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PROCEDURAL HISTORY

The Procedural History set forth by Appellants is hereby incorporated.

STATEMENT OF THE CASE

The Zoning Board of Hammonton granted a variance to relieve a developer of his own negligence, and did so without regard to the substantive and procedural foundations upon which the zoning laws are constructed. Judge Lance correctly recognized that the decision to grant the variance was not, and could not be, based upon the statutory criteria required for such a deviation from the Hammonton Zoning Ordinance, particularly since the same home, on the same lot, could have been constructed in complete compliance with the ordinance, rather than in violation of it.

Jasper Development LLC's surveyor located, and Jasper LLC built, a two-story home only seven (7) feet from where the Stanley family's children will sleep. The clear and unambiguous zoning ordinance requires a distance of ten (10) feet between the Stanley home and the developer's new building. The **ONLY** basis offered for allowing this unsafe and illegal encroachment was to save the corporate developer and its surveyor the embarrassment and expense of relocating the home to a safe distance from the Stanley family. The entire problem was a result of the developer falsely representing in its Zoning Permit Application that the homes would be ten (10) feet apart, and then building the home only seven (7) feet from the Stanleys' residence. Relieving the developer and the surveyor from the financial consequences of this "mistake" advances only

the interests of the developer and its surveyor (at least one of which should be insured for such mistake), and does not, and in fact cannot, advance the purposes of zoning.

There is no reason why this exact home could not have been built on the developer's lot in complete conformance with the zoning regulations. It does not matter whether the home was originally mislocated through gross negligence, malice, incompetence or mistake. The fact is that the present condition does not, and in fact cannot, satisfy the elements necessary for the grant of a variance. The Board excused a correctable and avoidable violation of a safety regulation without making any, let alone adequate, findings of fact or law to demonstrate that the purposes of zoning have been advanced and that the violation does not cause a substantial detriment to the public good nor impair the intent and purpose of the zoning ordinance.

The variance was improper and the house must be moved. That is the difficult, but not unfair, reality of the situation. The two or three responsible defendants may later sort out their relative responsibility for the expense of making the home comply with the ordinance. Regardless of how the culpable defendants solve the problem, the Court should not countenance the present "solution," which essentially inflicts the consequences of the developer's actions upon the Stanley family, the innocent party for whom the 10-foot separation provision was

designed to protect.

STATEMENT OF UNDISPUTED FACTS

1. Plaintiffs are the owners of property located within two hundred feet of property known and designated as 812 West Shore Drive, in the City of Hammonton, State of New Jersey, also known as Lot 6, Block 7304 on the Tax Map of the City of Hammonton (the "Property") (Appellant Brief Appendix I Page 53a).

2. Applicant, Jasper & Palace, LLC (now Jasper Development LLC) ("Applicant" or "Developer") was the owner of the Property until November 15, 2001 when, upon information and belief, the Property was sold to Paul and Maryanne Palmetto ("Palmettos") (Pa1).

3. The Palmettos were permitted to be joined as Defendants pursuant to an Order dated February 15, 2002. (Pa7)

4. The Developer applied for a zoning permit on or about November 21, 2000. The Zoning Permit Application (Pa9) represented to the zoning office that there would be ten (10) feet between the proposed structure and the homes on either side of the proposed structure.

5. Apparently due to an error by Developer's surveyor, the home was built less then eight feet from the Stanley home. (Pa10).

6. The Developer claims to have noticed the error only

after the pilings and a large portion of the framing was completed on the house (Appellant Brief Appendix I Page 93a).

7. On or about January 23, 2001, the Developer consulted with the zoning official, and perhaps other officials regarding the violation (Appellant Brief Appendix I Page 94a).

8. Rather than requiring the Developer to obtain a variance, the zoning official permitted the Developer to complete construction at the illegal location, but required the Developer to add fire rated drywall and relocate a fireplace chimney (Appellant Brief Appendix I Pages 56a, 72a, 73a, 94a).

9. Shortly thereafter, the Stanleys' friends and family noticed the new building seemed too close to the Stanleys' home (Appellant Brief Appendix I Page 103a).

10. The Stanleys were in Australia on a two-year business trip and were not aware of the construction until they were notified by their friends and family in the early part of 2001 (Appellant Brief Appendix I Page 103a).

11. The Stanleys were never notified of the construction, nor were they consulted regarding what should be done about the violation (Appellant Brief Appendix I Page 95a).

12. Once the Stanleys obtained legal counsel who formally objected to the absence of a variance, the City Solicitor informed the Developer that he needed a variance (Appellant Brief Appendix I Page 106a).

13. The Property was the subject of an application for variance pursuant to N.J.S.A. 40:55D-70 (the "Application") submitted to the Board by the Applicant. (Pa15)

14. The Application requested relief from §198-39(3) of the Ordinance (Pa29), which mandates a three (3) foot side yard setback on one side, a seven (7) foot side yard setback on the other side, and a minimum of ten (10) feet between buildings on adjoining lots in the R-2 Zone.

15. The Board conducted hearings on the Application on August 8, 2001, and September 12, 2001. (Appellant Brief Appendix I Page 36a)

16. Plaintiff expressed opposition to the Application at both meetings conducted by the Board. The Board approved the Application on September 12, 2001 by informal voice vote of 4-3. The Board formally adopted Resolution #2001-20 (Pa10) on October 10, 2001 by the same margin.

17. The Board published its Resolution granting the variance on October 18, 2001.

LEGAL ARGUMENT

I. The record does not, and could not, support a finding that the Application satisfies the statutory criteria for granting a variance.

Since there is nothing unique or peculiar about the physical nature of the lot or home at issue, the appropriate statutory provision under which this application must be

reviewed is N.J.S.A. 40:55D-70 (c)(2), also known as the "Flexible C". Lang v. Zoning Board of North Caldwell, 160 N.J. 41 (1999). The lower court correct dismissed any claim that this variance could be based on (c)(1) grounds since the lot upon which the home was built was just like every other flat, rectangular lot in this waterfront community, and the house at issue was not a lawfully existing structure. The house is the object for which the variance was sought, and could not be the lawfully existing structure causing the need for a variance. The only possible "hardship" is the loss of profit faced by the builder who has to correct his violation, and "personal hardship is irrelevant to the statutory standard, and . . . the correct focus must be on whether the strict enforcement would cause undue hardship because of the unique or exceptional conditions of the specific property." Lang, 160 N.J. at 53.

The Appellants reliance upon Hawrylo v. Board of Adjustment, Harding Tp., 249 N.J. Super. 568 (App. Div. 1991) in support of a c(1) variance is misplaced.

First, Hawrylo was decided before the Supreme Court decided Lang v. Zoning Board of North Caldwell, 160 N.J. 41(1999), which made clear that the hardship must have some relation to a physical condition on the property. Id. at 53 ("The Board's inquiry should be on whether the unique property condition relied on by the applicant constitutes the primary reason why

the proposed structure does not conform to the Ordinance.")

Second, and more importantly, the structure in Hawrylo causing the "unique and exceptional situation" was a pre-exiting, pre-ordinance, non-conforming structure consisting of a cement foundation constructed in the 1920's, and the court made clear the nonconforming structure was not an "unlawful structure", and that the foundation could therefore properly be considered in examining the "hardship" of the applicant.

The appellant never requested a c(1) variance, the Board did not utilize or adopt a c(1) analysis, and there is no basis to grant a c(1) variance under the present circumstances.

Judge Lance properly focused Her analysis upon subsection N.J.S.A. 40:55D-70 (c)(2). Pursuant to subsection (c)(2), the Board may only grant a variance if it makes specific findings of fact and concludes that those facts demonstrate:

a. The purposes of Municipal Land Use Law would be advanced by a deviation from the zoning ordinance provision;

b. The variance can be granted without substantial detriment to the public good;

c. The benefits of the deviation would substantially outweigh any detriment; ***AND***

d. The variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

N.J.S.A. 40:55D-70 (c)(2); see also Cox, § 6-3.3 [citing Ketcherick v. Bor. Of Mountain Lakes, 256 N.J. Super. 647 (App.

Div. 1992); and Green Meadows v. Planning Bd., 329 N.J. Super. 12 (App. Div. 2000)].

A. The Applicant can not demonstrate that the purposes of Municipal Land Use Law would be advanced by a deviation from the zoning ordinance and that the proposed project would be a better alternative to a compliant project.

The only interest advanced by permitting this deviation are the interests of the Applicant.

In Kauffman v. Planning Board of Warren, 110 N.J. 551, 563 (1988), the Supreme Court declared:

> By definition, then, **no c(2) variance should be granted when merely the purposes of the owner will be advanced**. The grant of approval must actually benefit the community in that **it represents a better zoning alternative for the property**. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a "hardship" on the owner warranting a *relaxation* of standards, but on the **characteristics of the land that present an opportunity for *improved* zoning and planning** that will benefit the community. [italics in original, emphasis added].

There was absolutely no evidence, and there could be no evidence, to support the proposition that violating the ten (10) foot separation requirement in this case represented an **IMPROVEMENT** over the condition that would have existed if the house was placed in conformity with the ordinance. The Board's "decision" to the contrary was arbitrary, capricious, unreasonable and not supported by the record.

The purposes of zoning are generally recognized to be those purposes listed in N.J.S.A. 40:55D-2. Burbridge v. Mine Hill

Twp., 117 N.J. 376, 386-87 (1990). There were at most three purposes of zoning discussed (but not necessarily relied upon in the findings of fact or conclusions of law) in the record below, and the illegally located home in this case does not, and could not, advance any of those purposes.

The first purpose implicated is the obligation to "secure safety from fire, flood, panic and other natural and manmade disasters." It is well recognized throughout the country that one of the primary purposes of side yard and separation requirements is to inhibit the spread of fire. "The obvious purpose of the side yard regulation is to serve the public health and safety by requiring space for the greater passage of air between buildings and to prevent the ready spreading of fire from one building to another." Pascale v. City of New Haven, 150 Conn. 113 (1962) [citing 1 Metzenbaum, *Zoning* (2d Ed.)]. **NO ONE** could credibly argue that the deviation permitted here improves upon the purpose of promoting fire safety. In fact, everyone seemed to recognize the increased danger of fire as a result of the violation, but there was no evidence that the safety provided by the ten (10) foot separation was **IMPROVED** by allowing only seven (7) feet of separation. There was no testimony, professional or otherwise, which could possibly have satisfied the Board that the "alternative" was superior to the separation required by the statute. The Stanley family is

entitled to have a ten (10) foot buffer from their house and the one next-door, and there is no "purpose", whether based in zoning or otherwise, which would justify involuntarily exposing this family to an unnecessary risk.

The second purpose purportedly advanced was the promotion of light, air and open space. Although Mr. Porto made a valiant effort, even he could not articulate why seven (7) feet of separation provides more light, air and open space than ten (10) feet of separation (Appellant Brief Appendix I Page 69a, 70a). It is true that the more you reduce the space on one side of the house the more you increase the space on the other, but that offsetting fact does not, and can not, correlate into an **IMPROVEMENT** upon the Zoning Ordinance's requirement that there be a ten (10) foot space between each building. Under Porto's theory, it would be an "improvement" to place the house within 1 foot of the Stanleys' home, thereby creating more open space on the other side of the developer's house. That is not how it works, that is not how the ordinance was designed, and it turns the entire zoning scheme on its head if one accepts the proposition that an individual applicant can determine on an *ad hoc* basis how to create "better" light, air and space for their neighbors.

The third "purpose" of zoning alleged to be enhanced by the illegal structure is the aesthetic quality of the structure.

The Resolution reports that Mr. Porto testified that "the proposed structure was architecturally pleasing and consistent with development along the bay front" (Pa11). The reasoning upon which this claim is based is fundamentally flawed. The Jasper Development/Palmetto house may be the prettiest building in the world, and it may be architecturally designed like the newer buildings in the area, but there is no evidence, and there could be no evidence, that the building's aesthetic quality is enhanced by being located three (3) feet closer to the Stanleys' home, or that the neighborhood scheme is one which compels homes be built in violation of the ten (10) foot separation requirement. As a planning alternative, even Mr. Porto could not testify that **DECREASING** the separation is an **IMPROVEMENT** to the aesthetic quality of the home, the property or the community. It may be a nice house, but it would be just as nice, or nicer, if it where located within the legal prescriptions of the ordinance.

The granting of the variance does not provide a better **ALTERNATIVE** to compliance, and certainly does not do so in relation to the purposes of zoning identified by the applicant. This is true whether one focuses upon the impact of the deviation alone, or if one focuses upon the application as a whole. The fact that it is a nice house is not sufficient to demonstrate that constructing the house in violation of the

ordinance is a better **ALTERNATIVE** to constructing the home in compliance with the ordinance. The home constructed is not a better alternative with respect to light, air and space, it does not promote fire safety, and it does not enhance the aesthetic quality or structural uniformity of the community any more than would a fully compliant home.

B. The Applicant can not demonstrate that the variance can be granted without substantial detriment to the public good.

The Resolution's only comment as to this element is: "There was no substantial detriment to the public good or to the Hammonton MLUL" (Pa13). This "finding" is conclusory, arbitrary, capricious, unreasonable and not supported by the record below.

It is true that granting this variance saves the developer and its architect money, and preserves their profit-making venture. However, the public good is always damaged when one person is excused from complying with the zoning ordinance notwithstanding their disregard of the ordinance and the approval process.

As discussed in greater detail below, the public suffers a substantial harm each time a developer is permitted to build a home in violation of the zoning ordinance and in direct contravention to the procedures designed to ensure its uniform enforcement. Deer Glen Estates v. Borough of Fort Lee, 39 N.J.

Super. 380 (App. Div. 1956)

The public deserves to have the ordinance enforced as written, and to have the process for exceptions followed in every circumstance. The public would have been better served by requiring this house to be built in accordance with the zoning laws, and that is how the house should be built. The members of the public most effected by the developer's actions, the Stanley family, deserve the protections of the ordinance, and ignoring them certainly constitutes a substantial detriment to the public good.

The Board failed to articulate a basis for its conclusory finding on this element, and that is because there is no doubt that the deviation, and the manner of its occurrence, damaged the public good.

C. The benefits of the deviation do not substantially outweigh the detriments.

The Resolution's only finding on this issue was as follows: "The reasons of the members who voted in favor of the variance were that on balance the improvements outweighed any detriments in terms of the effect on the entire neighborhood" (Pa13) The first and clearest defect in this finding is the glaring absence of the word "substantially" - an omission that make the finding *per se* legally deficient.

Even if one ignores the glaring deficiency in the Board's

written decision and analyzes the record as a whole, what is the benefit of the deviation? How could building a house too close to another house, when such a configuration is totally unnecessary, outweigh the damage to fire safety, privacy and quality of life intended to be protected by the ten (10) foot separation requirement? More importantly, where are the specific factual and legal conclusions in that regard? Nowhere does the Board weigh the benefit of compliance with the detriment of non-compliance from a **ZONING AND PLANNING** perspective. There was some mention that it would be expensive for the developer to make the house compliant (Appellant Brief Appendix I Page 90a, 91a). Where, however, in the record is that weighed against the fire safety of the Stanley children? This analysis was never done, there were no findings of fact or conclusions of law on this issue, and if it were done, surely any rational factfinder would err on the side of the Stanley family's safety and not the profit of the speculative developer next door.

The Board failed to articulate any basis for its conclusory finding on this element, and that is because there is no doubt that the "benefit" of the deviation does not outweigh (and certainly does not "substantially outweigh") the detriment caused by its existence.

D. The variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

There are two levels upon which this final element must be considered.

First, whether the record contains adequate factual support for the Board's conclusory determination that this Application would not impair the zoning ordinance since "this project was consistent with the development on other bay front lots in the area." Second, whether granting this particular variance impairs the purpose of the zoning ordinance under circumstances where a developer submits a deceptive Zoning Permit Application, builds a large portion of a house in violation of the ordinance, and then completes the house based upon an oral agreement with the zoning officer to proceed without a variance.

As to the first issue, the Resolution merely recites Mr. Porto's testimony to the effect that "The proposed structure was architecturally pleasing and consistent with the development along the bay front." The Transcript makes clear that Mr. Porto was referring to the fact that this is a nice big modern house on pilings, and that this is the type of house being built along the bay front. No one would disagree with that (Appellant Brief Appendix I Page 69a). But Mr. Porto **DOES NOT** testify that building houses seven (7) feet from the neighbor instead of ten (10) feet is consistent with the manner in which houses are

being built along the bay front. The fact that the house is nice and big has nothing to do with whether the deviation is so consistent with the neighborhood that its existence will not impair the zone plan or ordinance.

This was a feeble and ineffective attempt to bring to bear those cases that offset the impairment of the zone plan by identifying a trend or pattern of similar variances or violations existing throughout the neighborhood. See e.g., Chirichello v. Borough of Monmouth Beach, 78 N.J. 544 (1979) (recognizing that "proposed setting among three other homes on smaller tracts with no greater frontages are some indicia that the zone plan and zoning ordinance may not have been substantially impaired by granting the variance"). Porto's testimony does not establish that the deleterious effect of the deviation is mitigated by a repeated and consistent deviation from the zoning ordinance throughout the surrounding neighborhood. It only demonstrates that this house is big like the houses being built in the neighborhood. Such a declaration is not a basis upon which to grant a variance where the same house could have been built three (3) feet to the left and in compliance with the zoning ordinance.

The second level upon which the variance and the deviation impairs the zone plan is its obvious encouragement of sloppy and negligent applications, informal and improper avoidance of clear

violations of the law, and a total disregard of the rights of those persons relying upon the zoning laws and process (including the ordinance's notice provisions) for their protection. This issue will be addressed in Section II immediately below, but it is clear that the granting of this variance after the gross negligence of the developer could not possibly encourage future respect for the ordinance and the zoning process.

The record does not support the grant of this variance and the Board's decision must be reversed as arbitrary, capricious, unreasonable, and not supported by the record.

II. The municipal zoning laws cannot tolerate or promote a policy whereby commercial developers obtain a permit by providing inaccurate information and then rely upon oral approvals of unauthorized agents to avoid the variance process for relief from the non-debatable zoning provision impacting neighboring homes.

The doctrine of equitable estoppel is hesitantly applied against public entities and is applied only in "very compelling circumstances." Township of Fairfield v. Likanchuk's Inc., 274 N.J. Super. 320, 331 (App. Div. 1994). The developer's theory of estoppel in this case is based upon oral representations by the zoning officer that the ten (10) foot separation requirement could be violated without obtaining a variance. Estoppel can not be based upon such a clear miscomprehension of the law and process under which professionals operate in the zoning context.

The developer and its professionals are not naive, inexperienced homeowners who built a handicap ramp for their ill mother and didn't realize the ramp violated a setback. This developer and its surveyor are professionals, charged with the responsibility of conducting themselves in accordance with the ordinances of Hammonton. Even before the zoning officer allegedly permitted the continuation of construction without a variance, the "hardship" of which the developer complains was already self-inflicted, self-created and well entrenched.

The developer submitted a Zoning Permit Application that falsely represented that the distance between the neighboring buildings would be at least ten (10) feet. (Pa9) The building permit issued in this case was NOT invalid or imprudent, it was simply based upon inaccurate information provided by the Applicant.

The Courts are not sympathetic to builders who represent they are going to build one thing and then build another, regardless of how it happens. In Deer Glen Estates v. Borough of Fort Lee, 39 N.J. Super. 380, 385-386 (App. Div. 1956), the builder submitted a set of plans showing one side yard setback, but constructed the home with a different setback. The Court immediately recognized the dangers of permitting estoppel under such circumstances and stated:

There is not the slightest showing in the present case

> that there was anything about the premises in question that would have made it difficult for or imposed an exceptional and undue hardship upon the builder-owner to have complied with the side yard requirements. The hardship of which plaintiff now complains is one brought about by its own act or omission. The lot itself conformed with the zoning ordinance requirements as to size and footage. Its shape is not exceptional--as plaintiff would have us believe--in the sense that a building could not be erected thereon without the necessity of applying for a variance. The hardship of which the owner complains is one that was self-imposed or self-created, and not one imposed by the terms of the zoning ordinance, as is contemplated by N.J.S.A. 40:55-39(c). Plaintiff got itself into trouble through sheer negligence, accompanied by a flagrant violation of the zoning ordinance requirements. It had no right to build on the basis of a plot plan different from that which it filed with the acting building inspector when it sought a building permit. As stated in 8 McQuillin, *Municipal Corporations* (3d ed. 1950), § 25.168, p. 296:
>
> The practical difficulty or unnecessary hardship, essential to a variance, is not difficulty or hardship which would have existed in the absence of the ordinance and which is not occasioned by it. Nor, in general, is it self-created hardship, viz., that arising from the conduct, acts or omissions of the owner of property and not directly consequent upon zoning . . .
>
> * * *
>
> A builder may not, after his structure is practically completed, come into the building inspector's office with a new plan, and request, belatedly, that a certificate of occupancy be issued because of an alleged mistake by the surveyor, architect, contractor, or any of their employees. To permit him to do so would open the door to unconscionable, if not fraudulent, conduct on the part of builders. "Mistake" would then become nothing more than a guise for evading the legal requirements of a zoning ordinance. . . . The citizens of Fort Lee have a right to rely on the valid provisions of their zoning ordinance, and have a right to demand its protection . . .

The fact that the zoning officer permitted the builder to

compound the mistake by completing construction without a variance does not negate the strong public policy against permitting a negligent professional and/or surveyor to avoid the law at the expense of the public good.

At the outset, it must be recognized that the alleged action constituting the estoppel was not a formal written action upon which one customarily relies. The basis for the alleged estoppel (which it must be clear is only as to the completion of the home, and not its initial construction), is an *ad hoc* oral statement by the zoning officer to an experienced developer that the separation regulation could be ignored and construction completed without the need for a variance. See, Winn v. City of Margate, 204 N.J. Super. 114 (Law Div. 1985) (Judge Gibson recognizing the inherent dangers to the public good in estopping a municipal entity from taking formal action contrary to informal and unwritten action by a mistaken official in the zoning context). Even if one were to allow the oral acquiescence of the zoning officer to be elevated to the actual issuance of a permit, the principals set forth in Jantausch v. Borough of Verona, 41 N.J. Super 89, 93-94 (Law Div. 1956), aff'd 24 N.J. 326 (1957) prevent the application of the estoppel concept to the facts herein.

In Jantausch v. Borough of Verona, Id. at 93-94, Chief Justice (then Judge) Weintraub discussed the estoppel issue in

the context of the issuance of a building permit. Where a permit is regularly issued in accordance with an ordinance, absent fraud, a municipality will be estopped from revoking it after reliance. Id. at 93. In the "intermediate" situation, when an administrative official in good faith and within the ambit of his duty makes an erroneous and debatable interpretation of an ordinance and a property owner relies on it in good faith, that is where estoppel may be appropriate. Id. at 94-95. However, "where there is no semblance of compliance with or authorization in the ordinance, the deficiency is deemed jurisdictional and reliance will not bar even a collateral attack after the expiration of time limitation applicable to direct review." Id. at 94. The Jantausch principles were applied in Hill v. Board of Adjustment Borough of Eatontown, 122 N.J. Super. 156, 160-62 (App. Div. 1972), where a building inspector issued a building permit that clearly did not conform to the side-yard requirements of the zoning ordinance. In the context of a review of the grant of a hardship variance, a majority of the Court held that issuance of the permit was a "good faith" irregular exercise of duty rather than an act outside of the building inspector's capacity. Id. at 162. Thus the permit was not within the void class under Jantausch. Id. at 162. Noting that the municipality sought to enforce destruction of substantial improvements, the Court relied on the equitable doctrines of

estoppel, laches and relative hardship to bar the challenge to the resulting addition. Id. at 163-65. Judge Fritz, concurring, cautioned that reliance on action so clearly contrary to the zoning ordinance, whose impropriety was completely undebatable, should not generate an estoppel against the municipality. Id. at 163-65 (Fritz, J.A.D., concurring).

Judge Fritz and the Appellate Division revisited the issue in Jesse A. Howland & Sons, Inc. v. Borough of Freehold, 143 N.J. Super. 484, 489 (App. Div. 1976), *certif. denied,* 72 N.J. 466 (1976), where he had occasion to refine the majority holding in Hill. He stated that the finding of "good faith" on the part of a zoning official can only be satisfied by a showing that "an issue of construction of the zoning ordinance . . . was, when the permit was issued, sufficiently substantial to render doubtful a charge that the administrative official acted **without any reasonable basis**, or that the owner proceeded without good faith [emphasis added]." Id. at 849 The "mistake" by the zoning official must be one caused by a reasonable interpretation of a debatable issue arising from the interpretation of the zoning ordinance.

The holding of the Hill case is not applicable to the case at bar for at least three reasons. First, the holding in Hill was modified by Howland, and modified in a way that makes it clear that there must be some debatable interpretive issue upon

which the municipal official based his position.

In the present case, **10 feet is 10 feet**. There was no confusion as to whether the ordinance was violated. There was no question of interpretation. The Court can take judicial notice that a zoning officer knows or should have known that a violation of setback requirements requires a variance. The zoning officer knew a variance was required, but for reasons that are beyond anyone's comprehension, excused that procedure in this case. He had no authority, apparent or otherwise, to completely rewrite the variance procedure, and therefore the action of the zoning officer was not "an issue of construction," and it may not form the basis of a claim of reliance or estoppel.

Second, even if the Hill holding had not been modified, the present case is clearly distinguishable on its facts.

- The applicants in Hill were innocent homeowners who unknowingly submitted plans containing an accurate, albeit, inadequate, setback description. In the present case, the Applicant is a commercial developer assisted by a professional surveyor who was experienced in the zoning and building fields, and who obtained a permit based upon a false (but conforming) description of the distance between the houses. The two applicants do not stand on the same equitable

footing.

- The "mistake" in the Hill case was that the zoning inspector "forgot" to tell the owners that they needed a variance. In the present case, the inspector did not have reason to request a variance at the outset, and even when made aware of the appropriate facts, he knew or should have known, as should have the developer and its surveyor, that a variance was a necessary prerequisite to violating the separation requirements of the ordinance.
- The Hill owners relied upon a formal written permit obtained through ordinary and official channels. The developer in this case engaged in informal *ad hoc* conversation with public officials that resulted in an oral approval to continue construction in violation of the zoning ordinance.
- The Hill owners were performing construction on their own home to improve the quality of their own living quarters. The corporate developers in this case were building a for-profit house that they intended to sell, and did sell, to a third party.

It quickly becomes apparent that the corporate developers in this case are not the same as the innocent homeowners in the Hill case, and the circumstances of the Hill's reliance are not

the same as the highly suspect reliance of the corporate developer in this case.

There is a third reason Hill does not apply to the present case. Unlike in Hill, the developer's entire problem was originated by its own negligence and its inaccurate Zoning Permit Application. The developer's Zoning Permit Application clearly represented at Section C-5 that there was to be ten (10) feet between buildings. (Pa9) When the zoning officer was finally presented with the inaccuracy of this representation, the foundation and a large portion of the home's framing were already constructed in violation of the ordinance. The developer created the original problem through its own carelessness and misrepresentation in the Zoning Permit Application, and forced its self-created hardship to influence the action of the zoning officer once the violation was discovered. No such circumstances existed in Hill. The equitable positions of the two parties are very different and strongly disfavor the developer in this case.

This matter clearly falls within the third category of Jantausch, as clarified by Judge Fritz in Howland. There was no room for interpretation as to whether or not the structure violated the ten (10) foot separation requirement, and there is no question that a variance is needed to excuse a violation of the ten (10) foot separation requirement. Consequently, there

can be "no semblance of compliance with, or authorization in, the ordinance, [and] the deficiency must be deemed jurisdictional and reliance" will not protect the owner. The municipal zoning laws simply can not tolerate or promote a circumstance where commercial developers can rely upon oral approvals of unauthorized agents to avoid the variance process for clear ordinance violations.

III. The doctrine of relative hardship is not applicable to this case.

For many of the same reasons, the doctrine of relative hardship is not applicable to this circumstance, and the unique facts of Szymczak v. LaFerrara, 280 N.J. Super. 223 (App. Div. 1995) are clearly distinguishable in most critical respects. Although the case is distinguishable on a number of levels, it is only necessary to focus upon the three issues that seemed to most influence the court.

First, and most importantly, the Szymczak court focused upon the fact that the property and party encroached upon was a vacant piece of property owned by an investor who had not utilized the property for decades. The court concluded "there surely is nothing unique about this 60-by-100-foot vacant lot," and the record clearly demonstrated that the investor had "no

special personal purpose in mind for developing the lot." Id. at 229.

The same cannot be said of the Stanley home and the Stanley family, who although away on business during the construction of the adjacent home, certainly reside in the home as a summer residence and chose the home because it is down the street from their parents, who testified on behalf of their son, daughter in law and grandchildren at the variance hearing. (47a,180a) The Stanleys are impacted in a personal and real way by the imposing structure, and stand in an entirely different equitable position than the land speculator in Szymczak.

Second, the Szymczak court acknowledged that the encroacher was entirely without blame and innocently located the home on vacant land based upon a survey that was later the subject of a boundary line dispute. In the present case, although there may have been an error by a surveyor, the professional developer Palace and Jasper, which was building the home as part of a profit making venture, is far from innocent. The proximity to the Stanley residence was readily apparent, and was not an imaginary line in an empty field. This home is in a shore community where the lots and the homes are in straight lines and easily juxtaposed. Furthermore, the professional builder in this case discovered the "encroachment" and the violation of the law, but proceeded without a variance. Palace and Jasper are

not "innocent," and are not on the same equitable footing as Symczak. In fact, Palace and Jasper are not even the owners of the property any longer, as these great champions of equitable principles have sold the home to the Palmettos.

As for the Palmettos, they are perhaps the clearest example, by way of contrast, of the equitable maxim "Equity protects the vigilant." It is incomprehensible that Mr. Palmetto (himself a professional builder) paid more than three quarters of a million dollars for a home he knew was subject to a variance dispute. The Stanleys made no secret of their objection to the home, and the variance issue was recognized in the Palmetto contract (Appellant Brief Appendix II Page 288a,290a). The Palmetto's were in the best position to avoid the "inequity" of which they now complain.

A third reason this case differs from Symczak, as if a third reason were necessary, is that there is no evidence in the record to support the extent of the hardship to the Applicant. In fact, there is no even evidence that the cost of correcting the violation would exceed the PROFIT the Applicant has made on its business venture. A claim of relative hardship cannot be made in a vacuum, and without this evidence in the record, Applicant cannot succeed on this issue.

The doctrine of relative hardship has no applicability to this case, and the present circumstances have no substantial

similarity to the case cited by Appellant in support of its position.

IV. The Board's decision is inadequate on its face and is not capable of affirmance.

The Board completely failed to set forth findings of fact or conclusions of law as it is required to do pursuant to N.J.S.A. 40:55D-10. Such a dearth of explanation is understandable since there were no real facts presented to the Board, nor was there any basis in law to support its decision. The Board instead focused its attention, and based its decision, upon issues relating to the concept of estoppel, which is a determination far beyond the authority or jurisdiction of the Board. See, Springsteel v. West Orange, 149 N.J. Super. 107 (App. Div. 1977) (holding zoning board not appropriate forum for determination of estoppel).

In the portion of the Resolution which purports to set forth the facts that support the granting of the variance, the Resolution recites (inaccurately), but does not adopt as fact, the testimony of Andrew Porto, P.P., and reads in pertinent part:

> The applicant provided the testimony of Andrew Porto, P.P. who opined that the variance was deminimis and that the applicants met the standards for a "C" variance in terms of the negative criteria and the purpose of the Hammonton MLUL. He concluded that the, remediation efforts, combined with the actual side yard setbacks of 4.71' and 7.09' proposed or existing (3' and 7' required), created sufficient light, air and space as to

> justify the "C" variance. The proposed structure was architecturally pleasing and consistent with development along the bay front. Additionally, Mr. Gary Jasper, a representative member of the applicant testified, and stated that he acted in good faith, brought the error to the attention City immediately and relied upon the January, 2001 meeting with the City officials as an approval to continue construction. (Pa11)

As to the application of the facts to the law, the Resolution reads in relevant part:

> [t]he reasons of the Members who voted in favor of the variance were that on balance the improvements outweighed any detriments in terms of the effect on the entire neighborhood. The applicant met its burden of proof for a "C" variance. There was no substantial detriment to the public good or to the Hammonton MLUL. The applicant acted in good faith and took substantial remediation measures to provide for adequate light, air and space as well as maintain the neighbors privacy. Finally, this project was consistent with the development on other bay front lots in this area. (Pa13)

This Resolution violates the two most basic requirements for a land use board's written decision. The Board does not make findings of fact as to the positive and negative criteria, and it fails to explain how those facts impact and satisfy the legal criteria for the granting of the variance.

As recognized by Cox, *Zoning and Land Use Administration*, § 28-5.2, and supported by the numerous authorities cited therein, "mere recitals of testimony are not 'findings'. . . . Mere recitals of testimony do not satisfy a board's statutory responsibility to make findings of fact." By reciting Porto's testimony regarding the facts allegedly supporting the positive

and negative criteria, the Board is not making a finding of fact that those facts are accepted at true.

The Board also failed to explain how it applied the facts to the law. Instead, the Board merely parroted (inaccurately) the statutory language relating to the positive and negative criteria. The Resolution does not even describe the provision under which the variance is granted. Such a glaring deficiency was specifically criticized in Witt v. Borough of Maywood, 328 N. J. Super, 432, 454-455 (App. Div. 2000), wherein the Appellate Division refused to affirm a variance and stated:

> [The Board] grants approval with the most conclusionary findings, without explaining the reasons or rationale for finding that [the applicant] had satisfied the positive and negative criteria of N.J.S.A. 40:55D-70(c)(1) or (2) in granting a critical variance adjacent to a residential district, and without making adequate findings and conclusions that would allow a trial court to even begin the explication process. **The Planning board did not even describe what type of variance it was granting (hardship: "(c)(1)" or planning: "(c)(2)").** [emphasis added].

The clearest explanation for the absence of proper findings may be found in the comments of the Board members. These comments included at least two references to the homeowner's alleged refusal to settle the dispute for a monetary payment, a conclusion that "tearing it down is just not an option," and a number of references to the alleged "good faith" of the builder who violated the ordinance (Appellant Brief Appendix I Page 187a-188a). The entire focus was upon the equitable principles

that would support or refute a finding of estoppel. It is therefore not surprising that the Resolution fails to fulfill its statutory obligation to set forth findings of fact and conclusions of law in support of the Board's decision on the statutory zoning issues before it. The Board's attorney simply did not have anything to work with when drafting the Resolution, and the Resolution is defective on its face.

The Board's Resolution was legally defective and could not possibly be affirmed even if there were some basis to have granted the variance on its substantive merits.

CONCLUSION

For all of the reasons set forth above, and the authorities cited herein, Plaintiff Respondent respectfully requests the Court affirm the lower court's reversal of the decision of the Zoning Board of the City of Hammonton.

Respectfully submitted,

FORD, FLOWER & HASBROUCK

Dated: November 26, 2003 BY: _____
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