NEW JERSEY STATE FEDERATION OF WOMEN'S CLUBS, SCENIC HUDSON, INC., MARGO MOSS, JACOB FRANKE, JOHN DOES 1-10, AND ABC ENTITIES 1-10, Plaintiffs-Appellants, v. BOARD OF ADJUSTMENT OF THE BOROUGH OF ENGLEWOOD CLIFFS AND LG ELECTRONICS USA, INC., Defendants-Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000007-13T1 SAT BELOW: ALEXANDER H. CARVER, III, J.S.C. DOCKET NOS. BER-L-2301-12 BER-L-2373-12 Civil Action

BRIEF OF AMICI CURIAE NEW JERSEY CONSERVATION FOUNDATION, NATURAL RESOURCES DEFENSE COUNCIL, COALITION TO PROTECT THE PALISADES CLIFFS, FORT TRYON TRUST, NATIONAL TRUST FOR HISTORIC PRESERVATION, NEW JERSEY SIERRA CLUB, NEW YORK/NEW JERSEY BAYKEEPER, NEW YORK - NEW JERSEY TRAIL CONFERENCE, PALISADES PARK CONSERVANCY, PRESERVATION LEAGUE OF NEW YORK STATE, AND REGIONAL PLAN ASSOCIATION

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PRELIMINARY STATEMENT

The Palisades are a unique and irreplaceable historic and natural resource located in the heart of the Tri-State Area - one of the last remaining visible vestiges of wilderness for millions of local residents in New Jersey and surrounding states. Their aesthetic and natural value, designated both as a National Historic and National Natural Landmark, and the focal point of the Interstate Park is self-evident to anyone who has ever seen them.

These cases now before this Court could determine the fate of the Palisades, which have been carefully and strategically preserved by the States of New Jersey and New York since the early 19th century. Thus, New Jersey Conservation Foundation ("NJCF"), Natural Resources Defense Council ("NRDC"), Coalition to Protect the Palisades Cliffs ("CPPC"), Fort Tryon Trust, National Trust for Historic Preservation ("National Trust"), Sierra Club New Jersey Chapter, New York/New Jersey Baykeeper, New York - New Jersey Trail Conference, Palisades Park Conservancy, Preservation League of New York State, and Regional Plan Association ("RPA")(hereinafter "Amici") submit this Brief to assist the Court in its resolution of the questions of public importance raised in these cases; namely, whether the Englewood Cliffs Zoning Board of Adjustment (the "Board" or the "Zoning Board") properly approved the variances and other land use

approvals sought by LG Electronics USA ("LG"); and whether the court below erred in upholding those approvals.

The approvals authorize LG to construct a 493,000 square foot headquarters complex on a 27-acre tract atop the Palisades Cliffs approximately one mile north of the George Washington Bridge. Despite the fact that the property offered ample room for LG to conform to Englewood Cliffs' longstanding height limitation of 35 feet (as had numerous other major companies), LG proposed to build up - to a height of 143.7 feet, or four times the zoning limit. The resulting tower would rise well above the tree line and ridgeline of the Palisades, which, north of the Bridge, provide a natural landscape largely unmarked by man-made structures. The LG building would be *clearly* visible from the adjacent Palisades Interstate Parkway and *widely* visible from the George Washington Bridge and the New York side of the River.

LG's tower would rise above the ridgeline of these historic and beautiful cliffs. The evidence presented in testimony, photos and referenced reports is uncontroverted that the tower would mar this irreplaceable, historic view, that has been the subject of joint preservation efforts by the citizens of New Jersey and New York since the late 1890s.

The importance of the Palisades and the impacts of the tower on them were presented to the Board but met with

indifference. As soon as the last witness testified, the Board approved the application and when it memorialized the decision in its formal resolution, it did not include a single reference to the Palisades or the impact of the tower; and the trial court followed suit.

But, the Municipal Land Use Law requires more. Among other things, it directs that land use regulations and decisions promote "a desirable visual environment ... [and] the conservation of historic sites and districts...", while also considering the effect on adjacent properties and municipalities. Neither the Board resolution nor the lower court decision considered these factors, despite the record evidence.

Finally, the height variance granted by the Board allowed LG to construct a building more than *four times higher* than the 35 foot zoning limit and far higher than any other building in the district. These fatal errors and omissions demonstrate the arbitrariness of the Board's and the trial court's determination. This Court should correct the injustice and protect the natural and historic values of the Palisades Cliffs.

PROCEDURAL HISTORY

On March 31, 2011, LG applied to the Zoning Board for the grant of various land use approvals, including a height variance under N.J.S.A. 40:55D-70(d)(6). The application was filed in connection with LG's plan to relocate its offices in Englewood

Cliffs and construct a new North American headquarters at 111 Sylvan Avenue (PJa 140-50).[1]

Public hearings on the application were held by the Board on May 9, June 14, July 11, September 12, November 14 and November 30, 2011, with the public allowed to speak only at the last session.[2]

Immediately following the close of the record on November 30, 2011, the Board approved the LG application in all respects, subject to the adoption of a memorializing resolution (6T 173-15 to 199-20). On February 13, 2012, the Board memorialized its findings and conclusions and formally approved the application (PJa 701).

On March 20, 2012, Carol Jacoby, a resident of Englewood Cliffs, filed a timely action in lieu of prerogative writs under docket number BER-L-2301-12 challenging the Board's approval of the LG application (PJa 733). On March 22, 2012, Marcia Davis, also a resident, filed a similar challenge under docket number BER-L-2373-12 (PJA-743). On September 24, 2012, the Honorable Alexander H. Carver, III, J.S.C. heard oral argument presented on behalf of these two plaintiffs.

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[1] The prefix "PJa" denotes references to the Appendix filed herein by the original and intervening plaintiffs.

[2] The transcripts of the hearings are referenced as follow: May 9, 2011 - 1T; June 14, 2011 - 2T; July 11, 2011 - 3T; September 12, 2011 - 4T; November 14, 2011 - 5T; November 30, 2011 - 6T.

On December 4, 2012, the New Jersey State Federation of Women's Clubs, Scenic Hudson and two individuals (hereinafter the "Intervenors-Appellants") moved to intervene in both proceedings (PJa 753 to 826). The Trial Court granted the motions by Order dated January 11, 2013 (PJa 831), but LG and the Zoning Board filed for reconsideration. By order entered on April 15, 2013, Judge Carver confirmed the interventions, but only on the condition that (1) the Intervenors-Appellants be limited to the current record and the claims of the original plaintiffs, (2) their complaint in intervention be dismissed, and (3) they not file "any Brief, Affidavits or Certifications relative to the underlying merits of the case." (PJa 993).

On April 9, 2013, without further argument or submissions, the Superior Court issued its written opinion upholding the action of the Zoning Board (PJa 3) and on the same date entered an Order dismissing the plaintiffs' complaints (PJa 1). The original plaintiffs and the Intervenors-Appellants subsequently filed timely Notices of Appeals (PJa 20, 30, 36).

On January 27, 2014, the Natural Resources Defense Council and the New Jersey Conservation Foundation moved to intervene in these appeals and to supplement the record. This Court denied these motions without prejudice to seek leave to file an amicus curiae brief.

NRDC and NJCF are now joined by Coalition to Protect the Palisades Cliffs, Fort Tryon Trust, National Trust for Historic Preservation, New Jersey Sierra Club, New York/New Jersey Baykeeper, New York - New Jersey Trail Conference, Palisades Park Conservancy, Preservation League of New York State, and Regional Plan Association in this brief.

STATEMENT OF INTEREST

New Jersey Conservation Foundation ("NJCF") is a statewide non-profit organization established in 1960 with approximately 3000 members, whose mission is to preserve New Jersey's land and natural resources for the benefit of all, and which works toward this goal by promoting sound land use policy in New Jersey. Certification of Michelle S. Byers, ¶¶ 2, 3. NJCF is the leading advocate for protecting the Palisades from LG's proposed intrusion and to this end managed the collaboration between four former New Jersey Governors (Governors Byrne, Kean, Florio, and Whitman) to write a letter urging LG to plan a less disruptive design. Id. ¶ 6. NJCF's leadership has participated in or led nearly every successful preservation campaign in the entire state over the past 50 years and has safeguarded over 120,000 acres of national land in New Jersey as a result. Id. ¶ 5. NJCF's leaders have sat on state land use planning commissions and councils, task forces, land trust boards, and development boards throughout the state. Id. ¶ ¶ 12-16.

Natural Resources Defense Council ("NRDC") is a leading national environmental non-profit established in 1970 with 350 employees and 1.4 million members, whose mission is to safeguard the Earth. Certification of Mark A. Izeman, ¶ ¶ 1-3. NRDC has 1) participated extensively in litigation in federal and state courts to protect local and national parkland, 2) helped Congress to draft and enact federal parkland law, 3) participated in rulemakings before the National Park Service, and 4) led national public campaigns to create and protect national parkland. Id. ¶ 4. NRDC seeks to protect America's people as the beneficiaries of the National Natural Landmark and National Historic Landmark programs, from which the Palisades receive designations. Id. ¶ 12.

Coalition to Protect the Palisades Cliffs, Inc. ("CPPC"), is a New Jersey not-for-profit corporation with over 50,000 statewide supporters committed to preservation and protection of the Palisades Cliffs, sound land use planning, and the integrity of the land use decision-making process. Certification of Peggy Wong, ¶¶ 1- 3. Public efforts to preserve the Cliffs date back to the late 1800s, and CPCC is committed to continuing these efforts into the future. Id. ¶ 5.

Fort Tryon Park Trust's mission is to promote the restoration, preservation, and enhancement of Fort Tryon Park, a historic and scenic landmark, for the benefit and use of the

surrounding community and all New Yorkers. Certification of Jennifer Hoppa, ¶ 3. The Park has approximately 1,000,000 visits per year from tourists, residents of the Tri-State region and international visitors, and is home to the Cloisters, which had 150,000 visitors in the last quarter of 2013. Id. ¶ 6.
The Park's design capitalized on the preservation of the Palisades, which, along with the Hudson River, informed where the Park's garden areas, overlooks, and terraces would be placed, so that these natural features could be encountered and celebrated from numerous viewing locations within the park's 8 mile network of paths. Id. ¶¶ 8, 9.

The National Trust for Historic Preservation ("NTHP") is a privately funded nonprofit organization, chartered by Congress in 1949 to both further and facilitate public participation in our Nation's historic preservation policies. Certification of William J. Cook, ¶ 2 citing 16 U.S.C. § 468. NTHP has almost 200,000 members and supporters nationwide, including over 6,400 members in New Jersey. Id. ¶ 4. NTHP works to protect significant historic sites and to advocate historic preservation as a fundamental value at all levels of government, and challenges local administrative decisions nationwide that undermine or circumvent the integrity of local ordinances. Id. NTHP has participated as a party or amicus curiae in more than 200 cases in federal and state courts since 1970. Id. ¶ 5.

NY/NJ Baykeeper's mission is to protect, preserve, and restore the ecological integrity and productivity of the Hudson-Raritan Estuary. Certification of Deborah Mans, ¶ ¶ 1,3,5. NY/NJ Baykeeper seeks to preserve the Palisades Cliffs as a regional and national resource of significance and has formally opposed encroachment on the Palisades by retailers and development in previous legal actions. Id. ¶ ¶ 9, 10. Enjoyment of a beautiful, unobstructed view of the Cliffs from the water is a key component to recreational use of the Hudson-Raritan Estuary. Id. ¶ 12.

New York-New Jersey Trail Conference ("NY-NJ TC") is an organization with 100 organizational and 10,000 individual members that leads hikes through and around the Palisades Cliffs. Certification of Edward K. Goodell, ¶ ¶2, 4, 5. NY-NJ TC's 80-year-old Long Path is 350 miles long and winds through the Cliffs. Id. ¶ 6. LG's proposed building would be an eyesore to NY-NJ TC's members who hike to appreciate unobstructed nature. Id.

Palisades Parks Conservancy ("PPC") is the charitable partner of the Palisades Interstate Park Commission ("PIPC"). Certification of Carol Ash, ¶ 2. The Palisades region is the most-visited park system in the Eastern United States; the PIPC manages more than 100,000 acres of parkland and historic sites in New York and New Jersey. Id. ¶ 4. PPC values the unmarred

treeline of the Palisades Cliffs north of the bridge; LG's proposed building would represent the first departure from the longstanding effort to preserve this view. Id. ¶ 5. Initial efforts to protect the Palisades from blasting in the early 20th century were led by John D. Rockefeller and buttressed by a rare dual-state effort between New York and New Jersey's governors. Id. ¶ ¶ 9,10. Later, the forward-thinking and community-minded municipalities surrounding the Palisades established a uniform height requirement of 35 feet partly in order to further protect their communities from visual intrusion. Id. ¶ 10.

The Preservation League of New York State is dedicated to the protection of New York's diverse and rich heritage of historic buildings, districts, and landscapes. It actively encourages historic preservation by public and private organizations, agencies, and individuals in local communities throughout New York State.

The Regional Plan Association ("RPA") is America's oldest independent urban research and advocacy organization. Certification of Robert Freudenberg, ¶ 2. RPA approaches its mission through the development of long-range regional plans and policies and seeks to balance multiple concerns—efficient transportation, sustainable urban planning, economic development, and environmental protection. Id. RPA was founded in 1922; in 1929, the organization recognized protecting the

land of the Palisades as "one of the most urgent and important needs in the region." Id. ¶ 3. During the 1930s, RPA succeeded in persuading public agencies to purchase land in the Palisades to be preserved as parkland. Id. Since then, the organization has continued its efforts to ensure proper stewardship of this region. Id. ¶ 4. RPA has led similar efforts to preserve areas of significant historical and ecological value within New Jersey, a particular concern since the state is the nation's most densely populated. Such efforts include proposing a housing density plan to minimize negative impacts to the Meadowlands. Id. ¶ 5.

Founded in 1892, the Sierra Club is the nation's largest and most influential grassroots environmental organization. Certification of Jeff H. Tittel, ¶ 2. The New Jersey Chapter of the Sierra Club ("NJSC"), founded 40 years ago, has developed expertise on preservation in New Jersey through its many campaigns supporting appropriate land use. NJSC has written many informational guides on preservation and land use, including "Land Use and Preservation in New Jersey: A Beginner's Guide." A true and correct copy is attached hereto as Exhibit A. Id. ¶ ¶ 5, 6. Three years ago, NJSC formally opposed high rises being built in Fort Lee because of their detrimental effects on the area's viewshed; the proposed LG development would have similar results. Id. ¶ ¶ 10, 11.

Together, the Amici listed above are concerned that the decision in the court below does not properly take into account preservation, aesthetic, recreational, viewshed, and local and regional planning concerns and submit this brief to assist the court in resolving these questions of public importance.

STATEMENT OF FACTS

National Historic Significance of the Palisades

The Palisades, an iconic landscape recognizable to millions of Americans, has survived as a result of an unusual collaboration between states and among various constituencies in private and public spheres. Its historic significance lies in its long history of human development, use, and enjoyment, as the object of some of the country's earliest conservation and protection efforts, and as a treasured viewshed for millions living in and traveling through the region. Native American tribes, including the Sanhikan, Hackensack, Raritan and Tappan nations, used the cliffs as shelter and protection for centuries. The lands atop the cliffs were developed during European settlement through the late 19th century, when new quarries and other uses threatened to degrade the landscape.

As early as 1890 residents of New York and New Jersey launched a campaign to protect the Cliffs. The New York Times published a number of stories urging their protection and preservation. See e.g. "Destruction of the Palisades," N.Y.

Times (Sep. 28, 1895). The New Jersey Federation of Women's Clubs took up the charge and organized a campaign that eventually led to the creation of the Palisades Interstate Park Commission by New York and New Jersey governors Theodore Roosevelt and Foster Voorhees. N.J.S.A. 32:14-1 and New York L. 1900, c.87; and see To Preserve the Palisades N.Y. Times Jan. 5, 1900) (reporting on Governor Roosevelt's action to preserve the Palisades from "spoliation of this rare scenic gift which nature has bestowed upon the metropolis."). Later, in the early 1930s, John D. Rockefeller, Jr. acquired and donated the area protected as a park today, with a specific objective of saving the viewshed. In 1937, the states sought and received Congressional approval for an interstate compact to govern the Palisades Interstate Park. H.R.J. Res. 445, 75th Cong. 1st Sess. (1937).

Palisades Interstate Park was designated as a National Historic Landmark in 1965. http://www.nps.gov/nhl/learn/intro.htm. In 1983, the Secretary of the Interior recognized that the Palisades offered "some of the best examples of biological or geological resources in the nation," and named it a National Natural Landmark. http://www.nature.nps.gov/nnl/site.cfm?Site=PAHU-NJ. In designating the site, the Department of Interior said the Palisades "is the best example of a thick diabase sill formation known in the United States. Columnar jointing, and olivine zone

and thermal metamorphic effects are attributes found in rare combination at this site. The glaciated crest provides impressive evidence of the Pleistocene glacier." 49 FR 4605-01. In 1984, The Department of Interior named the Palisades Interstate Park to the National Register of Historic Places. This designation indicates that the Palisades is an historic place "that possess[es] exceptional value in commemorating or illustrating the history of the United States." http://www.cr.nps.gov/nr/.

Proceedings before the Zoning Board of Adjustment

In 2011, LG applied to the Board for a series of land use approvals for an office complex in Englewood Cliffs intended to serve as the company's North American headquarters (1T 24-1 to 25-15). The project site is on Sylvan Avenue in Englewood Cliffs in a B-2 zoning district (1T 28-23 to 25). The application sought a height variance under N.J.S.A. 40:55D-70(d)(6), as well as other bulk variances and site plan approval (1T 33-11 to 34-12).

From the outset, there was no question that the LG project and the Palisades were closely intertwined. Most of the plans submitted in support of the application depicted the project in the context of the Palisades (see e.g., PJa 196, 197, 201, 222). And, as if in emphasis, at the opening of the public hearings,

LG's description of the project site was: "It's 27.1 acres on the Palisades." (1T 24-25 to 25-1).

Located less than 200 feet from the border of Palisades Interstate Park, the site previously had been developed by Prentice Hall as its corporate headquarters (LG Overall Site Plan Rendering at PJa 233). With a floor area of approximately 412,000 square feet, the Prentice Hall headquarters was a low rise building that complied with the zoning height limit of 35 feet (1T 24-1 to 13). Other major corporations located along Sylvan Avenue (Route 9W) similarly complied and built low-rise head-quarters, which today continue to characterize development in the area (PJa 519, 520, 593, 601, 602).

LG's plans departed from this model. As reflected in the application to the Zoning Board (PJa 140-50), the company proposed to demolish the Prentiss Hall structure and replace it with its own vision for a new North American headquarters. The increase in square footage was modest - 493,000 square feet compared to 412,000 square feet in the building to be razed (1T 24-8 to 9; 2T 31-15 to 17). But the layout was much different. The plan included two principal office buildings, a four-level garage and a smaller structure labeled the "Cube" (2T 31-15 to 35-22; PJa 196, 217-222).

The largest of the office buildings was to be situated towards the north of the 27 acre tract (2T 32-23 to 33-9). It

would be 143.7 feet high, or four times the zoning limit of 35 feet (2T 33-1 to 5).[3] Early in the hearings, it was described by LG as visible from the George Washington Bridge (1T 25-5 to 8). As it turned out, the building could also be seen from several points in the Palisades Inter-state Park; and from the Cloisters in New York City. In fact, it would be clearly visible above the tree line of the largely unmarked natural landscape of the Palisades north of the Bridge (PJa 550-59; 5T 67-19 to 68-1; 6T 156-9 to 157-13).

Following the initial description of the plan, LG presented a number of witnesses who elaborated on the project design and sought to justify the requested variances. Witnesses addressed the dimensions of the development, the sustainability - or LEED status - of the project, the plans for buffers and landscaping, the treatment of the on-site wetlands and the planning rationale that supposedly supported the variances under New Jersey land use law (1T 60-23 to 138-11)

What received virtually no attention from the LG witnesses was the impact of the project, and particularly the outsized tower, on the Palisades and the Palisades viewshed. Indeed, the only witness who addressed the subject was LG's planning consultant, Joseph Burgis, who testified that because the new

[3] The second office building, located towards the south end of the site, and the cube would each be 55 feet high, again well above the zoning height limit (2T 34-11 to 35-16).

tower would only be visible for a few seconds by a driver on the Palisades Parkway, the negative impact would be negligible (T6 51-2 to 52-8). Neither Burgis nor any of LG's other witnesses addressed the impact the LG tower would have on the Palisades, a neighboring property, and its viewshed. This was apparent even from the distant photograph LG had taken from the Cloisters and that Mr. Burgis has supposedly reviewed, as the tower loomed over the cliffs (PJa 559). Nor did he focus on the impact the building would have on adjoining sections of the Palisades Park.[4]

Mr. Burgis testified in the last of the Zoning Board's five hearing sessions. When he finished - and only then - was the public finally given the chance to testify. Among those who did so were Daniel Chazin and Kevin Tremble, both of whom had official associations with the Palisades Interstate Park Commission.

Mr. Chazin is the Secretary and former chairman of the Commission's Citizens Advisory Council. He began by testifying that he was appearing "to address my concern about the height of the building, and particularly how it can be seen going along

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[4] Mr. Burgis apparently believed that the Palisades Interstate Park Commission was not concerned about the visual impact of the LG tower (6T 52-9 to 23). But this was to mischaracterize the testimony of James Hall, Executive Director of the Commission, who, focusing only on the impacts on the Parkway and adjacent parkland, made it clear that he remained concerned (5T 73-25 to 78-18). The further photo Mr. Hall requested to be taken from the Cloisters (PJa 559) showed the potential impacts to be far greater.

the river in New York." (6T 154-19 to 24). He then produced a photograph taken from the New York side of the Hudson that showed buildings in Fort Lee that could be seen from that vantage point. Continuing, Mr. Chazin testified:

> And as many of you know, these cliffs were preserved in large part to preserve the views of the cliffs from the river and New York. Of course, in addition to the people in New Jersey enjoying them and being able to walk along the cliffs, the preservation of the view is a very important point. This building, I understand, would infringe on that in that 30 feet or so at the top of the building would be visible from the other side of the river.[5]

(6T 156-9 to 157-13)[6]

The second witness was Kevin Tremble, who is President of the Citizens Advisory Committee of the Palisades Park Commission (5T 79-24 to 80-6). Before Mr. Tremble testified, he questioned Joseph Burgis, LG's planning consultant, and in that examination elicited a number of important facts that Mr. Burgis has previously failed to mention (6T 98-20 to 99-16). These included the designation of the Palisades as both a National Natural Landmark and a National Historic Landmark. Through his questioning, Mr. Tremble also ascertained that Mr. Burgis had not read either of the designation reports and was not familiar

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[5] In fact, at least three stories (60 to 70 feet) of the tower would show above the tree line (6T 104-12 to 21).

[6] In its Brief, LG takes three pages to describe the record testimony on the Palisades, but dismisses Mr. Chazin's testimony in a single sentence (LG Brief, pp. 27-29).

with the Natural Landmarks program (6T 98-20 to 99-16). These reports demonstrate Mr. Tremble also introduced several documents descriptive of the Palisades Park, and referred to the requirement that land use decisions consider adjacent properties, but was hurried along by an impatient Board anxious to proceed to a vote (6T 158-16 to 165-14). Still, he was able to make his point:

> The park has been in existence since 1900. It was established further by Congressional Interstate Compact in 1937. All of those documents that refer to the park that are national in scope always, in my opinion, referred to the scenic - importance of the scenic quality in preserving the scenic character of the park.
>
> The other basic point and value that I want to put in front of the board . . . in my questioning of Mr. Burgis was the conservation value. The park has been set aside by our national leadership for conservation and values that are embodied in the conservation of the park. . . .
>
> And this is a regional resource and we should be good stewards of it. And I ask you to consider the visual impact upon the park and the region as a resource. You know, we have to look a little beyond our own borders in this case.
>
> So without discussing in a lot of detail what's in this [management plan], the idea behind it was that this is a recreational tourist resource and a scenic high quality experience for people from around the country.

(6T 162-22 t0 163-23)

Mr. Tremble had prefaced his testimony with another pointed comment:

> I think what has happened here is that I think the realization that the park was a neighbor happened late in the planning process. And I think that's made it difficult to make the board and the applicant aware of the values that are embodied in the park.

(6T 158-25 to 159-5).

The Palisades Scenic Byway Corridor Management Plan Mr. Tremble referred to discusses extensively how the Palisades area meets the requirements of a New Jersey Scenic Byway Designation. New Jersey Department of Transportation, Palisades Scenic Byway Corridor Management Plan (2011), *available at* http://www.njpalisades.org/pdfs/bywayCmp.pdf. The Palisades provides a major metropolitan area's visitors and travelers with "a relationship with sublime scenery and wilderness" through the use of "long attractive and scenic roads" Id. at 6. These cliffs are a unique geological feature, over 200 million years old. Individuals including the Rockefeller family purposely donated land in the area, and sought and achieved National Natural Landmark designations in recognition of its uniqueness and beauty. Id. at 55. Following this pattern, "[p]rotecting the scenic views of the Palisades cliffs was a premise on which the Palisades Interstate Park was established." Id. at 11. The goals of the Management Plan, therefore, include restoring and maintaining the historic character of the region and preserving a viewer's "authentic experience"; these goals are to be accomplished partly through collaboration with adjacent

municipalities, such as the Borough of Englewood Cliffs, to strengthen the protection of this historically valuable area. See id. at 140-143.

The Board's Decision

Less than an hour after he testified, the record was closed and the members of the Board proceeded to approve LG's application (6T 173-15 to 199-20). The Palisades were never mentioned in the discussion, and when the question was called, the Board approved the application by a 6-to-1 vote (6T 199-2 to 20).

Two and half months later, the Zoning Board formalized its approval in a written resolution which purported to address the relevant factors bearing on the requested variance, including the "positive" and "negative" criteria applicable to the request for a height variance (PJa 701-28). However, missing from the Board's findings and conclusions was any mention of the Palisades, the immediately adjoining section of the Palisades Interstate Park or the impact the LG tower would have on them.[7]

The Trial Court's Decision

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[7] In its memorializing resolution, the Board included a summary of the testimony on the Palisades, but its findings and conclusions did not mention them. The record not only shows that the LG structure would be visible from a number of parts of the Palisades Park, it also confirms that it would be visible from the New York side of the Hudson (PJa 550-59; 5T 67-19 to 68-1; 6T 156-9 to 157-13).

While the Trial Court allowed the New Jersey State Federation of Women's Clubs and Scenic Hudson to intervene, it rejected *any* submissions from them, including their proposed complaint in intervention. Like the Zoning Board, Judge Carver ignored the Palisades, and the decision he issued on August 9, 2013, affirming the Zoning Board approvals, showed it (PJa 1-19). The entire opinion does not even mention the Palisades Cliffs, the neighboring Palisades Interstate Park or the potential impact on them of the LG tower. Indeed, the word "Palisades" does not appear even once in the Trial Court's decision.

STANDARD OF REVIEW

A reviewing court is not bound to show deference to a local board's application of the law. In the same way, an appellate court owes no deference to a trial court in the interpretation of the law. Manalapan Realty v Township Committee, 140 N.J. 366, 378 (1995); United Property Owners v. Belmar, 343 N.J. Super. 1, 14 (App. Div.), certif. den. 170 N.J. 390 (2001)); and see Shri Sai Voorhees LLC v. Township of Voorhees, 406 N.J. Super. 497, 500 (2009). When the matter in question involves legal issues, as is the case here, this Court may and should review those issues de novo. Shri Sai Voorhees LC, supra.

ARGUMENT

POINT I

THE ZONING BOARD'S GRANT OF A HEIGHT VARIANCE IS CONTRARY TO THE PUBLIC INTEREST AND THREATENS THE INTEGRITY OF THE PALISADES

The states of New Jersey and New York created the Palisades Interstate Park in 1900 in response to the degradation of the cliffs through development. The creation of the Park and the protection of its resources were one of the early victories of the environmental movement. Along with Governor Foster M. Voorhees of New Jersey, titans of U.S. history like Theodore Roosevelt (who helped create the Palisades Interstate Park as governor of New York State) and John D. Rockefeller Jr. (who donated much of the land within the Palisades) were instrumental in building the current preservation framework surrounding the Palisades. The work of such storied historical actors and cooperation between New Jersey and New York should not be so easily undone by a variance from a local zoning board that ignores the historic significance of the Palisades and the town's own zoning ordinance.

The National Historic Landmark Program Manager for the National Park Service wrote to the Board in December 2013. He observed that the Palisades conservation efforts predated the National Park Service and "was recognized as one of the key moments in conservation history when the Secretary of the

Interior designated the Palisades Interstate Park as [National Historic Landmark] on January 12, 1965." Letter from William Bolger, Nat'l Park Serv., U.S. Dept of the Interior to Chairman, Planning Bd. Of Englewood Cliffs (December 23, 2013); http://www.wmf.org/downloads/NPS-Historic-Landmark-Palisades.pdf. The Palisades are also a National Natural Landmark. This "rare dual distinction" was noted by the Chief of Natural Resources for the Northeast Region of the National Park Service in a letter to the Englewood Planning Board. Letter from Kristina Heister, Chief of Natural Resources, NE Region, Nat'l Park Serv., U.S. Dep't of the Interior to Chairman, Planning Bd. Of Englewood Cliffs (Jan. 7, 2014); http://www.wmf.org/downloads/NPS-TO-EC2.pdf. Ms. Heister explained that the National Natural Landmark program "was established to encourage and support the conservation of sites that illustrate the nation's geological and biological history, and to strengthen the public's appreciation of the America's natural heritage." Id. She urged the Board to maintain conformity to the zoning regulations observing that the proposed tower "threatens the integrity of the scene in a startling and major way." Id. In the words of Robert F. Kennedy Jr., building LG's tower in its proposed form is like trying to "build a high-rise next to Yellowstone." Mr. Kennedy rightly observed, "It's a national issue. It is so important to maintain landscapes in

cities, so people who can't afford to go out to the national parks will be able to experience the majestic beauty of the American wilderness in their backyards." Robin Pogrebin, New Forces Join Lawsuit Fighting Palisades Tower, N.Y. Times, Jan. 23, 2014, at C2. Rather than looking out at the same cliffs as the Tappan and Rumachenanck did in the 15th century and George Washington in the 18th, and the same cliffs Governors Roosevelt and Hughes protected in the 20th, LG proposes that the entire tri-state admire its proposed headquarters.

As is evident from both common sense and the certifications of the Amici, unobstructed views of the Palisades are a source of great aesthetic enjoyment for millions of citizens. The current case pits the interests of countless millions of residents and visitors to the tri-state area against those of one multinational corporation. In a recent editorial, four former governors of New Jersey characterized LG's conduct as "tak[ing] for its own private benefit the Palisades' natural beauty and unspoiled views – which belong to the public." Brendan T. Byrne et al., The Threat to the Palisades, N.Y. Times, Mar. 24, 2014, http://www.nytimes.com/2014/03/25/opinion/the-threat-to-the-palisades.html. The Palisades are a one-of-a-kind natural resource, while LG's proposed tower is simply another office building.

As an exceedingly large corporation, LG could have built its headquarters anywhere in the world. It presumably chose to build a high-rise in Englewood Cliffs for the unique combination of the natural splendor of the Palisades, coupled with the close proximity of one of the world's largest cities. LG's willingness to distort and abuse the variance mechanism, and aggressively litigate to defend the decision of the local zoning board, rather than choosing a different site or height for its headquarters is a testament to its disdain for the breathtaking aesthetics of the area. Of course, LG's corporate executives will not see the blight that is its tower when they look out from their penthouse on the Palisades.

This court should uphold the zoning plan that has been the law in Englewood Cliffs for years, and not permit a zoning board to ignore this comprehensive protection regime which, among other things, has protected the Palisades for over a century. Ruling against LG would not be an extrajudicial expropriation of property rights under the guise of public welfare. As detailed below and in the party briefs, LG was granted the variance in violation of multiple provisions of the MLUL.

POINT II

THE BOARD FAILED TO CONSIDER THE IMPACT OF THE VARIANCE ON THE PALISADES OR PALISADES INTERSTATE PARK

A zoning board of adjustment is bound by the provisions of the Municipal Land Use Law (hereinafter, the "MLUL") and by the provisions of the local land use ordinances in its jurisdiction. In this case, the Zoning Board was authorized by the MLUL to grant variances, but only within the limitations set forth in that statute. It had no authority to ignore or gloss over any of the criteria established under the MLUL for the issuance of a variance. It was required to address each of the criteria, take account of the facts bearing on each of them, and determine on the basis of an adequate record whether they had been met. The Trial Court, in turn, is obligated to review the Board's resolution against these criteria and decide whether its decision conforms with the MLUL.

Both the Board and the Trial Court failed to meet these obligations by failing to consider or address the impact that the height variance (and the 143 foot tower that it authorized) would have on the Palisades and the neighboring Palisades Interstate Park. Neither the Board nor the court below had any basis for evaluating whether the variance could "be granted without substantial detriment to the public good."

The quoted language is, of course, the first prong of the "negative criteria" that must be met any variance can be granted under the MLUL. N.J.S.A. 40:55D-70(d). This is not a discretionary standard; it *requires* that the potential negative

impacts of the variance be evaluated and a determination made as to whether they are substantial. And significantly, that determination must be made with respect to the *public* good - a phrase that is not limited to the immediate neighborhood or, indeed, the municipality as a whole.[8]

This conclusion follows not only from the term "public good" itself, but also from the purposes of the MLUL, which evidence the Legislature's intent to move beyond parochial land use planning. Thus, prominent among the stated purposed of the MLUL are the following:

> (a) To encourage municipal action to guide the appropriate use of development of *all lands in the State*, in a manner which will promote the public health, safety, morals and general welfare." N.J.S.A. 40:55D-2(a) [emphasis added]
>
> (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*." N.J.S.A. 40:55D-2(d) [emphasis added]
>
> (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*." N.J.S.A. 40:55D-2(g) [emphasis added]

In Urban Farms, Inc. v. Franklin Lakes, 179 N.J. Super. 203 (1981), the Appellate Division cited to and quoted the entirety

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[8] The use of the phrase "public good" in the first prong of the negative criteria is in sharp contrast to the second prong, which, with its focus of the "zone plan and zoning ordinance," is clearly referenced to the involved municipality.

of the (a) and (g) purposes in concluding that in a variance setting, a zoning board could not confine its consideration to the boundaries of the municipality:

> Clearly, it is a virtual truism of the modern land-use canon that zoning ordinances must be regionally oriented in their provisions, prohibitions and concern. . . . The insularity and parochialism of the Chinese wall theory of municipal zoning has long since been discredited.

179 N.J. Super at 213.

In light of the stated purposes of the MLUL quoted above, the impact of the height variance (and the LG tower it authorized) on the Palisades and the Palisades Park clearly bore on the question of "detriment to the public good." The Palisades and the Palisades Park *are* lands of the State and offer public open space that meets the needs of *all the citizens of New Jersey*. In this context, the Zoning Board was obligated to take them into consideration when it acted on the variance LG was seeking.

In a similar fashion, the stated purposes of the MLUL underscore the necessity of the Board evaluating the *impact* of the height variance on the Palisades and the Park. The purposes most relevant include:

> (i) To promote *a desirable visual environment* through creative development techniques and good civic design and arrangement. N.J.S.A. 40:55D-2(i) [emphasis added]

> (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. N.J.S.A. 40:55D-2(j) [emphasis added]

The Palisades and the Palisades Park are both historic sites and natural landmarks providing open space for the public and a highly dramatic and scenic resource. Given the purposes of the MLUL quoted above, it is beyond question that the impacts of the variance and the LG tower on the Palisades should have been considered by the Zoning Board. It failed to do so, as is apparent from the findings and conclusions in its Resolution, which do not mention the Palisades.[9] When the Trial Court followed suit and confirmed the Board's approvals without any consideration of the Palisades, it did so in error.

A New York appellate court has considered the significant public interest in protection of the Palisades as an issue that must be addressed when reviewing variance approvals for sites beyond the park boundaries that nevertheless impact Palisades resources. In Matter of Knight v. Bodkin, the Second Department reversed the approval of variance based on the grounds that the variance would result in "a serious blight upon the entire area and, more particularly, that it would have a destructive impact upon the aesthetic values created by the existence of Palisades

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[9] As stated in Grasso v. Borough of Spring Lake Heights, supra, "it is the resolution that controls." 375 N.J. Super. at 46.

Interstate Park, one of the Nation's most beautiful scenic resources." 41 A.D.2d 413, 417 (NY App. Div. 1973). Moreover, the Palisades Park adjoins the site of the LG tower, separated only by a relatively narrow road. As such, the Park was entitled to all the protections and consideration due any adjoining owner, including a meaningful and objective analysis of the impact the variance would have on its property in the context of detriment to the public good.

The Zoning Board's duty in this regard has been spelled out in numerous cases. For example, in Omnipoint Communication Inc. v. Board of Adjustment of Tp. of Bedminster, 337 N.J. Super. 398 (2001), the Appellate Division articulated the duty in the following language:

> The analysis of the negative criteria for a conditional-use variance also focuses on the specific deviation and its potential effect on the surrounding properties and the zone plan. In analyzing the first prong of the negative criteria, that the variance can be granted "without substantial detriment to the public good," the board "must evaluate the impact of the proposed [conditional-] use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute 'substantial detriment to the public good.'" *Ibid.* (quoting *Medici v. BPR Co.*, 107 N.J. 1, 22 n. 12, 526 A.2d 109 (1987))

337 N.J. Super. at 414.

There is nothing in the MLUL or the case law to suggest that the relevant "character of the neighborhood" to be

considered is limited to residential or does not comprehend a "park" character when, as in this case, a park is a significant adjoining use. With the Palisades Park less than 200 feet from the LG project site and occupying virtually all of the land to the east, the Zoning Board was duty-bound under the MLUL and the judicial decisions interpreting the "negative criteria" to have addressed and evaluated the impact the height variance would have on the Park. Instead, it did not consider it at all.

The failure of the Zoning Board in this case was not that it reached its decision after taking account of the impacts on the Palisades and balancing them against the purported "positive" criteria.[10] It was in not having considered or addressed the Palisades and the impact of the LG tower on the Palisades *at all*. As a consequence, it could not and did not rationally assess whether the variance could "be granted without substantial detriment to the public good."

In this regard, Amici are not asking the Court to decide the merits of the case or weigh the evidence at this point. Rather Amici ask the Court to hold the Zoning Board to its statutory obligations by requiring it to review the LG

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[10] Because the LG office tower is not an inherently beneficial use, any requirement for "balancing" is limited to determining whether the detriment to the public good is "substantial," rather than balancing the positive factors against the negative factors. See Sica v. Bd. of Adjustment, 127 N.J. 152, 164-65 (1992); see also Medici v. BPR Co., 107 N.J. 1, 22, fn 12 (1987)

application based upon the substantial evidence of the significance of the Palisades and the impact of the tower on that resource before deciding whether or not to grant the variance.

That the Board was duty bound to do so is reflected in cases such as Green v. State Health Benefits, 373 N.J. Super. 408 (App. Div. 2004), where the Court, citing In re Freshwater Wetland General Permits, 372 N.J. Super. 578 (App. Div. 2004), held that the "failure to address critical issues, or to analyze evidence in light of those issues renders an agency's decision arbitrary and capricious and is grounds for reversal. . . In this case, we conclude that the agency decision is arbitrary and capricious because it fails to address fundamental legal and factual issues." See also, In re Warren, 117 N.J. 295, 297 (1989), where the Supreme Court described a two-prong agency review test, the first being whether the decision was "premised on a consideration of all the relevant factors" consistent with "the enabling act's express or implied legislative policies." In this case, the Zoning Board gave no consideration to two clearly relevant factors - the impact of the LG tower on a historic site and its effect on the visual quality of the Palisades - and the Trial Court erroneously sanctioned that failure.

Moreover, the evidence in the record put the Board on notice that the impact of the variance on the Palisades would be

real and significant. Amici have summarized in the Statement of Facts the testimony of Mr. Chavin and Mr. Tremble, and the documents he referenced, as well as LG's photo-simulation from the Cloisters showing the tower rising above the Palisades tree line and ridgeline. In addition, James Hall, the Executive Director of the Park Commission testified as to his continuing concern over visual impacts (5T 73-25 to 78-18).

In its Brief, LG contends that far from expressing concern over the visual impact of the proposed 143-foot high structure, Mr. Hall testified that the Park Commission had no objections to the tower based on visual impact (LG Reply Brief (A-0404-13T1), pp. 29-30). This stands the testimony and its head. Equally important, at the time it submitted its Brief, LG knew that the Park Commission had adopted a formal resolution objecting to the tower *because* of its visual impacts. Palisades Interstate Park Commission, Meeting Minutes (February 24, 2014), *available at* http://www.wmf.org/downloads/Palisades-Minutes-LG.pdf.

Relying on its crabbed reading of the record, LG would like the Court to believe that there are no legitimate objections to the proposed tower. This is to ask the Court to ignore the elephant in the room. The objections are many and official, ranging from four former governors of New Jersey to the National Park Service to the U.S. Environmental Protection Agency to the World Monuments Fund. Moreover, the evidence in the record,

including Mr. Chazin's testimony and the photo-simulations, clearly identifies the potential damage to the natural landscape of the Palisades and the Park that encompasses them.

The Zoning Board quite literally paid no attention to this evidence. This may have been because most of it came late in the hearing process and the Board was anxious to move to a decision, which it did an hour after Mr. Chazin and Mr. Tremble testified (see Amici Statement of Facts, supra, pp. 9-12). But the fact that the evidence may have come late does not relieve the Board of its duty to consider the impact of the requested variance on the Palisades in weighing whether there would be a "substantial detriment to the public good." To the contrary, the Board is not at liberty under the MLUL to disregard the testimony of the impacts on the Palisades and the images of visibility of the tower.

Instead, he Board completely ignored the concerns that had been raised; made no reference to them in its discussions preceding the November 30, 2011 vote and did not address or mention the Palisades in its formal findings and conclusions, violating the MLUL. Similarly, in upholding the Board's decision without any consideration of that impact, the Trial Court also committed reversible error.

POINT III

THE ZONING BOARD DID NOT PROPERLY APPLY THE "POSITIVE" AND "NEGATIVE" CRITERIA FOR A VARIANCE

The failure of the Zoning Board and the Trial Court to address or otherwise include in their consideration the impact of the variance on the Palisades and Palisades Park was not the only error in their decisions. The Board also erroneously determined, and the Court erroneously upheld the conclusion, that the variance met the "positive criteria" and the second prong of the "negative" criteria" applicable in the circumstances of this case under the MLUL.

These failures on the part of the Zoning Board and the Trial Court are discussed at length in the briefs of the Plaintiffs-Intervenors and Marcia Davis, and Amici join in the arguments they have presented. In this Brief, Amici confine themselves to emphasizing a few of those points.

A. LG Did Not Satisfy the Positive Criteria

N.J.S.A. 40:55D-70(d) states that variances may be issued "[i]n particular cases for special reasons." This language is generally referred to as the "positive criteria," and the ways in which these criteria can be met depends on the type of (d) variance at issue.

In this case, LG applied to the Zoning Board for several variances, including, most pertinently, a height variance

pursuant to N.J.S.A. 40:55D-70(d)(6). What is meant by "special reasons" for a height a variance has most recently been set forth in Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2008), where the court stated that "[w]e believe that the special reasons necessary to establish a height variance must be tailored to the purpose for imposing height restrictions in the zoning ordinance." Id. at 52.

The Grasso decision is instructive as to how a height variance analysis must proceed. The court pointed out that very early on, courts recognized the relationship between height restrictions and the public welfare because the height of a building impacts adequate light, air and population density. In Grasso, a developer was proposing a home 38 feet tall in a district that had a 30 foot height restriction. In remanding the case to allow the record to be supplemented, the court noted that "the standard for a height restriction variance ha[d] never before been articulated." Id. at 52. The court then suggested reasons as to why a municipality might have a height restriction, including to promote a desirable visual environment, avoid excessively tall structures that can aesthetically impair a municipality, preserve views of the skyline and trees, avoid degradation of a neighborhood, or keep a neighborhood's character intact. The court added that "proofs that a less tall, different style house . . . would have a more

detrimental effect on the neighborhood" could be relevant. Id. at 54.

LG failed utterly to show that the height of its building, four times the permissible 35 feet, did not contravene "the purpose for imposing height restrictions in the zoning ordinance." Indeed, it never presented any testimony or other evidence responsive to the standard set out in Grasso. And for good reason. It could not have been by accident that this height limit was imposed.

The Palisades Scenic Byway Corridor Management Plan introduced by Mr. Tremble is instructive as to the purpose for imposing height restrictions in the zoning ordinance. The plan states "[p]rotecting the scenic views of the Palisades cliffs was a premise on which the Palisades Interstate Park was established." The corridor along which the LG project site was to be located supported a large number of corporate offices and other business structures, all of which, including the Prentiss Hall site on which LG proposed to build, had been constructed to conform to the 35 foot height restriction.

Ultimately, the true reason for the height restriction may have been to "promote a desirable visual environment" or to "avoid excessively tall structures that [could] aesthetically impair a municipality," or perhaps the Palisades, or to "preserve views of the skyline and trees," or perhaps *of* the

Palisades. But whatever the reason, it was an issue on which neither LG nor the Zoning Board chose to present evidence or otherwise address. Yet this is exactly what the Grasso court required. The failure of the Board to apply the Grasso standard, and the subsequent failure of the Trial Court to hold the Board to that standard, were clearly in error.

It is also important to emphasize that insofar as "hardship" had any relevance to the variance application, LG, by any measure, failed to show (and, indeed, did not attempt to show) how the 35 foot height restriction limited or foreclosed the use of its property for office purposes.

In fact, the opposite is true. The property has been used as corporate offices for decades and has accommodated 412,000 square feet of office space while complying with the 35 foot height limitation. Since LG is only proposing to use 493,000 square feet of office space in its tower plan, it is inconceivable that a building built to 35 feet would not be adequate for LG's purposes. In addition, LG's architect confirmed that no alternatives to the tower configuration had been considered (2T 100-6 to 102-10; 103-16 to 24). If alternatives complying with the height restriction were never considered, there was no basis for the argument that LG was faced with any hardship. The reality is that LG wanted what it

wanted not because it was necessary, but because it was more to its taste.

The lower court never applied the Grasso standard or analyzed the case in that context. Instead, it concluded that "special reasons" were shown on the basis that "the proposed increased height of the building advanced the purposes and objectives of the Master Plan by enhancing landscaping and buffers, and preserving environmentally sensitive areas . . . (Pja 9)." While enhancing landscaping and buffers and preserving environmentally sensitive areas is of course commendable, it is not what is required to meet the "special reasons" requirement set forth in the MLUL. Under the law, what must be shown is either a type of hardship - that the height limitation prohibits utilization of the property - or that granting the height variance is in some way in keeping with the purpose of the height restriction imposed by the zoning ordinance.

LG failed to show either of these factors, and the Trial Court followed suit. Rather than addressing the Grasso standard, the Court created a standard of its own, invoking sections of the Master Plan that had nothing to do with the reasons for the height restriction. In this, and in failing to hold the Zoning Board to the Grasso standard, the Trial Court committed reversible error.

B. LG Did Not Satisfy the Second Prong of the Negative Criteria

The second prong of the "negative criteria" provides that a variance can be granted only if "it does not substantially impair the intent and the purpose of the zone plan and zoning ordinance." As already noted, LG presented no testimony or other evidence on the intent of the zoning, but the presence of the height restriction over many years and the consistency of the low rise commercial development along Sylvan Boulevard (Route 9W), including in the boroughs to the north, strongly suggests that the purpose of the 35-foot height limit would be undermined by a high rise tower. Indeed, it would not be too far a stretch to assume that the purpose was to protect views of, and from the Palisades. *See* Price v. Strategic Capital Partners, 404 N.J. Super. 295 (App. Div. 2008), where the court suggested that the density restriction in a special district in Union City might have been imposed for that reason, while wondering why the ordinance did not also restrict height. Id. at 307. However that may be, the indisputable fact is that LG did not present any evidence that a building four times taller than the zoning ordinance allowed would not substantially impair the intent and purpose of the in-place zoning.

Any evaluation of the purpose behind a height restriction must also include neighborhood character as a relevant

component. As the Appellate Division observed in Shri Sai Voorhees v. Township of Voorhees, supra, 406 N.J. Super. at 221 (citing Engleside West Condo Ass'n. v. Land Use Bd. of Beach Haven, 301 N.J. Super. 628, 639 (1997)), the Legislative history of the (d)(6) height variance indicated that "the Legislature reasoned that when a height deviation reached [a] level of nonconformity [exceeding 10 feet or 10%], the resulting structure arguably could be seen as something out of character with the structures permitted in the zone." See also, Vidal v. Lisanti Foods, 292 N.J. Super. 555, 562 (1996) citing Township of Dover v. Bd. of Adjustment of Dover, 158 N.J. Super. 401, 411 (1978), noting that "[t]he basic inquiry in each case must be whether the impact of the requested variance will be to substantially alter the character of the district as that character has been prescribed by the zoning ordinance"; and see also Price v. Himeji, LLC, and Union City Zoning Board of Adjustment, supra, 214 N.J. at 276, where the court noted that conforming to the character of a neighborhood includes a building's height being similar to that of nearby buildings.

In this case, the character of the neighborhood, as evidenced by the built structures lining Sylvan Avenue, was of large, but low-rise, corporate offices and other businesses. How, in these circumstance, the proposed 143-foot high tower - a total outlier and contradiction - could be seen as "not

substantially impair[ing] the intent of the zoning ordinance is a mystery on which neither the Zoning Board Resolution nor the Trial Court's decision sheds any light. Both lack any discussion of the issue.

The magnitude of the variance in the instant case was also highly relevant to the level of analysis that should have been, but was not, undertaken by the Zoning Board or the Trial Court. As stated by the court in North Bergen Action Group v. North Bergen Township Planning Board, 122 N.J. 567 (1991), "the greater the disparity between the variance granted and the ordinance's restriction, the more compelling and specific the proofs must be that the grant of the variance 'will not substantially impair the intent and purpose of the zone plan and zoning ordinance'. . . [I]t is fundamental that resolutions granting variances undertake to reconcile the deviation authorized by the Board with the municipality's objectives in establishing the restriction. Expert testimony or resolutions that merely track the statutory language are inherently suspect." Id. at 578. Despite the magnitude of the variance involved in this case, the Zoning Board's Resolution was virtually silent on the subject, as was the Trial Court in its opinion.

In the end, it appears that virtually no effort was made to reconcile the intent and purpose of the height restriction with

the grant of the variance, yet this reconciliation process is precisely what is required by law.

POINT IV

THE VARIANCE AUTHORIZING A BUILDING FOUR TIMES HIGHER THAN THE 35 FOOT LIMIT CONSTITUTED ILLEGAL REZONING

The briefs of Marcia Davis and the Plaintiffs-Intervenors present in depth the reasons why the Zoning Board's grant of a variance to LG exceeded its authority, effectively constituting a rezoning that only the municipal legislature had the power to enact. Amici join in those arguments and will not repeat them here. Rather, Amici confine their discussion to what we regard as the central and inescapable point.

This is, simply, the extraordinary magnitude of the height variance. In a district and larger neighborhood in which, over many years, buildings were constructed to 35 feet and no more, resulting in a physical environment of often large but always low-rise structures that complied with the zoning ordinance, the Zoning Board would thrust a building 143 feet high - four times the allowable limit - that would stick up like a sore thumb. In our democracy, to change the terms of the game in such a drastic fashion is not within the authority of a non-elected administrative board to effect. That responsibility belongs to the municipal legislature, acting in conformity with the laws

that govern its zoning actions. Here the Zoning Board usurped that prerogative.

The case that brings this home most clearly is Price v. Strategic Capital Partners, LLC, supra, discussed in detail in the brief on behalf of Marcia Davis. As the Appellate Division wrote:

> A zoning board is not permitted to correct deficiencies in the zoning plan by issuing variances, because such action "is tantamount to an usurpation of the legislative power reserved to the governing body of the municipality to amend or revise the plan." In our view, a variance that permits the construction of a building with *treble* the permitted density in order to establish "appropriate population densities" has strayed into the forbidden area, absent a compelling explanation to the contrary.

404 N.J. Super. at 307 (internal citations omitted).

This Court should hold that the Zoning Board exceeded its lawful authority in granting LG a height variance that allowed a building *four times* higher than the limit set forth in the Englewood Cliffs zoning ordinance.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the Trial Court, and grant such further relief as the Court deems just and appropriate.

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