.S.A. 40:55D-

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<sup>4</sup> The parties agree that Jenkinson's is a pre-existing nonconforming use.

70(d). He further stated that in approximately 1996 or 1997, after the rezoning had occurred, Jenkinson's was expanded by adding the upper deck area and the seasonal beach deck without permits or approvals.

Several local residents, who opposed the restaurant's application, testified that in the late 1990s and early 2000s the events held at the establishment had become larger, louder, and more frequent. They asserted that some of those events involved hundreds of patrons.

After completing these initial hearings, the Board determined in November 2009 that the lower beach deck was indeed in violation of the local zoning ordinance and thus would require a use variance. The Board also found that the upper deck area was an unauthorized expansion of the existing structure, having been built without proper approvals.

C.

The Storinos thereafter filed a land use application with the Board, seeking approval to expand a nonconforming use and a use variance, respectively pursuant to N.J.S.A. 40:55D-70(d)(2) and (d)(3).<sup>5</sup> In that application, the Storinos sought a (d)(3)

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<sup>5</sup> The statute provides in relevant part:

The board of adjustment shall have the  
power to:

(continued)

variance to continue using the lower deck area on the beach for banquets, despite the zoning ordinance's requirement that new restaurant construction not decrease off-street parking, a (d)(2) variance to expand the upper deck area, and approval to renovate much of the building for aesthetic purposes.

The Board held four public hearings on the application between December 2009 and October 2010. Once again, Harborhead participated and objected to the Storino's application. Specifically, Harborhead opposed the Storinos' variance requests with respect to the restaurant's upper deck and lower deck

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(continued)

. . . .

d. In particular cases and for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit: . . . (2) an expansion of nonconforming use, (3) deviation from a specification or standard . . . pertaining solely to a conditional use[.]

. . . .

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 the purpose of the zone plan and zoning ordinance.

[N.J.S.A. 40:55D-70.]

areas. Harborhead, however, did not object to the proposed renovations of the restaurant building itself.

Gary Lepore, a licensed architect, testified as an expert on behalf of the Storinos in support of the proposed changes. Lepore explained that one aspect of the project was to redesign the restaurant's façade, by adding natural materials such as wood and stone, in order to "enhance the look and the aesthetics." The coloring was to be "beachy," consisting of "tans and those sorts of colors."

Lepore further explained that three existing garage doors on the west side of the building were to be replaced with a single garage door and a glass composite opening as a service window to the boardwalk. The north side of the building was to be a "solid wall," except for a three-foot wide door that leads into a storage room. A storage room, a mechanical room, and regular and handicapped toilets were all planned for the inside of the building along the north wall. There were to be no areas for serving food or any music to be played in that part of the building. The purpose of having these rooms on the north side, according to Lepore, was to create a buffer to limit noise from reaching Harborhead. The handicapped toilets were to be added to accommodate building code requirements.

The entrance to the renovated restaurant was planned to be on the southwest corner of the building, at a forty-five degree angle abutting the south and west façades. None of the dimensions of the building were to change under the plan.

Maczuga, Harborhead's expert planner, expressed concerns with Jenkinson's deck addition, especially the lower deck's purpose in holding banquet parties. He opined that the beach area "ambiance" where Jenkinson's is located does not "constitute a particular suitability for a banquet facility." Maczuga was unaware of any planning principle, legal interpretation, or judicial decision establishing that beaches are particularly suitable locations for "banquet facilities, drinking, dancing, [or] partying . . . ."

Gordon Gemma, a professional planner and attorney, testified as an expert before the Board for the Storinos. Among other things, he noted that the deck area benefits handicapped patrons, because when weddings or similar events are being held, the deck area "makes it somewhat easier to utilize the beach." He emphasized that the changes would "allow for more bathrooms inside the restaurant, particularly a handicap accessible bathroom . . . ."

Gemma further stated that the beach deck is used in conjunction with the main building as a conditionally permitted



use. According to Gemma, Jenkinson's has "particular suitability" to the area because it had been a restaurant on the beach "for a long period of time," and because the restaurant had a "history [there] that goes to the particular suitability of this area." He observed that that portion of the beach had historically been used for "banquets [and] hosting various events." He added that the planned aesthetic improvements alone would justify the variance.

Gemma stated that the deck addition would not be a "substantial impairment of the intent and purpose of the zone plan" because although the zone plan prohibits structures blocking views of the ocean, the deck did not block the view of persons standing on the boardwalk and looking out onto the beach and ocean.

The expansion of seating in the restaurant was also a contested issue. Before the proposed changes and additions, the restaurant had a seating capacity of 220, consisting of thirty-two indoor bar seats, seventy-eight indoor dining seats, twenty-six outdoor bar seats, and eighty-four outdoor dining seats. The proposed changes would reconfigure the upper deck seating to thirty-four indoor bar seats, seventy indoor dining seats, twenty-four outdoor bar seats, eight bistro seats, and eighty-four outdoor dining seats, preserving a total of 220 seats. In

addition, the lower deck area would seat 280 people. All together, the entire Jenkinson's establishment, as reconfigured, would seat 500.

According to Frank Storino, even though the lower deck could potentially accommodate 294 people, on average the events held there had only eighty or ninety people in attendance. In such situations, the business's practice is to set up only as many tables as are needed. He noted that the absolute maximum is 250 people at events in the evening, and that evening events were generally smaller than day events. He explained that there is a policy to use wristbands so that only invitees can enter the party on the deck.

The witnesses also addressed parking issues. Through its expert Maczuga, Harborhead contended that the proposed expansions to Jenkinson's would adversely affect parking, in violation of Ordinance 19-9.6(b)(2). Maczuga expressed concerns that a restaurant focused upon banquet events would "squeeze parking" during the times while such events were taking place. He stated that such an increased need for parking would cause a "substantial detriment to the public good" affecting the entire area surrounding Jenkinson's.

On the other hand, Gemma testified that "[g]iven that the use [of the restaurant] predates the parking lot, it's hard to

say that there's a reduction of parking. This has been used as a restaurant for many, many years prior to a parking lot being in existence." He acknowledged that the added deck area increases the number of people who can be accommodated at Jenkinson's. He also stated that occasionally events had been held at Jenkinson's with 800 people in attendance. He opined that even if the restaurant's expanded operations increased the need for parking in the area, it is not a problem because that area is "not as heavily congested as the middle part of the town."

After the record was closed, a Board member suggested that the Storinos be required to set aside seventy parking spaces at their nearby parking lot on Block 180, Lot 1, so as to accommodate the 280 potential patrons of the lower deck area. The Storinos agreed to this proposed set-aside.

Maczuga also urged the Board to consider the Storinos' need for bulk variances as an additional negative criterion pursuant to N.J.S.A. 40:55D-70(d)(3). He cited deficiencies of lot frontage, depth, rear yard setback, and building coverage, some of which were preexisting. He further noted that there were encroachments on nearby lots, and that the beach deck was not anchored, in violation of the local flood hazard ordinance. In

Maczuga's opinion, all of these considerations weighed against the Storinos' application.

Due to the likely increase in patronage at Jenkinson's, an increase in noise also became an issue. Although Gemma acknowledged that "the biggest issue is noise," he deferred to Alexander Litwornia's assessment that noise would not "substantially impact the public good." Litwornia, a professional engineer, testified before the Board as an expert for the Storinos, addressing the potential sound and noise issues related to their proposal. He explained that state law allows no more than sixty-five decibels between 7:00 a.m. and 10:00 p.m., and no more than fifty decibels between 10:00 p.m. and 7:00 a.m.

Litwornia conducted a series of noise tests under police supervision outside Jenkinson's in 2009. The tests were performed between 6:30 p.m. and 7:00 p.m. on a Thursday night, with music playing. The tests showed that the sound emanating from the establishment did not violate the noise ordinance.

One test at the closest measurement location outside Jenkinson's produced a reading of sixty-six decibels. This measurement was one of five readings which, in total, averaged around sixty-two decibels. According to Litwornia, this measured sound consisted of the noise from music and the

boardwalk "and other things." The measurement location was at the "residential property line," most likely at the edge of the Harborhead property. Litwornia explained that sixty-five decibels equates to standing at the roadside with cars passing at thirty-five miles per hour. Because the one measurement of sixty-six decibels included ambient noise, Litwornia did not consider that reading as indicative of a violation.

Litwornia anticipated that the proposed site modifications would improve the decibel measurements he previously obtained. He also noted that the Storinos installed equipment that prevented the amplifier volume from being changed without first inputting a code. Frank Storino later testified that the controls for the sound levels at Jenkinson's are kept at another building on the other side of the boardwalk. There are six speakers on the edges of the lower deck: two on the south, two on the north, and two on the west, all facing inward. He also noted that when live musicians play, there are "[n]o horns or drums," and sound equipment from third parties is not allowed. Frank Storino further indicated that there is no live music played on the lower deck.

Before the record closed, the Storinos and Harborhead entered into a Memorandum of Understanding ("MOU"), where the Storinos agreed that, as a condition of their liquor license

renewal, they would not play music at Jenkinson's after 10:00 p.m. They further agreed to restrict the number of live musicians to two, and to restrict the types of instruments which would be played.

D.

On October 21, 2010, the Board approved the Storinos' site plan and variance requests. The Board issued a "Resolution of Approval," which contained a series of factual findings and legal conclusions in support of its decision. Among other things, the Board found that the site plan would be an aesthetic improvement to the restaurant building and surrounding area; the Storinos had sufficiently addressed the issue of increased parking by reserving seventy parking spaces in the nearby parking lot; the beach deck did not obstruct views of the ocean; and the Storinos' agreement with Harborhead regarding noise would mitigate the negative impact of potential noise.

The Board's resolution further noted that the new building would be code-compliant and thus safer and beneficial to the general welfare of the borough; the expansion of the deck was particularly well-suited because of Jenkinson's unique location and because it sits adjacent to a pre-existing condition; the expansion did not have an adverse effect on anyone's light and air; and it generated income from tourism. The Board determined

that any negative impacts from the Storinos' proposal were mitigated by the conditions of its approval, and that all benefits outweighed the detriments.

In sum, the Board concluded that the Storinos had met the requirements of N.J.S.A. 40:55D-70(d)(2) and (d)(3), subject to twenty-two conditions. Those conditions, among other things, required that there be no live music at Jenkinson's after 10:00 p.m.; there be no more than two instruments and no brass instruments or drums on site; all beach deck parties end by 10:00 p.m.; banquets, weddings, and reunions occur on the beach deck within the roped area; the restaurant not seat more than 220 people; the beach deck area not exceed 280 guests; there be no public seating or service on the north side of the structure; the beach deck area be used only for contracted events; the Storinos record a parking license for seventy spaces on the Lot 1 parking lot; catered and contracted events on site occur only in the beach deck area; and that no events be held on the beach deck on Memorial Day, the Fourth of July, or Labor Day.

E.

Following the Board's final action, Harborhead filed an action in lieu of prerogative writs in the Law Division in February 2011, challenging the decision. As part of the pretrial stipulations in the trial court, Harborhead conceded

that "notice in accordance with [the Municipal Land Use Law]"<sup>6</sup> had been provided in connection with the Storinos' application.

After hearing oral argument, Judge Vincent J. Grasso, A.J.S.C., upheld the Board's decision. In a written opinion dated December 9, 2011, Judge Grasso described at length the testimony presented to the Board and summarized the Board's findings.

Because the boardwalk and its commercial operations were at the "core of [Point Pleasant Beach's] resort industry," and also because the Board had the benefit of being familiar with Jenkinson's history and operations, Judge Grasso reasoned that the Board's findings, that variance relief would not "substantially impair the intent and purpose of the zone plan" under N.J.S.A. 40:55D-70(d), warranted judicial deference. In particular, the judge concluded that the Board's grant of variance relief under N.J.S.A. 40:55D-70(d)(3) was based upon "sufficient and credible evidence in the record and cannot be found to be arbitrary, capricious, or unreasonable." Among other things, the judge specifically found that the Board "could reasonably conclude that the parking issue" was "adequately

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<sup>6</sup> This stipulation appears to have been made at a pretrial conference, but no transcript of such a conference has been provided in the record on appeal.



addressed" by the condition that Jenkinson's reserve seventy parking spaces on Lot 1.

As to the Board's grant of a (d)(2) variance with regard to the beach decking and banquet facility, Judge Grasso found that such a variance was appropriately predicated on considerations of public welfare. As the judge noted, the decking did not impact the view of the ocean, the decking would allow "individuals and families to have memorable celebrations on the beachfront," accommodations would be made for handicapped persons, there would be improved access to the beach, "the new building and structures would be code and ADA [Americans with Disabilities Act] compliant," the Board had imposed twenty-two conditions on the changes in an effort to "harmonize the restaurant and banquet use with its oceanfront environment," and the "relocation of the banquet facility to the south side of the building was designed to minimize impact" on Harborhead. Consequently, the judge ruled that the Board had adequate grounds to approve the requested (d)(2) variance.

On the whole, Judge Grasso concluded that "the Board's findings [were] supported by sufficient and competent evidence in the record and that its approval of the application with variance relief cannot be found to be arbitrary, capricious, or unreasonable."

## II.

Harborhead now appeals the trial court's decision, raising two main issues. First, Harborhead argues, for the first time, that notice of the application was insufficient and the Board thereby lacked jurisdiction over the Storinos' request. In support of that claim, Harborhead points out that the Board's condition that the Storinos reserve seventy parking spaces on nearby Lot 1 for banquet patrons was imposed without notice of that arrangement having been served upon persons living within 200 feet of the parking lot. Second, Harborhead argues that there are insufficient substantive grounds to grant the Storinos' variance requests under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163.

### A.

Harborhead urges that notice of the Storinos' land use application should have been given to all landowners within 200 feet of Lot 1, including those who were not within 200 feet of Lots 2 and 3. Harborhead concedes, however, that this issue was not raised in the trial court.

In general, appellate courts "decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available" unless the question raised on appeal goes to jurisdiction of the trial

court, concerns matters of great public interest, or involves plain error by the trial court. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); accord Cavanaugh v. Skil Corp., 331 N.J. Super. 134, 178-79 (App. Div. 1999), aff'd, 164 N.J. 1 (2000); see also R. 2:10-2.

Although we are mindful that proper notice of a zoning board hearing is a jurisdictional requirement for a land use application, Twp. of Stafford v. Stafford Twp. Zoning Bd. of Adjustment, 154 N.J. 62, 79 (1998), we decline to address the alleged notice deficiency in the discrete setting of this case. As we have already noted, Harborhead stipulated in the Law Division that "notice in accordance with [the] M.L.U.L." had been given in this case. This stipulation provides a strong basis to conclude that Harborhead has waived its ability to now raise a notice issue for the first time on appeal.<sup>7</sup> See, e.g., Izenberg v. Bd. of Adjustment, 35 N.J. Super. 583, 588 (App. Div. 1955) (observing that the court "incline[s] to the view" that a party which appeared before a board of adjustment and made no objection to service there is deemed to have waived its

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<sup>7</sup> We note that on October 10, 2012, the Supreme Court heard oral argument in a case addressing whether a party which appeared at the hearings before a local planning board but did not object to notice at that time should be deemed to have waived its right to appeal the notice requirement. See Northgate Condominium Ass'n v. Borough of Hillsdale Planning Bd., 208 N.J. 337 (2011) (granting certification).

right to subsequently object to notice); see also Wilson v. Union Twp., 123 N.J.L. 474, 476-77 (Sup. Ct. 1939) (holding that waiver of proper notice in accordance with a precursor to the MLUL was binding on appeal); Cox & Koenig, N.J. Zoning & Land Use Admin., 27-1.5(g) (2012) (citing Izenberg and noting that "where a person appears at the hearing prepared to address the application and makes no objection to lack of properly sent notice at that time, he will be said to have waived it"). We add only the following remarks.

Even assuming, for the sake of argument, that the alleged notice defect was not waived by Harborhead, it is not clear that residents within 200 feet of Lot 1 were necessarily entitled to notice of Harborhead's land use application concerning the restaurant located on Lots 2 and 3. There is no indication that anyone other than Harborhead wanted to participate in this litigation or voice opposition to the set-aside of the seventy spaces on Lot 1. Given the configuration of the properties, as reflected on the maps provided in the record, it appears that many of the same residents who are within 200 feet of either Lot 2 or Lot 3, are also within 200 feet of Lot 1. Moreover, Lot 1 only became an issue after the hearings had concluded, when the Board raised the set-aside of parking spaces at that location, sua sponte, as a condition of approval. It is undisputed that

Lot 1 is already used for parking. Although the set-aside of seventy spaces on that lot for banquets conceivably might intensify the need for street parking on those occasions, there was no evidence to that effect presented.

We see little to be gained by adjudicating the notice question in this particular setting, especially where the issue could have been readily presented and decided in the trial court. We therefore decline to address this newly-minted argument.

B.

We turn to the merits of the Board's approval. In doing so, we must be mindful of our limited scope of review.

When reviewing a trial court decision regarding municipal land use decisions, this court gives substantial deference to the local board's factual determinations. See Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296-97 (1965); Friends of Peapack-Gladstone v. Borough of Peapack Land Use Bd., 407 N.J. Super. 404, 424 (App. Div. 2009). Such a deferential standard of review is appropriate, given that local boards are most familiar with the characteristics of a town, as well as with its particular issues and interests. Ward v. Scott, 16 N.J. 16, 23 (1954); Med. Ctr. at Princeton v. Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 198 (App. Div. 2001).

Moreover, a local board's discretionary rulings will only be struck down if they are arbitrary, capricious, or unreasonable. Toll Bros. v. Bd. of Chosen Freeholders, 194 N.J. 223, 256 (2008); Berkeley Square Ass'n v. Trenton Zoning Bd. of Adjustment, 410 N.J. Super. 255, 263 (App. Div. 2009), certif. denied, 202 N.J. 347 (2010). A plaintiff bears the burden of proving that the local board's actions were so improper as to be arbitrary and capricious. Toll Bros., supra, 194 N.J. at 256.

A request for a use variance requires an examination of both so-called "positive" and "negative" criteria. Sica v. Bd. of Adjustment, 127 N.J. 152, 156 (1992). An applicant's proof of "positive criteria" requires a showing that special reasons exist to grant the use variance, including, among other things, the promotion of health, safety, and the general welfare; the provision of adequate light, air, and open space; the provision of sufficient space for residential, recreational, and commercial uses; the establishment of appropriate population densities; and the creation of a desirable visual environment. N.J.S.A. 40:55D-2. Burbridge v. Mine Hill, 117 N.J. 376, 386 (1990). These reasons must be site-specific, in that the applicant must show that the proposed use is "peculiarly fitted to the particular location for which the variance is sought." Kohl v. Mayor of Fair Lawn, 50 N.J. 268, 279 (1967).

As a separate consideration, the "negative criteria" requirement of subsection (d) incorporates two distinct, but related, forms of proof. First, an applicant must show that the non-conforming use of the property will not cause "substantial detriment to the public good . . . ." N.J.S.A. 40:55D-70(d). The focus of this criterion is also site-specific, and requires an assessment of the proposed variance's impact on the surrounding properties, and whether it will cause "damage to the character of the neighborhood . . . ." Medici v. BPR Co., 107 N.J. 1, 22 n.12 (1987). That damage must preponderate over the benefits to weigh against the proposed variance. See Yahnel v. Bd. of Adjustment, 79 N.J. Super. 509, 519 (App. Div.), certif. denied, 41 N.J. 116 (1963).

A second demonstration required under the negative criteria prong of subsection (d) is a showing that the proposed non-conforming use "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70(d). The burdens involved in making this showing were substantially increased by the Supreme Court in Medici. Specifically, since Medici, it is well-established that applicants seeking a use variance must now offer "an enhanced quality of proof and clear and specific findings . . . that the variance sought is not inconsistent with the intent and purpose

of the master plan and zoning ordinance." Medici, supra, 107 N.J. at 21. Such "enhanced quality of proof" must "reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district." Ibid.

The present appeal involves requests for both a (d)(2) variance and a (d)(3) variance for the upper and lower decks, respectively. The (d)(2) variance request is for the physical expansion of Jenkinson's on the upper deck area, which is in violation of local Ordinances 19-8.4(a) (prohibiting most structures east of the boardwalk with an exception for pre-existing nonconforming uses) and 19-14.2(b)(1) (requiring site plan approval for expansion to existing uses and structures). The (d)(3) variance request is for the lower deck area because it is a new structure being used for banquet purposes, but is not in compliance with local Ordinance 19-9.6(b)(2) (requiring that new restaurant construction must not decrease off-street parking).

Although a (d)(3) conditional use variance essentially follows a similar positive/negative criteria analysis, the respective standards of proof governing the two types of variances are different. Whereas a (d)(2) variance must meet the enhanced standard of proof prescribed by Medici, a (d)(3) variance need only "justify the municipality's continued



permission for a use notwithstanding a deviation from one or more conditions of the ordinance." Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 298 (1994). This less stringent standard is applied to (d)(3) variances because they pertain to uses that are conditionally allowed, as opposed to (d)(2) uses that are prohibited. In the case of a (d)(2) variance, the land use board must "vindicate the municipality's determination that the use ordinarily should not be allowed in the zoning district." Id. at 297. In the case of a (d)(3) variance, the municipality has already determined that the use is allowable, but wishes that certain conditions be satisfied. Ibid. Hence, "a conditional-use applicant's inability to comply with some of the ordinance's conditions need not materially affect the appropriateness of the site for the conditional use." Ibid.

Like the trial court, we are satisfied that the Board had more than ample grounds to find that the Storinos met these requirements for both (d)(2) and (d)(3) variances. The proposed expansion of the restaurant's seating capacity in the upper and lower decks was well-suited to its beachfront location, particularly given the long-standing use of the site as a restaurant. The Storinos took obvious pains to contain the noise levels emanating from the facility. There was no opposing

expert witness who countered their noise expert's finding of compliance with the noise ordinance. Moreover, the Board imposed many sensible conditions upon the approval, not only to abate noise but also to assure that there is enough parking available when banquets are taking place.

In sum, we see no reason to second-guess the Board's careful consideration of this matter. The Board's decision was reasonable, and neither arbitrary nor capricious. We affirm the approvals that were granted to the Storinos, substantially for the cogent reasons expressed by Judge Grasso in his written opinion.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION