

July 7, 2025

To: River Edge Joint Planning Board (the "Board")
Re: Analysis of the Constitutionality of River Edge's Prohibition on Billboards

Question Presented:

Does River Edge's zoning ordinance §416-44.A(1) placing a blanket prohibition on billboards in the municipality violate the First Amendment?

Short Answer: Yes.

Analysis

IAAT Services LLC ("Applicant") has applied (the "Application") to install a freestanding 60-foot high, two-faced static billboard at 41 Grand Avenue (the "Property"). The Property is designated as Lot 4 in Block 1405 and is currently developed with an office building. Pursuant to River Edge's zoning ordinances §416-44.A(1), billboards are prohibited within the Borough.

In anticipation of this issue and at my direction, the Applicant, through counsel, submitted a letter analyzing the constitutional issues raised by §416-44.A(1). The letter, from Steven Sinisi, Esq., dated May 21, 2025, cites caselaw in support of the proposition that the ordinance violates the First Amendment's protection of freedom of speech. In response, the owner of 335 Johnson Avenue (Block 1405, Lot 3) Dark Star Development, LLC, ("Dark Star") submitted a letter from counsel, Charles Sarlo, Esq., dated June 7, 2025, taking the position that this Board is precluded from declaring the ordinance unconstitutional because questions of law are reserved for courts. In a memorandum dated May 22, 2025, and a letter dated May 28, 2025, the Board Planner and Board Engineer, respectively, concurred with the Applicant's counsel that the prohibition is unconstitutional and hence unenforceable.

We have reviewed the letters and offer the following analysis for your consideration:

Two of the cases cited by Applicant are worthy of close examination:

1. E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, goes beyond what is necessary to support the Applicant's position by providing precedent for striking down an ordinance *less restrictive* than the one currently before this Board. There, the challenged ordinance prohibited *digital* billboards. E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 562 (2016). Despite this more specific version of a billboard prohibition, the New Jersey Supreme Court held that the ordinance violated the free speech provision of the Constitution. Id. at 585. While the ordinance was content neutral and supported by the substantial government interests of aesthetics and motorist safety, id. at 582-583, the court held that the prohibition was not narrowly tailored to

these interests based on the scant factual support presented by the township connecting the prohibition to such interests. Id. at 585.

In River Edge, the ordinance in question does not prohibit a specific type of billboard such as digital billboards but *all* billboards. This is a problem. In fact, §416-44.A(1) is merely one word: “Billboards.” Considering that the state supreme court has ruled that a prohibition on digital billboards is not narrowly tailored, it’s unlikely that a court would find a broader prohibition on all billboards to be sufficiently tailored to pass First Amendment scrutiny. On the other hand, the township’s shortcoming in E & J Equities was a lack of evidence, and so perhaps if River Edge could provide substantial testimony and documentation on the importance of the ordinance for this municipality, it could satisfy such scrutiny. However, given the Time of Application Rule, N.J.S.A. 40:55D-10.5, the record in this regard would be limited to the current ordinance.

2. Applicant’s citation to Bell v. Stafford Twp., another New Jersey Supreme Court case, represents an example of an ordinance prohibiting *all* billboards like the one at issue here. Bell v. Stafford Twp., 110 N.J. 384, 541 A.2d 692 (1988). There, the court found that the township failed to present evidence of even a legitimate governmental interest and accordingly struck down the prohibition as violative of the First Amendment. Id. at 397-398.

On the other hand, the caselaw cited by Dark Star in support of the proposition that this Board does not have the authority to declare §416-44.A(1) unconstitutional is unconvincing. The cited section of Messer v. Burlington Tp. concerned the validity of rezoning provisions. Messer v. Burlington Tp., 172 N.J. Super. 479, 487 (Law Div. 1980). The relevant provision specified that the planning and zoning boards were to reach conclusions of law in evaluating applications for rezoning, and in Messer the court found that the only such conclusion to be reached in these applications was whether the current zoning was unconstitutional as applied to the given applicant. Id. It was this aspect of the ordinance that the court invalidated based on the quotation Dark Star cited regarding constitutional questions strictly being a province of the court. Id. This is easily distinguishable from the case at hand. Whereas in Messer the township had explicitly reserved for its land use boards the authority to determine constitutional questions, in this case the Board is faced with a claim that a specific ordinance is unconstitutional. *It is the Board Attorney’s opinion that it is not the function of this Board to enforce facially unconstitutional law.* While it is true that constitutional questions are best suited for courts, if precedent has already dictated that ordinances such as §416-44.A(1) violate the First Amendment, then there is no constitutional question to decide; the Board would simply be faced with an unconstitutional law.

Dark Star also cites Jantausch v. Verona, 41 N.J. Super. 89 (Law Div. 1956), *aff’d* 24 N.J. 326 (1957). This case is from over sixty years ago and the section cited concerned the standard of review for courts reviewing land use board decisions: administrative decisions are reviewed under the arbitrary and capricious standard whereas conclusions of law are not given deference because they are better suited for courts. Id. at 96. This has no bearing on the issue at hand since the Application is not in front of a court. Also, it worth noting that this case pre-dates the Municipal Land Use Law.

Where billboard restrictions have been upheld, the ordinance in question did not completely exclude billboards from the municipality. In an unpublished decision (in a case I was involved with in 2006), Outdoor v. Upper Saddle River Bd. of Adjustment, the zoning ordinance prohibiting billboards was amended to rendering billboards a conditional use in the highway retail and commercial district on Route 17. Outdoor v. Upper Saddle River Bd. of Adjustment, No. A-1991-05T5, 2006 WL 3153145

(N.J. Super. Ct. App. Div. Nov. 6, 2006) at 1. After the plaintiff's application for a conditional use variance was denied, we filed a complaint challenging the constitutionality of the ordinance. Id. In upholding the denial, the appellate court contrasted the case with Bell by pointing out that the ordinance was not a blanket prohibition but instead a regulation related to legitimate government purposes. Id. The Upper Saddle River case also pre-dates the Time of Application Rule and Upper Saddle River changed the subject ordinance during the course of the litigation, something that the MLUL now expressly prohibits.

Yet even these tailored restrictions are not always immune to constitutional challenges. The case that has most thoroughly examined and applied E & J Equities appears to be Garden State Outdoor, LLC v. Egg Harbor Twp., No. A-2830-23, 2025 WL 1638848 (N.J. Super. Ct. App. Div. June 10, 2025). In that case, the municipality permitted billboards conditioned on various restrictions such as distance from an intersection. Id. at 2. When the plaintiff challenged this distance restriction's constitutionality, the trial court upheld the ordinance. Id. at 3. Relying on the section of the ordinance specifying the purpose of the restrictions, the trial court found that the distance requirement advanced the interests of traffic safety and open space and accordingly granted summary judgment to the defendant township. Id. But on appeal, the appellate court found that the township's sole reliance on the purpose section of the ordinance was not enough to satisfy E & J Equities' evidence requirement so as to warrant summary judgment. Id. at 6. Once again, the fact that this relatively tailored version of a billboard restriction, supported by purpose language from the ordinance, was not adequate (in and of itself) to survive a constitutional challenge raises serious doubts that River Edge's ordinance in this case would survive such a challenge.

An analysis of how a court would review such a challenge may be helpful for the Board. The caselaw discussed above supports the Applicant's contention that the relevant test here is the "time, place, and manner" standard which asks whether the regulation (1) is content-neutral, (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open ample alternative channels for communication. E & J Equities 226 N.J. at 582. River Edge would likely have no issue demonstrating the content-neutral nature of §416-44.A(1), which regulates a manner of speech, not its content. The municipality could present testimony and documentation regarding the ordinance's purpose of promoting aesthetics and traffic safety, the most cited government interests for billboard regulation. It could similarly provide evidence of alternate channels of communication for the content the Applicant here seeks to include on the proposed billboard such as "signs, internet advertising, direct mail, radio, newspapers, television, advertising circulars, advertising flyers, commercial vehicle sign advertising, and public transportation advertising." Garden State Outdoor at 3 (citing Interstate Outdoor Advertising, L.P. v. Zoning Board of Mount Laurel, 706 F.3d 527, 535 (3d. Cir. 2013)). But as alluded to throughout this memorandum, the Borough will have significant difficulty demonstrating that the restriction is sufficiently narrowly tailored to the aforementioned interests. We once again emphasize that §416-44.A(1) is a one word, blanket prohibition. While River Edge is not required to adopt the *least* restrictive means possible to achieve the goals of billboard regulation, the precedent analyzed above, striking blanket prohibitions, and even well-tailored restrictions, indicates that a court would likely find that the ordinance here is more restrictive than necessary and violates freedom of speech guarantees.

The next question is: what follows if §416-44.A(1) is in fact unconstitutional? Of course, the Borough is always entitled to amend the ordinance, but that will offer no protection in this case due to the Time of Application Rule, N.J.S.A. 40:55D-10.5. As the court in Bell stated after their holding that the ordinance there was unconstitutional: "[t]his does not mean that [the township] is incapacitated from enacting an ordinance seeking to further a proper governmental objective and

suitably restricted to meet that objective and satisfy the constitutional imperatives...in light of the problems peculiar to that municipality.” Bell 110 N.J. at 398.

Having determined that the blanket prohibition on billboards is not constitutional, the Board must entirely turn its attention away from the Use Variance (N.J.S.A. 40:55D-70(d)(1)) issue and focus on the bulk variances. These are set forth in the Thomas Behrens (Board Planner) review letter of May 22, 2025, at page 4.

- Minimum Front Yard: 30’ required, 10.78’ proposed to billboard
- Minimum Side Yard (one/both): 15’/35’ required, billboard at 10’/37.86’ proposed
- Minimum Rear Yard: 20’ required, 17.86’ proposed
- Lot Coverage: 80% permitted, 95.4% existing, 95.55% proposed
- Maximum Building Height: 35’ permitted, proposed is 60’, a variance under N.J.S.A. 40:55D-70(d)(6).

As noted in Mr. Behrens’ report, the Applicant still must comply with all requirements and be granted variances before the proposed billboard could be approved. The Property is located in the C-2 Commercial Office Zone.

CONCLUSION

Ultimately, §416-44.A(1) - placing a blanket prohibition on billboards - violates First Amendment protections of free speech. If the Borough wishes to amend the ordinance it should commence this process promptly, but it will not retroactively apply to this matter.

The Board must consider the evidence presented in favor, and against, the grant of the bulk variances under the criteria set forth in the MLUL and as summarized in Mr. Behrens’ report of May 22, 2025.

The height variance will require 5 of the 7 sitting members to be approved. The bulk variances under N.J.S.A. 40:55D-70(c)(1)&(2) will require a majority. The council member and mayor/designee may not participate in this Application in light of the “D” variance.

We also have attached copies of the legal decisions mentioned herein for your review should any members be so interested.

Very truly yours,

Marc E. Leibman, Esq.
Conflict Counsel to River Edge Joint Planning Board

226 N.J. 549

Supreme Court of New Jersey.

E & J EQUITIES, LLC, a New Jersey limited liability company, Plaintiff-Appellant,

v.

BOARD OF ADJUSTMENT OF THE
TOWNSHIP OF FRANKLIN, Defendant,
and

Township of Franklin, Defendant-Respondent.

A-40 Sept.Term 2014

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Argued March 1, 2016

|

Decided September 15, 2016

Synopsis

Synopsis

Background: Company seeking to install digital billboard brought action against township and its zoning board of adjustment, alleging that township ordinance, which permitted billboards to be installed in zoning district proximate to interstate highway but prohibited digital billboards anywhere in the township, contravened the free speech provisions of the United States Constitution and the New Jersey Constitution. After bench trial, the Superior Court, Law Division, Somerset County, [Peter A. Buchsbaum](#), J.S.C., 2013 WL 197732, declared the ordinance invalid. Township appealed. The Superior Court, Appellate Division, [Espinosa](#), J.A.D., 437 N.J.Super. 490, 100 A.3d 539, reversed. Company's petition for certification was granted.

Holdings: The Supreme Court, Cuff, P.J.A.D., Temporarily Assigned, held that:

[1] time, place, and manner standard governed Supreme Court's review of township ordinance, and

[2] township ordinance violated free speech provisions of the United States Constitution and the New Jersey Constitution.

Reversed.

Procedural Posture(s): On Appeal.

West Headnotes (31)

[1] **Municipal, County, and Local Government** 🗝️ Billboards, signs, and other structures or devices

Governments may regulate the physical characteristics of signs.

[2] **Highways** 🗝️ Billboards and highway beautification in general

If a billboard is adjacent to the interstate highway system, it is subject to the Highway Beautification Act. 23 U.S.C.A. § 131(b).

1 Case that cites this headnote

[3] **Constitutional Law** 🗝️ Freedom of Speech, Expression, and Press

The New Jersey Constitution guarantees a broad affirmative right to free speech. N.J. Const. art. 1, par. 6.

3 Cases that cite this headnote

[4] **Constitutional Law** 🗝️ Relation between state and federal rights

Because the New Jersey Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide the Supreme Court's analysis of a free speech claim. U.S. Const. Amend. 1; N.J. Const. art. 1, par. 6.

6 Cases that cite this headnote

[5] **Constitutional Law** 🗝️ Freedom of Speech, Expression, and Press

Different types of speech are afforded different levels of protection, and some forms of expression are beyond the scope of the First Amendment. U.S. Const. Amend. 1.

1 Case that cites this headnote

- [6] **Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest. [U.S. Const. Amend. 1.](#)

- [7] **Constitutional Law** 🔑 Political speech, beliefs, or activity in general

Laws that burden political speech are subject to strict scrutiny. [U.S. Const. Amend. 1.](#)

- [8] **Constitutional Law** 🔑 What is "commercial speech"

The First Amendment protects commercial speech from unwarranted governmental regulation; commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. [U.S. Const. Amend. 1.](#)

- [9] **Constitutional Law** 🔑 Difference in protection given to other speech

Commercial speech is granted less protection than other constitutionally-guaranteed expression; instead, commercial speech is afforded a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. [U.S. Const. Amend. 1.](#)

- [10] **Constitutional Law** 🔑 What is "commercial speech"

Most commonly, "commercial speech" has been defined as expression related solely to the economic interests of the speaker and its audience, or speech proposing a commercial transaction. [U.S. Const. Amend. 1.](#)

- [11] **Constitutional Law** 🔑 Commercial Speech in General

Constitutional Law 🔑 Reasonableness; relationship to governmental interest

The First Amendment protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation. [U.S. Const. Amend. 1.](#)

- [12] **Constitutional Law** 🔑 Commercial Speech in General

The effect of a restriction on commercial speech, which is challenged under the First Amendment, has to be evaluated in the context of the entire regulatory scheme, rather than in isolation. [U.S. Const. Amend. 1.](#)

- [13] **Constitutional Law** 🔑 Time, Place, or Manner Restrictions

Laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether. [U.S. Const. Amend. 1.](#)

- [14] **Constitutional Law** 🔑 Content-Neutral Regulations or Restrictions

The threshold inquiry in a free speech challenge of a law regulating the time, place, or manner of speech is whether the regulation of expressive activity is content neutral. [U.S. Const. Amend. 1.](#)

- [15] **Constitutional Law** 🔑 Content-Neutral Regulations or Restrictions

Government regulation of expressive activity is "content neutral" so long as it is justified without reference to the content of the regulated speech. [U.S. Const. Amend. 1.](#)

- [16] **Constitutional Law** 🔑 Governmental disagreement with message conveyed

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. [U.S. Const. Amend. 1](#).

[17] Constitutional Law 🔑 [Content-Neutral Regulations or Restrictions](#)

When courts assess content neutrality of a regulation restricting speech, the government's purpose is the controlling consideration. [U.S. Const. Amend. 1](#).

[1 Case that cites this headnote](#)

[18] Constitutional Law 🔑 [Content-Neutral Regulations or Restrictions](#)

Constitutional Law 🔑 [Difference in protection given to other speech](#)

Constitutional Law 🔑 [Difference in protection for commercial signs](#)

A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others; by contrast, when a regulation favors commercial over non-commercial speech and, more importantly, where a violation of the ordinance is based on the purpose for which the sign is displayed, that regulation is content-based. [U.S. Const. Amend. 1](#).

[19] Constitutional Law 🔑 [Time, Place, or Manner Restrictions](#)

Under the second part of the time, place, and manner standard used for laws regulating the time, place, or manner of speech, courts assess the government's asserted interests as well as the fit between the interests served and the means used. [U.S. Const. Amend. 1](#).

[20] Constitutional Law 🔑 [Narrow tailoring](#)

A regulation restricting speech is “narrowly tailored” if it promotes a substantial government interest that would be achieved less effectively absent the regulation. [U.S. Const. Amend. 1](#).

[21] Constitutional Law 🔑 [Narrow tailoring](#)

A regulation restricting speech is not invalid simply because there is some imaginable alternative that might be less burdensome on speech. [U.S. Const. Amend. 1](#).

[22] Constitutional Law 🔑 [Narrow tailoring](#)

A restriction may not burden substantially more speech than is necessary to further the government's legitimate interests; government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. [U.S. Const. Amend. 1](#).

[1 Case that cites this headnote](#)

[23] Constitutional Law 🔑 [Signs](#)

Constitutional Law 🔑 [Billboards](#)

One avenue of attack on a billboard or sign regulation is that the ordinance restricts too little speech because its exemptions discriminate on the basis of the signs' messages; the other is that the measure simply prohibits too much protected speech. [U.S. Const. Amend. 1](#).

[24] Constitutional Law 🔑 [Commercial Speech in General](#)

Constitutional Law 🔑 [Reasonableness; relationship to governmental interest](#)

The test used for regulation of commercial speech is a four-prong inquiry: first, whether the restricted expression enjoys constitutional protection; second, whether the state has asserted a substantial interest to be achieved by the restrictions; third, whether the restriction directly advances the governmental interest asserted; and fourth, whether the restriction is no more

extensive than necessary to serve that interest.
[U.S. Const. Amend. 1.](#)

[25] Constitutional Law 🔑 [Signs](#)

A restriction on the content of signage may contravene the First Amendment guarantee of free speech. [U.S. Const. Amend. 1.](#)

[3 Cases that cite this headnote](#)

[26] Constitutional Law 🔑 [Narrow tailoring requirement; relationship to governmental interest](#)

Constitutional Law 🔑 [Existence of other channels of expression](#)

Under the intermediate scrutiny standard, if a restriction on speech is content neutral, the ordinance is constitutionally permissible if it is narrowly tailored to serve a significant government interest and leaves open alternative channels of communication; an ordinance is narrowly tailored if it does not burden substantially more speech than necessary to further the government's legitimate interests. [U.S. Const. Amend. 1.](#)

[1 Case that cites this headnote](#)

[27] Constitutional Law 🔑 [Signs](#)

Constitutional Law 🔑 [Billboards](#)

An ordinance or statute regulating signs, including billboards of any form, and affecting commercial as well as noncommercial speech should be examined under the First Amendment in accordance with the time, place, and manner standard. [U.S. Const. Amend. 1.](#)

[1 Case that cites this headnote](#)

[28] Constitutional Law 🔑 [Bans or moratoria](#)

Time, place, and manner standard governed Supreme Court's review of township ordinance that prohibited digital billboards in action brought by company, seeking to install digital billboard, to challenge the ordinance under the free speech provisions of the United

States and New Jersey Constitutions, where company advocated form of advertising not limited to commercial messages, prohibition of digital billboards did not bar all outdoor, off-premises advertising, and signs, other than digital billboards, were permitted. [U.S. Const. Amend. 1](#); [N.J. Const. art. 1, par. 6.](#)

[29] Constitutional Law 🔑 [Billboards](#)

Under the time, place, and manner standard, although a township's ordinance regulating billboards carries a presumption of validity, when faced with a constitutional challenge to its legislation, the township must demonstrate that the prohibition of digital billboards is content neutral, that it is narrowly tailored to serve a recognized and identified government interest, and that reasonable alternative channels of communication exist to disseminate the information sought to be distributed. [U.S. Const. Amend. 1.](#)

[1 Case that cites this headnote](#)

[30] Constitutional Law 🔑 [Bans or moratoria](#)

Zoning and Planning 🔑 [Signs and billboards](#)

Township ordinance, which permitted billboards to be installed in zoning district proximate to interstate highway but prohibited digital billboards anywhere in the township, violated free speech provisions of the United States and New Jersey Constitutions; although township identified substantial government interests, which included aesthetics and safety of motorists, it did not identify how three static billboards were more aesthetically palatable than single digital billboard, and motor vehicle accident statistics, standing alone, did not lead to conclusion that installation of digital billboard in township would exacerbate the accident rate. [U.S. Const. Amend. 1](#); [N.J. Const. art. 1, par. 6.](#)

[More cases on this issue](#)

[31] Constitutional Law 🔑 [Bans or moratoria](#)

Zoning and Planning 🔑 [Signs and billboards](#)

Township ordinance, which permitted billboards to be installed in zoning district proximate to interstate highway but prohibited digital billboards anywhere in the township, was content neutral, as required for the ordinance to be upheld under free speech provisions of United States and New Jersey Constitutions; ban on digital billboards addressed manner of communication, not its content. *U.S. Const. Amend. 1*; *N.J. Const. art. 1, par. 6*.

[1 Case that cites this headnote](#)

[More cases on this issue](#)

****626** On certification to the Superior Court, Appellate Division, whose opinion is reported at 437 N.J. Super. 490, 100 A.3d 539 (App.Div.2014).

Attorneys and Law Firms

[Francis P. Linnus](#) argued the cause for appellant (Mr. Linnus, attorney; Benjamin T. Wetzel, on the briefs).

[Louis N. Rainone](#) argued the cause for respondent (DeCotiis, Fitzpatrick & Cole, attorneys; Mr. Rainone, [Jason D. Attwood](#), and [Victoria A. Flynn](#), on the briefs).

[Ronald K. Chen](#) argued the cause for amicus curiae American Civil Liberties Union of New Jersey ([Edward L. Barocas](#), Legal Director and Rutgers Constitutional Rights Clinic Center for Law & Justice, attorneys; Mr. Chen, Mr. Barocas, Jeanne M. LoCicero, [Alexander R. Shalom](#), and [Andrew Gimigliano](#), of counsel and on the brief).

Opinion

JUDGE [CUFF](#) (temporarily assigned) delivered the opinion of the Court.

***556** In 2010, the Township of Franklin (the Township) adopted an ordinance revising its regulation of signs, including billboards. The ordinance permits billboards, subject to multiple conditions, in a zoning district proximate to an interstate highway but expressly prohibits digital billboards anywhere in the municipality.

A company seeking to install a digital billboard challenged the constitutionality ***627** of the ordinance. The Law Division declared unconstitutional that portion of the

ordinance barring digital billboards. The trial court viewed the Township's treatment of such devices as a total ban on a mode of communication. In a reported opinion, the Appellate Division reversed. Applying the *Central Hudson*¹ commercial speech standard and the *Clark/Ward*² time, place, and manner standard to content-neutral regulations affecting speech, the appellate panel determined that the ban on digital billboards passed constitutional muster.

We acknowledge that aesthetics and public safety are generally considered to be substantial governmental interests, particularly in the context of regulations affecting billboards. Nevertheless, billboards generally or specific types of billboards are a medium of communication, and any regulation of that medium may not transgress ***557** the United States Constitution or the Constitution of this State. Thus, simply invoking aesthetics and public safety to ban a type of sign, without more, does not carry the day.

Here, the Township, citing aesthetic and public safety concerns, permitted billboards to be installed in a single zoning district proximate to a heavily travelled interstate highway but prohibited digital billboards in the same zone. The Township did so on the basis of information gathered by its Director of Planning, Planning Board, and a Land Use Committee of the municipal governing body. Nevertheless, the record provides scant support for several propositions that informed the Township's decision and no support for the decision that the aesthetics of three billboards are more palatable than the aesthetics of a single digital billboard. Although we do not consider the digital billboard ban equivalent to a total ban on a medium of communication, it is a form of communication that is subject to the protection of the First Amendment. To that end, the record must support, to some degree, the interests that the municipality seeks to protect or advance. The record fails to support this restriction. We therefore declare that the 2010 ban on digital billboards is unconstitutional and reverse the judgment of the Appellate Division.

I.

The Township is the second-largest municipality in Somerset County, covering forty-seven square miles. Sixty-two thousand persons reside in the Township. A former planner for the Township described it "as a mosaic of various development patterns."

Some sections of the Township are rural, and some sections contain historic villages. A road that passes through the Township has been designated a national scenic byway. Other portions of the Township are highly developed. Interstate Route 287 (I-287), a highway that carries over 100,000 cars and trucks daily, passes through the Township. The I-287 corridor is bordered by an M-2 ***558** Light Manufacturing zoning district (hereinafter the M-2 zone),³ which ****628** permits various industrial and corporate uses. The Township has aggressively sought to preserve farmland and open space. To that end, it has preserved thirty-four percent of the real property in the Township.

In 2008, the Township commenced a review of its ordinance governing signs and billboards. The Township did so at the suggestion of its insurance company, which noticed some inconsistencies in the existing ordinance. At the time, billboards were permitted in the Township's General Business zoning district as a conditional use. The ordinance, however, failed to define a billboard and did not identify any conditions for approval of an application to construct a billboard. The Township also prohibited signs with electronic script or electronic bulletin boards.

Upon notice to the public, the Township Council and the Planning Board commenced a two-year review of the Township's sign ordinance. During the course of the review, the Planning Board conducted a survey of existing billboards⁴ and identified potentially acceptable locations for billboards on two highways in the Township—State Highway 27 and I-287.

The discussions of the Planning Board were followed closely by plaintiff E & J Equities, LLC (E & J), which owns property along I-287 in the M-2 zone. E & J made a presentation to the Planning Board about the features and benefits of digital billboards, and it submitted a proposed ordinance prepared by its attorney as well as other material prepared by a professional engineer and planner it retained. The ordinance proposed by E & J permitted billboards ***559** with changing imagery and the use of LED or equivalent technology.

In January 2009, the Director of Planning forwarded a memorandum to the Planning Board identifying potentially acceptable billboard locations and suggesting billboard bulk and design requirements. The Director of Planning recommended limiting billboards to the M-2 and General Business zoning districts, and prohibiting signs that moved or gave the illusion of movement, rotated, or produced noise

or smoke. The Director of Planning also recommended that neither signs nor billboards should display videos or other changing imagery. The Director of Planning also suggested standards for illumination of any billboards and a ban on words or symbols, such as “STOP” or “DANGER,” that might be interpreted by a passerby as a command issued by a public authority.

On April 7, 2009, the Planning Board forwarded a draft ordinance to the Township Council. The accompanying memorandum from the Planning Board outlined the process it had employed and advised that it “determined that permitting billboards along I-287 would be the most prudent means of addressing potential First Amendment claims on the part of billboard companies.” The memorandum also stated that the draft ordinance “was carefully crafted to minimize impact to the character of Franklin, particularly to the residential properties on the north side of I-287.” Finally, the Planning Board reported that it had decided to recommend barring “LED billboards” because “the Board felt that it did not have enough information or sufficient expertise to craft ordinance language to appropriately address LED billboards.”

****629** Notably, the Planning Board suggested that the question whether such LED billboards would be appropriate was best addressed by an application by a billboard company before the Zoning Board of Adjustment. Later, in defense of the ordinance adopted by the Township Council, the Director of Planning added that the Planning Board and the Land Use Committee of the Township Council ***560** believed that the Planning Board made its recommendation and the Township Council adopted the new billboard ordinance because “there was no conclusive source or documentation that digital billboards were safe, or some literature that the Board or Committee could depend on to come up with reasonable standards.”

In September 2009, E & J submitted an application to the Zoning Board of Adjustment for a variance to construct and install a digital billboard on its property parallel to I-287. E & J's property is located in the M-2 zone. The area immediately south of the zone consists of several shopping centers, large supermarkets, banks, several large drug stores, and senior housing projects. The closest residential neighborhood to the proposed billboard is 500 feet across the highway. A heavily vegetated buffer separates the homes from the highway.

At the time the Planning Board and Township Council were considering amendments to the sign ordinance, and

the Zoning Board of Adjustment was considering E & J's application for a use variance, a number of studies investigating the relationship between digital billboards and traffic safety were published. The Director of Planning acknowledged that he was familiar with those studies, and stated that he had concluded there was a lack of "conclusive guidance on the issue." Two of those studies, one from Rochester, Minnesota, and the other from Cuyahoga County (including Cleveland), Ohio, were submitted by E & J in support of its variance application before the Board of Adjustment. Each study opined that "digital billboards in [city or county] have no statistically significant relationship with the occurrence of accidents."

The methodology used in those studies was sharply criticized in a report issued in April 2009 prepared by Jerry Wachtel (the Wachtel Report) commissioned by the Association of State Highway and Transportation Officials. The Wachtel Report concluded that "the issue of the role of [digital billboards] in traffic safety is extremely complex," that the rapidly changing digital billboard ***561** technology complicates the task of assessing risk, and that the absence of uniform criteria for assessing the relationship between billboards and traffic safety has hampered local officials' ability to assess the traffic safety risk of digital billboards. Nevertheless, the Wachtel Report determined that the plethora of studies reviewed supported the conclusion that

[t]he research underway by [the Federal Highway Administration as of April 2009] may begin to provide specific, directed answers to assist those officials in their work. In the interim, those governmental agencies and toll road operators, faced with the need to make such decisions now have, in our opinion, a sufficient and sound basis for [reviewing applications for digital billboards].

Both E & J's planner and the Director of Planning acknowledged familiarity with the Wachtel Report during consideration of the 2010 ordinance.

Since 1996, the New Jersey Department of Transportation (NJDOT) has permitted off-premises digital billboards or multiple message signs on the interstate highway

system. 28 *N.J.R.* 4742(a) (Nov. 4, 1996). Such signs are governed by regulations that establish minimum distance requirements between a digital billboard and an ****630** official variable message board, *N.J.A.C. 16:41C-11.1(a)(6)*; ⁵ bar illumination by intermittent or moving light, *N.J.A.C. 16:41C-11.1(a)(4)*; and establish the minimum time a message must remain fixed before a new message can be displayed, *N.J.A.C. 16:41C-11.1(a)(3)*. Under those regulations, a neighboring municipality, South Plainfield, permitted installation of a digital billboard along a portion of I-287 traversing that borough.

On May 3, 2010, the Township Council adopted Ordinance 3875-10. Franklin Twp., N.J., Ordinance 3875-10 (2010) (the Ordinance). The stated purpose of the Ordinance is "to balance the need to control and regulate billboards, promote and preserve the scenic beauty and character of the Township, provide for the safety and convenience of the public, and to recognize certain Constitutional ***562** rights relative to outdoor advertising." The Ordinance permits static billboards in the M-2 zone. *Id.* § 112-114.1. The Ordinance added Section 53.1 to Chapter 112 of the Township Code. *Id.* § 112-53.1. The challenged section of the Ordinance provides, in relevant part:

No billboard or billboard display area or portion thereof shall rotate, move, produce noise or smoke, give the illusion of movement, display video or other changing imagery, automatically change, or be animated or blinking, nor shall any billboard or portion thereof have any electronic, digital, tri-vision or other animated characteristics resulting in an automatically changing depiction.

[*Id.* § 112-53.1(C)(3).] ⁶

Allowing for the minimum spacing of 1000 feet between permitted billboards, *N.J.A.C. 16:41C-8.1(d)(3)*, three static billboards can be erected in the Township. Allowing for the minimum spacing of 3000 feet between digital billboards, *N.J.A.C. 16:41C-11.1(a)(5)*, only one digital billboard can be erected in the Township.

Following adoption of the Ordinance, the Zoning Board of Adjustment voted four to three in favor of E & J's application. The effect of the vote is a statutory denial of the use variance for a digital billboard because *N.J.S.A. 40:55D-70(d)(3)* requires five members to vote in favor of a variance application.

To date, traffic safety remains a concern at the location of the proposed digital billboard. According to motor vehicle accident statistics cited by the Township, the portion of I-287 on which E & J proposed to install a digital billboard had 181 crashes in 2010 and 176 crashes in 2011, making it the portion of I-287 with the greatest number of crashes in 2010 and the second-greatest number of crashes in 2011. N.J. Dep't of Transp., *Summary of Crash Rates on State and Interstate Highways in Route and *563 Milepost Order for 2011* 183 (June 21, 2012), <http://www.state.nj.us/transportation/refdata/accident/11/route11.pdf> (2011 Crash Rates) (stating that, between mileposts 10.48 and 12.30 on I-287, there were 176 crashes in 2011); N.J. Dep't of Transp., *Summary of Crash Rates on State and Interstate Highways in Route and Milepost Order for 2010* 187 (Nov. 17, 2011), <http://www.state.nj.us/transportation/refdata/accident/10/route10.pdf> **631 (2010 Crash Rates) (stating that, between mileposts 10.48 and 12.30 on I-287, there were 181 crashes in 2010). Notably, however, the segment of I-287 in South Plainfield, where a digital billboard has been located for several years, experienced only 70 crashes in 2010 and 48 in 2011. See 2011 Crash Rates, *supra*; 2010 Crash Rates, *supra*.

II.

A.

E & J filed a complaint in lieu of prerogative writs against the Township's Zoning Board of Adjustment and the Township. E & J challenged the constitutionality of the section of the Ordinance prohibiting digital billboards, alleging that it contravened the First Amendment of the United States Constitution and [Article I, paragraph 6 of the New Jersey Constitution](#). At trial, E & J and the Township presented witnesses who testified about the technical details of digital billboards, the economic benefits of digital billboards, the types of messages that can be displayed on them, and the impact on traffic safety of such devices. The parties also presented evidence about the legislative process, the purposes of the Ordinance, and the alternative means to communicate certain messages.

The trial court determined that “the Township has failed to meet the First Amendment intermediate scrutiny standard required for commercial speech restrictions.” In doing so, the trial court determined that the Ordinance banned an entire medium of speech and burdened commercial speech. Applying the intermediate scrutiny standard, the trial court

determined that the Township *564 failed to establish that the total ban on digital or electronic billboards served a legitimate government interest and that the Ordinance was not narrowly drawn to advance that interest.

In particular, the trial court found that “one digital billboard, by itself, was not likely to have any more of an impact on [T]ownship aesthetics than a static billboard.” The trial court also found that the Township failed to demonstrate that the complete ban of this medium of expression advanced its stated interest in traffic safety. The trial court accepted as credible the traffic safety studies submitted by E & J which uniformly found no correlation between the installation of digital billboards and any increase in traffic accidents, and characterized the Township's justification as supported by nothing more than speculation. Having found that the Township's ban on digital billboards was more expansive than necessary to advance the identified governmental interests, the trial court declared the Ordinance invalid.

B.

On appeal, the Appellate Division reversed the trial court and found that the Ordinance “passe[d] constitutional muster.” *E & J Equities, LLC v. Bd. of Adjustment of Franklin*, 437 N.J. Super. 490, 496, 100 A.3d 539 (App.Div.2014). The Appellate Division agreed that “a time, place, and manner review” was appropriate, and criticized the trial court's reliance on *Bell v. Township of Stafford*, 110 N.J. 384, 541 A.2d 692 (1988). *E & J Equities, supra*, 437 N.J. Super. at 496, 506, 100 A.3d 539. Such reliance, the panel found, “required the Township to meet standards not required in the review of content-neutral time, place and manner restrictions.” *Id.* at 504, 100 A.3d 539.

The panel also determined that the *Central Hudson* test “governs the review of restrictions on commercial speech that are *not* content-neutral.” *Id.* at 507, 100 A.3d 539. The Appellate Division noted that **632 “somewhat wider leeway” was afforded to content-neutral regulations. *Id.* at 508, 100 A.3d 539 (quoting *McCullen v. Coakley*, — U.S. —, —, 134 S.Ct. 2518, 2529, 189 L.Ed.2d 502, 514 (2014)).

*565 The panel stated that “the standard governing the regulation of commercial speech that is not content-neutral and the standard applicable to time, place, and manner restrictions, are often ‘closely intertwined.’ ” *Ibid.* The

appellate panel proceeded to analyze the Ordinance de novo under the *Clark/Ward* standard. *Id.* at 509–19, 100 A.3d 539. Concluding that the restriction imposed by the Ordinance is content neutral, *id.* at 509–10, 100 A.3d 539, the panel stated that “[i]t is universally recognized that [the] government has a legitimate, even substantial, interest in preserving the aesthetics of its community and in promoting traffic safety,” *id.* at 512, 100 A.3d 539. The panel determined that the Township’s stated reasons, as well as the need for further studies on the impact of such billboards, “provides a rational, objective basis for the Township’s decision to refrain from adopting a regulation of them.” *Id.* at 514, 100 A.3d 539. The panel also recognized that “a regulation need not be ‘the least restrictive means’ to satisfy the requirement that a content-neutral restriction on time, place, and manner [of speech] be ‘narrowly tailored.’ ” *Id.* at 515, 100 A.3d 539. The Appellate Division concluded that the concerns triggered by the new form of outdoor advertising was reasonable and no broader than necessary “to eliminate [the] heightened intrusive quality” of digital billboards. *Id.* at 518, 100 A.3d 539. Lastly, the Appellate Division determined that the Township has adequate alternatives for communicating certain messages that can be displayed on a digital billboard, particularly emergency messages. *Id.* at 519, 100 A.3d 539. The panel cited the NJDOT signs located along I-287 and other measures, such as reverse 9-1-1 calls and emails, used in the Township. *Ibid.*

We granted E & J’s petition for certification. 220 N.J. 574, 108 A.3d 634 (2015). We also permitted the American Civil Liberties Union of New Jersey (ACLU-NJ) to appear as amicus curiae.

III.

E & J contends that the ban on digital billboards restricts commercial and noncommercial speech. It therefore maintains that *566 the Court should apply the strict scrutiny standard to the noncommercial speech ban and the intermediate scrutiny standard to the commercial speech restrictions. E & J contends that the Township has not met its burden under either standard because the Township failed to demonstrate that the stated reasons for the ban—maintaining the aesthetic character of the Township and traffic safety—are significant and substantial interests.

The Township contends that the digital billboard ban represents a valid exercise of government authority. It

maintains that the intermediate scrutiny standards outlined in *Central Hudson* and *Clark/Ward* are the appropriate standards. The Township argues that the digital billboard ban is content neutral and that it demonstrated that its aesthetic and traffic concerns are real and reasonable and provide an objective and rational basis for the restriction.

Amicus ACLU-NJ contends that the Appellate Division judgment should be reversed. ACLU-NJ maintains that the Township bore the burden of establishing that the digital billboard ban advances a substantial government interest and is no more expansive than necessary. ACLU-NJ contends that the Township has neither established the existence of an actual threat to safety attributable to a single digital billboard nor narrowly tailored its **633 Ordinance. Furthermore, amicus argues that the Township’s reliance on advancing its interest in aesthetics is unsupported and does not justify a complete ban on the distinct form of communication represented by digital billboards. Finally, ACLU-NJ argues that the Township failed to establish a reasonable factual basis that alternative means of communication are available to reach the intended audience.

IV.

We commence our scrutiny of the Ordinance with review of the regulatory process governing billboards.

*567 [1] Billboards of any kind are subject to considerable regulation. Regulations on billboards are justified because “signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs[.]” *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S.Ct. 2038, 2041, 129 L.Ed.2d 36, 42–43 (1994). Further, some scholars have suggested that while “[t]raditional billboards have been debated for decades, ... digital technology has significantly raised the stakes.” Susan C. Sharpe, “*Between Beauty and Beer Signs*”: *Why Digital Billboards Violate the Letter and Spirit of the Highway Beautification Act of 1965*, 64 Rutgers L. Rev. 515, 517 (2012) (arguing that digital billboards “command far more profits,” “attract far more attention,” and “are far more intrusive to communities” than traditional billboards).

[2] If a billboard is adjacent to the interstate highway system, it is subject to the Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028 (codified as amended in scattered

sections of 23 U.S.C.A.). That statute requires states to take “effective control of the erection and maintenance” of outdoor advertising signs located within 660 feet of that system. 23 U.S.C.A. § 131(b). Outdoor advertising signs are permitted in areas adjacent to those systems which are zoned industrial or commercial, with “size, lighting and spacing, consistent with customary use ... to be determined by agreement between the several states and the Secretary [of Transportation].” 23 U.S.C.A. § 131(d). When a local zoning authority “has made a determination of customary use,” that determination controls within the locality. *Ibid*.

In accordance with those provisions, the Legislature established state controls of roadside advertising in areas adjacent to the federal interstate system and authorized the Commissioner of Transportation to enter into agreements with the United States Secretary of Transportation. *N.J.S.A. 27:5–5* to *-26*. Pursuant to *N.J.S.A. 27:5–11(a)*, municipalities continue to control local land use, but, in the event of conflict, state regulations prevail to the extent necessary to permit the state to carry out its declared policy or to permit the state to comply with its agreement with the United States Department of Transportation. *See also N.J.A.C. 16:41C–6.3(e)(2)*. NJDOT had issued a permit for a digital billboard to E & J subject to local zoning.

V.

A.

[3] The First Amendment to the United States Constitution states, “Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *U.S. Const. amend. I*. Similarly, “[t]he New Jersey Constitution guarantees **634 a broad affirmative right to free speech[.]” *Dubliner v. 2000 Linwood Ave. Owners, Inc.*, 220 N.J. 71, 78, 103 A.3d 249 (2014) (citing *N.J. Const. art. I, ¶ 6*).

[4] “Because our State Constitution’s free speech clause is generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide the Court’s analysis.” *Twp. of Pennsauken v. Schad*, 160 N.J. 156, 176, 733 A.2d 1159 (1999) (citing *Hamilton Amusement Ctr. v. Verniero*, 156 N.J. 254, 264–65, 716 A.2d 1137 (1998)). The few exceptions where the State Constitution provides greater protection are not at issue here. *See, e.g., Dubliner, supra*, 220

N.J. at 71, 103 A.3d 249 (state action); *W.J.A. v. D.A.*, 210 N.J. 229, 242, 43 A.3d 1148 (2012) (defamation).

[5] [6] [7] Different types of speech are afforded different levels of protection, and some forms of expression are beyond the scope of the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443, 452, 131 S.Ct. 1207, 1215, 179 L.Ed.2d 172, 181 (2011); *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83, 112 S.Ct. 2538, 2542–43, 120 L.Ed.2d 305, 317 (1992). “If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government *569 interest.” *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865, 879 (2000) (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93, 105 (1989)). Similarly, “[l]aws that burden political speech are ‘subject to strict scrutiny[.]’ ” *Citizens United v. FEC*, 558 U.S. 310, 340, 130 S.Ct. 876, 898, 175 L.Ed.2d 753, 782 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464, 127 S.Ct. 2652, 2664, 168 L.Ed.2d 329, 343 (2007)); *see also Schad, supra*, 160 N.J. at 177, 733 A.2d 1159.

[8] “The First Amendment ... protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–62, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341, 348 (1980) (internal citation omitted).

[9] “Commercial speech, however, is granted less protection than other constitutionally-guaranteed expression.” *Schad, supra*, 160 N.J. at 175, 733 A.2d 1159 (citing *Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 72, 494 A.2d 804 (1985)); *see also Cent. Hudson, supra*, 447 U.S. at 563, 100 S.Ct. at 2350, 65 L.Ed.2d at 348–49. Instead, “commercial speech [is afforded] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.” *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800, 814 (1981) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444, 453 (1978)).

[10] Most commonly, commercial speech has been defined as “expression related solely to the economic interests of the speaker and its audience[.]” or “speech proposing a

commercial transaction[.]” *Cent. Hudson, supra*, 447 U.S. at 561–62, 100 S.Ct. at 2349, 65 L.Ed.2d at 348 (citations omitted).

***570** [11] [12] “The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.” *Id.* at 563, 100 S.Ct. at 2350, 65 L.Ed.2d at 349. To balance these factors, the United States Supreme Court created a four-part test for commercial speech:

****635** At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

[*Id.* at 566, 100 S.Ct. at 2351, 65 L.Ed.2d at 351.]

“[T]he effect of the challenged restriction on commercial speech ha[s] to be evaluated in the context of the entire regulatory scheme, rather than in isolation[.]” *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 192, 119 S.Ct. 1923, 1934, 144 L.Ed.2d 161, 180 (1999).

[13] “[L]aws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether.” *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 93, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155, 162 (1977). The United States Supreme Court has consistently held that

[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

[*Clark, supra*, 468 U.S. at 293, 104 S.Ct. at 3069, 82 L.Ed.2d at 227 (citations omitted).]

See also *id.* at 308, 104 S.Ct. at 3076, 82 L.Ed.2d at 236 (Marshall, J., dissenting); *Ward, supra*, 491 U.S. at 791, 109 S.Ct. at 2753, 105 L.Ed.2d at 675 (quoting *Clark, supra*, 468 U.S. at 293, 104 S.Ct. at 3069, 82 L.Ed.2d at 227).

[14] [15] The threshold inquiry is whether the regulation of expressive activity is content neutral. See ***571** *Ward, supra*, 491 U.S. at 791, 109 S.Ct. at 2753–54, 82 L.Ed.2d at 675. “Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’ ” *Id.* at 791, 109 S.Ct. at 2754, 105 L.Ed.2d at 675 (quoting *Clark, supra*, 468 U.S. at 293, 104 S.Ct. at 3069, 82 L.Ed.2d at 227); see also *Linmark, supra*, 431 U.S. at 94, 97 S.Ct. at 1619, 52 L.Ed.2d at 163 (holding that ordinance which banned “for sale” signs could not be time, place, or manner restriction because it only prohibited certain types of signs, “based on their content”); *State v. DeAngelo*, 197 N.J. 478, 487, 963 A.2d 1200 (2009) (holding that laws are “content-based” if they “distinguish favored speech from disfavored speech on the basis of the ideas or views expressed” and “content-neutral” if they “confer benefits or impose burdens on speech without reference to the ideas or views expressed[.]” (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497, 517 (1994))).

[16] [17] [18] “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward, supra*, 491 U.S. at 791, 109 S.Ct. at 2754, 105 L.Ed.2d at 675 (citing *Clark, supra*, 468 U.S. at 295, 104 S.Ct. at 3070, 82 L.Ed.2d at 228). When courts assess content neutrality, “[t]he ****636** government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ibid.* By contrast, when a regulation “favors commercial over non-commercial speech and, more importantly, [where] a violation of the ordinance is based on the purpose for which the sign is displayed, ... [that regulation] is content-based.” *DeAngelo, supra*, 197 N.J. at 488, 963 A.2d 1200.

[19] [20] [21] [22] Under the second part of the time, place, and manner test, courts assess the government’s asserted interests as well as the fit between the interests served and the means used. The Supreme Court has noted that “the validity of the regulation ***572** depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government’s interests in an individual case.” *Ward, supra*, 491 U.S. at 801, 109 S.Ct. at 2759, 105 L.Ed.2d at 682. A regulation is

narrowly tailored if it “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.* at 799, 109 S.Ct. at 2757–58, 105 L.Ed.2d at 680 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536, 548 (1985)). Moreover, a regulation is not invalid “simply because there is some imaginable alternative that might be less burdensome on speech.” *Id.* at 797, 109 S.Ct. at 2757, 105 L.Ed.2d at 679 (citation omitted). On the other hand, a restriction may not “burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Id.* at 799, 109 S.Ct. at 2758, 105 L.Ed.2d at 681.

When speech is restricted, there must be alternative means of communicating the message, although there is some disagreement as to what are qualified alternative channels. In *Linmark, supra*, the United States Supreme Court held that “[t]he alternatives ... are far from satisfactory” when “[t]he options to which sellers realistically are relegated ... involve more cost and less autonomy[,] ... are less likely to reach persons not deliberately seeking sales information, and may be less effective media for communicating the message[.]” 431 U.S. at 93, 97 S.Ct. at 1618, 52 L.Ed.2d at 162 (internal citations omitted). Similarly, in *Metromedia, supra*, the Court accepted the parties’ stipulations that alternative channels were inadequate. 453 U.S. at 516, 101 S.Ct. at 2897, 69 L.Ed.2d at 820.

Some federal appellate courts, however, have found that “[t]he First Amendment does not guarantee a right to the most cost-effective means of [speech.]” *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 37 (1st Cir.2008) (second alteration in original) (quoting *573 *Globe Newspaper Co. v. Beacon Hill Architectural Comm’n*, 100 F.3d 175, 193 (1st Cir.1996)). The Third Circuit found that “maximizing ... profit is not the animating concern of the First Amendment. The fact that restrictions prohibit a form of speech attractive to plaintiff does not mean that no reasonable alternative channels of communication are available.” *Interstate Outdoor Advert., L.P. v. Zoning Bd. of Mt. Laurel*, 706 F.3d 527, 535 (3d Cir.2013) (alteration in original) (quoting *Naser Jewelers, supra*, 513 F.3d at 37).

The United States Supreme Court has observed that “[e]ach method of communicating ideas is ‘a law unto itself’ and that law must reflect the ‘differing natures, values, abuses and dangers’ of each method.” **637 *Metromedia, supra*, 453

U.S. at 501, 101 S.Ct. at 2889, 69 L.Ed.2d at 810–11 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97, 69 S.Ct. 448, 459, 93 L.Ed. 513, 528 (1949)). Billboards are no exception. Despite their ubiquity along main highways in this country and their use to communicate a wide variety of messages, “the billboard remains a ‘large, immobile, and permanent structure which like other structures is subject to ... regulation.’ ” *Id.* at 502, 101 S.Ct. at 2889–90, 69 L.Ed.2d at 811 (alteration in original) (citation omitted).

[23] First Amendment jurisprudence regarding the regulation of billboards and signs falls roughly into two categories: those regulations that prohibit billboards or signs of any kind and those that impose conditions on the size and mode of communication. Two analytically distinct grounds have emerged to challenge billboard or sign regulation. One avenue of attack is that the ordinance “restricts too little speech because its exemptions discriminate on the basis of the signs’ messages.” *Ladue, supra*, 512 U.S. at 51, 114 S.Ct. at 2043, 129 L.Ed.2d at 44. The other is that the measure “simply prohibit[s] too much protected speech.” *Ibid.*

B.

We turn to *Metromedia*, the seminal case on the regulation of billboards, to discuss the constitutional principles governing regulations of billboards. *Metromedia, supra*, addressed a city ordinance *574 which permitted onsite commercial advertising but prohibited other fixed-structure signs, including billboards, unless a sign fell within one of several enumerated exceptions. 453 U.S. at 495–96, 101 S.Ct. at 2886, 69 L.Ed.2d at 807. The ordinance created exceptions for onsite signs and signs in twelve exempted categories, *id.* at 494, 101 S.Ct. at 2885–86, 69 L.Ed.2d at 806–07, “but other commercial advertising and noncommercial communications using fixed-structure signs [were] everywhere forbidden unless permitted by one of the specified exceptions,” *id.* at 496, 101 S.Ct. at 2886, 69 L.Ed.2d at 807. Several outdoor advertising companies challenged the ordinance. *Ibid.*

[24] In its analysis, the plurality “consider[ed] separately the effect of the ordinance on commercial and noncommercial speech.” *Id.* at 505, 101 S.Ct. at 2891, 69 L.Ed.2d at 813. With regard to commercial speech, the plurality applied the four-prong *Central Hudson* test and found that the ordinance was constitutional. *Id.* at 507, 101 S.Ct. at 2892, 69 L.Ed.2d at 815.⁷ The *Metromedia* plurality found that prongs one, two, and four of the *Central Hudson* test were

uncontroversial. *Ibid.* Notably, the plurality held that traffic safety and aesthetics, the only purposes identified by the ordinance, are “substantial government goals.” *Id.* at 507–08, 101 S.Ct. at 2892, 69 L.Ed.2d at 815. The plurality also stated that “[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.” *Id.* at 508, 101 S.Ct. at 2893, 69 L.Ed.2d at 815.

The Court then considered the “more serious question” of whether the ordinance directly advances the government’s interests, **638 *575 and thereby satisfies the third prong of the *Central Hudson* test. *Ibid.* The plurality answered in the affirmative, finding that the ordinance advanced the government’s interests in traffic safety and aesthetics. Justice White, writing for the plurality, noted the California Supreme Court’s finding that “[b]illboards are intended to, and undoubtedly do, divert a driver’s attention from the roadway,” and stated, “[w]e likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.” *Id.* at 508–09, 101 S.Ct. at 2893, 69 L.Ed.2d at 815–16 (first alteration in original) (internal citation omitted).

Additionally, the plurality did not find that the city’s interest was undermined by underinclusiveness because the ordinance permitted onsite advertising and other exempted signs. *Id.* at 510–11, 101 S.Ct. at 2894, 69 L.Ed.2d at 817. “[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. ... [T]he city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising.” *Id.* at 511, 101 S.Ct. at 2894, 69 L.Ed.2d at 817. Thus, the plurality held that “insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of *Central Hudson*.” *Id.* at 512, 101 S.Ct. at 2895, 69 L.Ed.2d at 818.

Because the total ban of offsite billboards included both commercial and noncommercial speech, however, the plurality found that the ordinance was unconstitutional on its face as to the noncommercial speech banned by the ordinance. *Id.* at 521, 101 S.Ct. at 2899, 69 L.Ed.2d at 823. The plurality held that “[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods

and services connected with a particular site is of greater value than the communication of noncommercial messages.”

*576 *Id.* at 513, 101 S.Ct. at 2895, 69 L.Ed.2d at 818. Additionally, the plurality found that the ordinance was not “appropriately characterized as a reasonable ‘time, place, and manner’ restriction” because the ordinance distinguished between signs based on content. *Id.* at 515–17, 101 S.Ct. at 2896–97, 69 L.Ed.2d at 820.

Justice Brennan wrote separately. Because he approached the ordinance as a total ban on a distinctive medium, Justice Brennan would have applied the Supreme Court’s tests that were “developed to analyze content-neutral prohibitions of particular media of communication.” *Id.* at 526–27, 101 S.Ct. at 2902, 69 L.Ed.2d at 826–27 (Brennan, J., concurring) (citing *Schad v. Mt. Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), in which “Court assessed ‘the substantiality of the governmental interest asserted’ and ‘whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment’”). Under such a test, Justice Brennan found the ordinance invalid. *Id.* at 528, 101 S.Ct. at 2903, 69 L.Ed.2d at 827. Justice Brennan found that the city’s sole asserted interest, aesthetics in its “commercial and industrial areas,” was insufficient. *Id.* at 530, 101 S.Ct. at 2904, 69 L.Ed.2d at 829.

Justice Stevens dissented in part. He agreed with the plurality that San Diego could constitutionally distinguish between onsite and offsite commercial signs. *Id.* at 541, 101 S.Ct. at 2909–10, 69 L.Ed.2d at 836 (Stevens, J., dissenting in part). However, Justice Stevens would have held that as long as it was impartial, the city could **639 “entirely ban one medium of communication.” *Id.* at 542, 553, 101 S.Ct. at 2910, 2916, 69 L.Ed.2d at 836, 843. Justice Stevens did not believe that the content-neutral exceptions affected the analysis and would have upheld the ordinance. *Id.* at 542, 101 S.Ct. at 2910, 69 L.Ed.2d at 836. Both Chief Justice Burger and then-Justice Rehnquist, in separate dissents, lamented the use of the federal court’s power to address a traditionally local concern, worthy of deference. *See id.* at 556, 101 S.Ct. at 2917, 69 L.Ed.2d at 845 (Burger, C.J., dissenting); *id.* at 570, 101 S.Ct. at 2925, 69 L.Ed.2d at 854–55 (Rehnquist, J., dissenting).

*577 In *Bell, supra*, this Court applied *Metromedia* and its prior sign jurisprudence to invalidate a municipal ordinance prohibiting “[b]illboards, signboards and off-premises advertising signs and devices[.]” 110 N.J. at 387,

541 A.2d 692 (first alteration in original). Characterizing the ban as a drastic and direct encroachment of constitutionally protected freedom of speech and expression, the Court assigned to the municipality a “particularly strenuous” burden to overcome the constitutional challenge. *Id.* at 395–96, 541 A.2d 692 (citations omitted). Noting that the municipality failed to identify any government objective furthered by the ban or to provide any facts to support the ban, the Court found that the municipality could not demonstrate that the ban was the least-restrictive means to achieve the government interest. *Id.* at 396–97, 541 A.2d 692. Moreover, the Court found that the municipality failed to make any showing of alternate means of communicating the messages that would have been displayed in the prohibited signage. *Id.* at 397, 541 A.2d 692. The Court therefore declared the complete ban on off-premises advertising unconstitutional. *Id.* at 398, 541 A.2d 692.

[25] *Metromedia* and *Bell* represent instances in which a municipal ban foreclosing an entire form of media has been held to contravene the First Amendment. A restriction on the content of signage also may contravene the First Amendment guarantee of free speech. *Linmark, supra*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155, and *Ladue, supra*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, respectively, represent instances in which a regulation of speech that is underinclusive of permitted messages or the combination of a general speech restriction accompanied by multiple exemptions to that ban may yield an unconstitutional selection of permissible messages.

Linmark, supra, illustrates a regulation restricting too little speech. 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155. There, an ordinance generally permitted signs for commercial and noncommercial purposes but expressly prohibited signs announcing that a house was “For Sale” or “Sold.” *578 *Id.* at 86, 97 S.Ct. at 1615, 52 L.Ed.2d at 157–58. The ostensible purpose of the ordinance—to promote stable, racially integrated neighborhoods—ran afoul of First Amendment guarantees because it prevented communication of specific and truthful information. *Id.* at 96–97, 97 S.Ct. at 1620, 52 L.Ed.2d at 164.

Ladue, supra, illustrates a signage regulation that prohibits too much protected speech. There, the city adopted an ordinance prohibiting homeowners from displaying any signs on their homes with the exception of “For Sale” or “Sold” signs, signs identifying the house, and signs warning of a dangerous condition on the property. 512 U.S. at 45, 114

S.Ct. at 2040, 129 L.Ed.2d at 41. The terms of the ordinance therefore prohibited a homeowner from placing a two-foot by three-foot sign on her lawn declaring her opposition to war in the Persian Gulf and a smaller sign **640 in a second-story window stating “For Peace in the Gulf.” *Id.* at 45–47, 114 S.Ct. at 2040–41, 129 L.Ed.2d at 41–42.

The Supreme Court observed that the combination of a general speech restriction with multiple exemptions permits the government to select messages it deems permissible. *Id.* at 51, 114 S.Ct. at 2043–44, 129 L.Ed.2d at 45. The Supreme Court recognized that the stated purpose of eliminating visual clutter is a valid public purpose, but found that the ordinance “almost completely foreclosed a venerable means of communication that is both unique and important, ...[and] has totally foreclosed that medium to political, religious, or personal messages.” *Id.* at 54, 114 S.Ct. at 2045, 129 L.Ed.2d at 46–47. The Supreme Court therefore declared the municipal ban on virtually all residential signs violative of the First Amendment. *Id.* at 58, 114 S.Ct. at 2045, 129 L.Ed.2d at 49.

C.

Metromedia, Linmark, and *Ladue* addressed billboards and signs that may be placed on a lawn or in the window of a house. The billboards at issue in *Metromedia, supra*, were static billboards displaying a single message for a fixed period of time as long as a month or more before a new message was affixed to the *579 surface of the billboard. 453 U.S. at 496, 101 S.Ct. at 2886, 69 L.Ed.2d at 807. Since the *Metromedia* decision, new methods of displaying messages, such as electronic messaging centers, have developed, and various governmental units have reacted to their introduction by commercial and noncommercial users. Electronic messaging centers display electronically changeable messages. The text may change frequently by the use of scrolling text or substituting a series of different messages on the screen. Opinions addressing municipal regulations of such signage inform our evaluation of regulations governing digital billboards because such devices are similar to digital billboards in virtually all respects other than size.

[26] In *Naser Jewelers, supra*, the Court of Appeals held that an ordinance prohibiting all electronic messaging centers was constitutional. 513 F.3d at 30. In reaching that conclusion, the court determined that the ban was content neutral, and

applied to commercial and noncommercial entities. *Id.* at 30–31. Determining that the *Central Hudson* test applied to restrictions involving solely commercial speech, *id.* at 33, the Court of Appeals invoked the *Clark/Ward* intermediate scrutiny standard. Under this test, if the restriction is content neutral, the ordinance is constitutionally permissible “if it is narrowly tailored to serve a significant government interest and leaves open alternative channels of communication. An ordinance is narrowly tailored if it does not burden substantially more speech than necessary to further the government’s legitimate interests[.]” *Id.* at 30. Moreover, the court held that the ordinance “need not be the least restrictive means to serve those interests.” *Ibid.*

Notably, the panel did not consider the ban on electronic message centers as a ban on an entire medium of communication. *Id.* at 36. The panel also emphasized that billboards and other signs were permitted, and that they constituted an alternative means of communication. *Ibid.* The court also underscored the principle that “[t]he maximizing of profit is not the animating concern of the First Amendment.” *Id.* at 37. The court therefore *580 held that the ban on electronic messaging centers was constitutional. *Ibid.*; see also *La Tour v. City of Fayetteville*, 442 F.3d 1094, 1096–97 (8th Cir.2006) (applying *Clark/Ward* standard to hold as constitutional ban on electronic message boards displaying anything **641 other than time, date, and temperature); *Carlson’s Chrysler v. City of Concord*, 156 N.H. 399, 938 A.2d 69, 72–74 (2007) (applying *Central Hudson* standard to hold total ban of electronic message boards constitutional; concurring justice would apply *Clark/Ward* standard).

VI.

We commence our analysis with the question of whether the *Central Hudson* commercial speech standard or the *Clark/Ward* time, place, and manner standard governs our review of the Ordinance. We acknowledge that applying either standard often produces the same conclusion; yet judicial scrutiny of the constitutionality of government regulation of speech deserves precision. In recent years, several courts have sought to clarify those instances when the *Central Hudson* standard or the *Clark/Ward* standard governs. See *Naser Jewelers, supra*, 513 F.3d at 30 (employing *Clark/Ward* standard to review challenge to ordinance prohibiting all electronic messaging centers); *Carlson’s Chrysler, supra*, 938 A.2d at 74 (Duggan, J., concurring)

(declaring *Central Hudson* governs only when regulation restricts only commercial speech).

[27] We conclude that an ordinance or statute regulating signs, including billboards of any form, and affecting commercial as well as noncommercial speech should be examined in accordance with the *Clark/Ward* time, place, and manner standard. *Central Hudson, supra*, addressed purely commercial speech. 447 U.S. at 561, 100 S.Ct. at 2349, 65 L.Ed.2d at 348. There, a state utility commission adopted a regulation imposing a total ban on electric utilities from all advertising promoting the use of electricity. *Id.* at 558, 100 S.Ct. at 2347, 65 L.Ed.2d at 346. The standard fashioned to evaluate the constitutionality of the ban concerned solely commercial entities and the message they sought to disseminate. *581 *Id.* at 566, 100 S.Ct. at 2351, 65 L.Ed.2d at 351. The standard also addressed a total ban of a particular message. See *id.* at 571–72, 100 S.Ct. at 2354, 65 L.Ed.2d at 354–55.

The *Clark/Ward* standard, however, is generally applicable to content-neutral regulations restricting or regulating expression by those seeking to advance commercial ventures or broad noncommercial interests. In many instances, the government action does not impose a complete ban on a particular speaker or mode of expression. For example, in *Ward, supra*, the City of New York adopted a regulation to address complaints of poor sound quality at events staged at an open-air theater in Central Park and complaints of excessive noise by those in other areas of the park and nearby residents. 491 U.S. at 784–88, 109 S.Ct. at 2750–52, 105 L.Ed.2d at 670–72. The regulation required those using the open-air theater to comply with noise standards and directed those using the sound system to employ designated sound engineers. *Id.* at 787, 109 S.Ct. at 2751, 105 L.Ed.2d at 672. Noting that the sound-level regulation was content neutral and did not prohibit the expression of ideas, the Court departed from the *Central Hudson* commercial speech standard and used a time, place, and manner standard to evaluate the constitutionality of the regulations. *Id.* at 802, 109 S.Ct. at 2760, 105 L.Ed.2d at 683.

[28] We conclude that this appeal is best addressed using the *Clark/Ward* standard. Here, E & J explained to the Planning Board the variety of commercial and noncommercial messages that digital billboards could convey. E & J took pains to compare the flexibility and versatility of a digital billboard to the single message static billboard. E & J also emphasized the ability of a digital billboard to rapidly respond

****642** to the need to broadcast emergency messages and the cost-effectiveness of this form of advertising to advance the interests and special needs of nonprofit groups in the Township. In other words, E & J advocated a form of advertising not limited to commercial messages.

Moreover, the prohibition of digital billboards adopted by the Township does not bar all outdoor, off-premises advertising. Signs, ***582** other than billboards, are permitted, albeit with certain conditions, in the Township, and static billboards are permitted in the M-2 zone along I-287. In fact, three static billboards can be erected within the M-2 zone. We therefore conclude that the *Clark/Ward* standard is the appropriate standard to evaluate the Ordinance at the center of this appeal.

[29] Under that standard, although the Ordinance carries a presumption of validity, *Bell, supra*, 110 N.J. at 394, 541 A.2d 692, when faced with a constitutional challenge to its legislation, the Township must demonstrate that the prohibition of digital billboards is content neutral, that it is narrowly tailored to serve a recognized and identified government interest, and that reasonable alternative channels of communication exist to disseminate the information sought to be distributed, *Ward, supra*, 491 U.S. at 791, 109 S.Ct. at 2757–58, 105 L.Ed.2d at 675; *Clark, supra*, 468 U.S. at 293, 104 S.Ct. at 3069, 82 L.Ed.2d at 227. In assessing whether an ordinance is narrowly tailored, the inquiry is whether it “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward, supra*, 491 U.S. at 799, 109 S.Ct. at 2758, 105 L.Ed.2d at 680 (quoting *Albertini, supra*, 472 U.S. at 689, 105 S.Ct. at 2906, 86 L.Ed.2d at 548). A restriction on speech may not substantially burden more speech than necessary to further the government interest, but identification of another alternative that might be less restrictive of speech to achieve the desired end does not render the ordinance invalid. *Id.* at 798–99, 109 S.Ct. at 2757–58, 105 L.Ed.2d at 680–81.

[30] [31] Here, there can be little, if any, debate that the Ordinance is content neutral. Unlike the ordinance addressed in *DeAngelo, supra*, which permitted a temporary sign to announce the opening of a store, but barred a union from displaying a rat balloon at the site of a business employing non-union labor, 197 N.J. at 481–82, 963 A.2d 1200, the Township ban of digital billboards addresses a manner of communication, not its content. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48, 106 S.Ct. 925, 928–29, 89 L.Ed.2d 29, 37–38 (1986) (declaring regulation ***583** content neutral because it serves purposes unrelated

to content of expression); *Naser Jewelers, supra*, 513 F.3d at 32 (declaring municipal ban of electronic message boards content neutral because ordinance banned category of communication, not message).

E & J urges that the Township has suppressed an entire mode of communication. That is simply not the case. All manner of signs are permitted as well as static billboards. Furthermore, other than frustrating E & J's attempt to maximize profit by utilizing a different form of billboard, there is no suggestion that the Township had an ulterior motive antithetical to free expression.

E & J also argues that the stated reasons have not been amply supported by the Township. It focuses on the studies it submitted and the existence of digital billboards in places proximate to the Township along the I-287 corridor and along other heavily travelled highways. It contends this information belies the interests invoked by the Township.

****643** The government interests identified by the Township— aesthetics and the safety of motorists travelling on I-287—have long been recognized as legitimate and substantial government interests, particularly related to billboards. *Metromedia, supra*, 453 U.S. at 507–08, 101 S.Ct. at 2892–93, 69 L.Ed.2d at 815. Yet, when a governmental entity restricts speech, it must do more than simply invoke government interests that have been recognized over time as substantial. In other words, there must be a modicum of support for the invoked government interest.

To be sure, the record demonstrates that the Township has labored to preserve the bucolic character of sections of the municipality and to minimize the impact on a residential neighborhood across the highway. The Township Council also cited safety concerns. The Township, however, permits industrial and corporate development and has directed that static billboards may be erected in the M-2 zone. In fact, three static billboards can be erected along I-287 in the M-2 zone. The record provides no basis to discern how three static billboards are more aesthetically palatable than a single digital billboard.

***584** Clearly, the action by the governing body was informed by the work of the Planning Board and the advice of the Township Planner. That official informed the governing body that there was an absence of research upon which he could recommend standards to address those concerns. Yet, the record reveals the existence of a considerable body of

literature discussing the impact, or lack thereof, of digital billboards on traffic safety and standards that can be applied to such devices to enhance traffic safety and mitigate aesthetic concerns. A respected report concluded its exhaustive review of the impact of such devices stating that ample information existed to make informed decisions about such devices. In addition, NJDOT had promulgated regulations governing off-premises digital billboards. See *N.J.A.C. 16:41C-11.1*. Moreover, a digital billboard had been erected along I-287 in a neighboring municipality. It appears that standards were available to the Township to inform its decision-making.

Finally, motor vehicle accident statistics do not prove either party's argument regarding the danger of digital billboards. To be sure, the Township has experienced more than twice the number of motor vehicle accidents along I-287 than the neighboring town, but the numbers standing alone do not lead inexorably to the conclusion that the installation of a single digital billboard in the Township will exacerbate the accident rate. The accident rate in the Township may be attributable to many other factors such as weather, road design or road maintenance. The record is also bereft of any examination of the safety impact of the installation of three static billboards. In short, bare numbers do not carry the public safety debate.

We recognize that the Township was not required to adopt the least restrictive means to further its interests. Rather, an ordinance is considered to be narrowly tailored "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward, supra*, 491 U.S. at 799, 109 S.Ct. at 2758, 105 L.Ed.2d at 680 (alteration in original) (quoting *585 *Albertini, supra*, 472 U.S. at 689, 105 S.Ct. at 2906, 86 L.Ed.2d at 548). Here, however, in the face of a record founded only on unsupported suppositions, fears, and concerns, we need not address whether the course taken by the governing body is reasonable under all of the circumstances.

We do not suggest that no municipal restriction on off-premises digital billboards or multiple message centers can

pass constitutional muster. Contrary to E & J and amicus, we do not consider the **644 ban adopted by the Township a complete ban on a form of communication but rather a restriction on a subset of off-premises signage. A more robust factual record in support of the cited government interests deemed substantial may satisfy the *Clark/Ward* standard. By the same token, the information accumulated over the last six years concerning the aesthetic and safety impacts of such devices may assuage the governing body's concerns.

In sum, we do not quarrel with the proposition that aesthetics and public safety are substantial government interests, particularly when the medium of expression is an outdoor, off-premises advertising device. See *Metromedia, supra*, 453 U.S. at 507–08, 101 S.Ct. at 2892–93, 69 L.Ed.2d at 815. On the other hand, a governing body seeking to restrict expression cannot simply invoke those interests with scant factual support informing its decision-making and expect to withstand a constitutional challenge. In the end, the record provides no explanation of the qualitative differences between three static billboards and a single digital billboard. The record also belies the assertion that no standards existed to address aesthetic and public safety concerns. This absence requires us to declare § 112-53.1(C)(3) of Ordinance 3875 unconstitutional.

VII.

The judgment of the Appellate Division is reversed.

CHIEF JUSTICE RABNER, JUSTICES PATTERSON, FERNANDEZ-VINA and SOLOMON, join in JUDGE CUFF's opinion. JUSTICES LaVECCHIA and ALBIN did not participate.

All Citations

226 N.J. 549, 146 A.3d 623

Footnotes

1 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980).

- 2 [Ward v. Rock Against Racism](#), 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); [Clark v. Cmty. for Creative Non-Violence](#), 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed. 2d 221 (1984).
- 3 The M-2 zone permits the following uses: manufacturing, fabrication and assembly of various products including light machinery, wood and paper products and metal furniture, bottling of food and beverages, food processing, manufacturing of liquors, laboratories, industrial parks, warehouses, general office buildings, administrative and dispatch services, hotels, indoor recreational uses, child care centers, and personal storage facilities. Franklin Twp., N.J., Code ch. 112, Schedule 1 (2015).
- 4 Three existed at the time, but none were located in the M-2 zone.
- 5 Until March 2, 2015, the regulations governing off-premises digital billboards were codified at [N.J.A.C. 16:41C-8.8](#).
- 6 The Ordinance also amended Section 112-109J, of Chapter 112, Land Development, Article XII, Sign Regulations, Section 112-109, Prohibited Signs, to make it consistent with the Ordinance. The new provision states: "No sign or portion thereof shall rotate, move, produce noise or smoke, display video or other changing imagery, automatically change, or be animated or blinking, nor shall any sign or portion thereof have any electronic, digital, tri-vision or other animated characteristics."
- 7 The [Central Hudson](#) test is a four-prong inquiry: first, whether the restricted expression enjoys constitutional protection; second, whether the state has asserted a substantial interest to be achieved by the restrictions; third, whether the restriction "directly advances the governmental interest asserted"; and fourth, whether the restriction is no more extensive than necessary to serve that interest. *Cent. Hudson*, *supra*, 447 U.S. at 566, 102 S.Ct. at 2351, 65 L.Ed.2d at 351.



KeyCite Yellow Flag

Declined to Extend by [E & J Equities, LLC v. Board of Adjustment of Tp. of Franklin](#), N.J.Super.A.D., October 17, 2014

110 N.J. 384

Supreme Court of New Jersey.

Wesley K. BELL, t/a Wes Outdoor
Advertising Co., Plaintiff–Respondent,

v.

TOWNSHIP OF STAFFORD, a
Municipality in the County of Ocean, State
of New Jersey, Defendant–Appellant,
and

Robert H. Mears, Construction Official of the Township
of Stafford, and the County of Ocean, Defendants.

A-68

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Argued Jan. 5, 1988.

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Decided May 26, 1988.

Synopsis

Property owner, who had sought and been denied building permits for erection of billboards and relocation of billboard, brought action seeking declaratory judgment that township ordinance that prohibited billboards within any zoning district of township was facially unconstitutional. The trial court upheld the constitutional validity of the ordinance, but the Superior Court, Appellate Division, reversed, finding that the ordinance was unconstitutional. After grant of township's petition for certification, the Supreme Court, Handler, J., held that: (1) decision of constitutional issue was warranted, and permit applicant had standing to press the constitutional challenge, and (2) township's failure to present and confirm compelling legitimate governmental interest in ordinance and reasonable factual basis for regulatory scheme that validated legislative action was fatal.

Affirmed.

West Headnotes (7)

[1] **Constitutional Law** 🔑 Resolution of non-constitutional questions before constitutional questions

Decision on constitutionality of challenged ordinance that prohibited billboards within any zoning district of township was warranted, notwithstanding strict necessity principle that precludes disposition of case on constitutional grounds where there is nonconstitutional basis available for the decision; township relied on billboard banning ordinance to deny building permits to property owner who sought to erect billboards, so township action was squarely predicated on validity of the ordinance, and action was brought by party with standing to raise the constitutional issue.

3 Cases that cite this headnote

[2] **Zoning and Planning** 🔑 Remand

Amendment of township ordinance that prohibited billboards within any zoning district of township and was attacked as unconstitutional did not effect merits of constitutional challenge or justify remand of the matter, where operative terms of ordinance upon which trial court had ruled remained unchanged.

1 Case that cites this headnote

[3] **Zoning and Planning** 🔑 Effect of change of law or facts

Where township relied primarily on then-current ordinance as basis for its action denying building permits to property owner who sought to erect billboards, appellate court correctly applied the law that was operative at the time of its decision.

[4] **Constitutional Law** 🔑 Freedom of Speech, Expression, and Press
Declaratory Judgment 🔑 Subjects of relief in general

Zoning and Planning 🔑 **Validity of regulations**

Property owner who sought building permits to erect billboards and sought to relocate another billboard had standing to press constitutional challenge to township ordinance that prohibited billboards within any zoning district of township and was basis for township decisions denying building permits and relocation; Declaratory Judgments Act confers standing on person whose legal rights have been affected by municipal ordinance and affords expeditious relief from uncertainty with respect to rights when claims are in genuine conflict. [N.J.S.A. 2A:16–53](#).

[12 Cases that cite this headnote](#)

[5] Constitutional Law 🔑 **Disappearance of presumption of constitutionality**

If legislative enactment directly impinges on constitutionally protected right, presumption in favor of its validity disappears; courts are far more demanding of clarity, specificity, and restrictiveness with respect to legislative enactments that have demonstrable impact on fundamental rights.

[11 Cases that cite this headnote](#)

[6] Constitutional Law 🔑 **First Amendment in general**

Ordinance that substantially curtails freedom of expression clearly requires that municipality shoulder burden of proving its constitutional validity; the municipality must satisfactorily demonstrate legitimate governmental interest that is to be served by the enactment and demonstrate reasonable factual basis indicating that the regulation advances governmental interest and is no more expansive than necessary in advancing that interest.

[15 Cases that cite this headnote](#)

[7] Constitutional Law 🔑 **Billboards**
Zoning and Planning 🔑 **Signs and billboards**

Township's ordinance prohibiting billboards within any zoning district of township would

be declared facially unconstitutional; it appeared that curtailment affected by ordinance would apply to commercial forms of expression as well as noncommercial speech, there had been no adequate showing that ordinance left open alternative means of communication, and township had not presented evidence demonstrating its ordinance furthered particular, substantial government interest and was sufficiently narrow to further only that interest without unnecessarily restricting freedom of expression.

[11 Cases that cite this headnote](#)

Attorneys and Law Firms

****694 *386** Thomas E. Monahan, Toms River, for defendant-appellant (Gilmore & Monahan, attorneys; J. Mark Mutter and Charles W. Hutchinson, on the briefs).

Wesley K. Bell, pro se.

Theodore L. Abeles, Roseland, submitted a brief on behalf of amicus curiae Gannett Outdoor Co., Inc. of New Jersey (Lum, Hoens, Abeles, Conant & Danzis, attorneys).

Jeffrey M. Hall and Kenneth I. Hyman, Princeton, submitted a brief on behalf of amicus curiae, Outdoor Advertising Ass'n ***387** of New Jersey (Strauss & Hall, attorneys; Jeffrey M. Hall, of counsel).

The opinion of the Court was delivered by

Opinion

HANDLER, J.

This case engenders first amendment and freedom of speech concerns arising from the efforts of a municipality to regulate through its zoning powers the use of billboards as a form of out-door advertising. The controversy arose from the Township of Stafford's ("Township" or "Stafford") enactment and enforcement of an ordinance declaring that "[b]illboards, signboards, and off-premises advertising signs and devices are prohibited within any zoning district of the Township."¹

Three separate billboards owned by Wesley K. Bell ("Bell"), trading as Wes Outdoor Advertising, that are located along

Route 72 in the municipality have been affected by the ordinance, whose constitutional validity was upheld by the trial court. In an unpublished *per curiam* opinion, the Appellate Division reversed the trial court's decision and found that the ordinance was unconstitutional. Stafford filed a petition for certification and notice of appeal. We granted certification, 108 N.J. 191, 528 A.2d 17 (1987),² and now affirm the Appellate Division's decision.

I.

In its opinion, the Appellate Division provided a brief recitation of the underlying events, which suffices for our disposition of the matter.

***388** During the latter half of the 1960's Wesley K. Bell obtained title to two plots of land located along Route 72 in Stafford identified as Block 145A, Lot 26A (Lot 26A) and Block 120, Lot 8 (Lot 8). Thereafter, Bell constructed a number of billboards on these properties. During the early 1970's the DOT [*i.e.*, Department of Transportation] sought to condemn a portion of Lot 26A in order to widen Route 72, a State highway which passes through Stafford. Bell unsuccessfully challenged that condemnation action in the state and federal courts.

On September 30, 1983 agents of the DOT entered upon Lot 26A and cut down the billboard located thereon. At the same time, the DOT mistakenly tore down the billboard located on Lot 8 even though this land had not been condemned by the State. Bell then disassembled the billboards and removed them to his warehouse for repairs. In May 1984 Bell reconstructed the billboard on the portion of Lot 26A which the State had not taken in the condemnation proceedings, despite an order by Stafford not to do so.

On May 8, 1984 Bell entered into a contract with Lewis [*sic*] and Jeanne Raupp to purchase a plot of land identified as Block 158A, Lots 114 and 119 (Block 158A) which contained a billboard thereon. On May 18, 1984 Bell purchased ****695** another billboard which he intended to relocate to the property he had just purchased from the Raupps. Thereafter, he filed an application with Stafford seeking approval of the relocation.

On May 30, 1984, Stafford filed an action in the Chancery Division, claiming that Bell needed a building permit in order to maintain the billboard on Lot 26A. The judge

who heard the matter held that a new building permit was required notwithstanding the fact that Bell had obtained a building permit at the time that the original billboard had been constructed on Lot 26A. During the first week of June 1984, Bell also began to reconstruct the billboard which had been improperly torn down by the DOT on Lot 8. Stafford's construction code official, Robert Mears (Mears), ordered Bell to stop work on this billboard until he obtained a building permit. Stafford then filed a second suit and the same judge again determined that a building permit was required in order to reconstruct the billboard on Lot 8.

As a result of that litigation, Bell filed applications for building permits on Lots 26A and 8. In the meantime, Stafford had amended its Ordinance 77-22, which had regulated the use of billboards in the Township, by passing Ordinance No. 84-35, which sought to prohibit all billboards for off-premises advertising within any zoning district of the Township. On July 2, 1984 Bell received written notices denying his application for building permits on Lots 26A and 8 and his application to relocate the billboard from Block 181, Lot 4 to Block 158A, Lots 114 and 119. Among other reasons, the applications purportedly were denied because billboards were prohibited under Ordinance 84-35 within any zoning district of the municipality.

On receipt of the Township notices Bell filed a complaint in lieu of prerogative writs against the Township, which in part sought a declaratory judgment that the ordinance was unconstitutional on its face. The trial court rejected this argument but ***389** the Appellate Division reversed, ruling that the ordinance was facially unconstitutional.

Stafford contends that the Appellate Division erred in declaring the ordinance unconstitutional. The Township maintains that the appellate court should have refrained from making its determination of unconstitutionality, and instead have decided this case on nonconstitutional grounds. Specifically, the Township's alleges: (1) that Bell's billboards are not entitled to protection as non-conforming uses; (2) that the Township should not have any wrong imputed to it because of the DOT's actions; and (3) that Bell's permits could properly have been denied due to failure to timely submit a site plan.

II.

We deal first with the contention that in this case a decision on constitutional grounds would be improvident. This contention, made by the Township, invokes the doctrine of “strict necessity.”

Generally, courts will adjudicate the constitutionality of legislation only if a constitutional determination is absolutely necessary to resolve a controversy between parties. This doctrine of “strict necessity,” articulated by the United States Supreme Court in *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947), is well-recognized. Thus, in *Donadio v. Cunningham*, 58 N.J. 309, 325–26, 277 A.2d 375 (1971), we acknowledged that “a court should not reach and determine a constitutional issue unless absolutely imperative in the disposition of litigation.” See, e.g., *Ahto v. Weaver*, 39 N.J. 418, 189 A.2d 27 (1963); *State v. Salerno*, 27 N.J. 289, 142 A.2d 636 (1958); *American Bank & Trust Co. of Pennsylvania v. Lott*, 193 N.J.Super. 516, 475 A.2d 73 (App.Div.1984), aff’d, 99 N.J. 32, 490 A.2d 308 (1985).³

****696 *390 [1] [2] [3]** Stafford argues that the “strict necessity” principle, exemplified by *Rescue Army* and *Donadio*, precludes disposition of a case on constitutional grounds where there is a nonconstitutional basis available for the decision. It contends that this is such a case because the court could have upheld the Township’s denial of Bell’s billboard application on the basis of nonconstitutional arguments. In addition, the Township suggests that the billboard ban need not be considered to resolve the dispute between the parties. However, the Township clearly relied on the billboard-ban of its ordinance to deny Bell his building permits. Its action is squarely predicated on the validity of the ordinance.⁴

[4] Moreover, Bell has the standing to press this constitutional challenge. This is confirmed by the Declaratory Judgments Act, N.J.S.A. 2A:16–53, which expressly confers standing on a person whose legal rights have been affected by a municipal ordinance. Our courts have acknowledged that this Act should be liberally construed and administered in order to carry out its purpose. See *New Jersey Banker’s Ass’n v. Van Riper*, 1 N.J. 193, 198, 62 A.2d 677 (1948); ***391** *Rego Indus., Inc. v. American Model Metals Corp.*, 91 N.J.Super. 447, 454, 221 A.2d 35 (App.Div.1966). While the Act is not to be used to secure decisions that are only advisory in effect, *Civil Serv. Comm’n v. Senate of State of N.J.*, 165 N.J.Super. 144, 397 A.2d 1098 (App.Div.), certif. denied, 81 N.J. 266, 405 A.2d 811 (1979), it does afford expeditious relief from

uncertainty with respect to rights when claims are in genuine conflict. *Hartford Acc. & Indem. Co. v. Selected Risks Indem. Co.*, 65 N.J.Super. 328, 167 A.2d 821 (App.Div.1961).

In this case it is clear that an issue involving the constitutionality of the ordinance is properly presented. The case is brought by a party with standing to raise the constitutional issue in a context warranting such a decision in order fairly to resolve the legal controversy engendered by the application of the ordinance.

III.

In dealing with the merits of the constitutional issue presented, it is instructive to consider the underlying constitutional interests that are implicated. The United States Supreme Court has recognized the importance of these interests in similar contexts involving local government attempts totally to prohibit or drastically to curtail forms of free speech and expression.

In *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), the Supreme Court struck down as unconstitutional a municipal zoning ordinance that prohibited all live entertainment, including nude dancing, in any establishment within the Borough of Mount Ephraim. There, Justice White, writing for the Court, articulated the standard of review to be applied where a zoning law infringes on a protected fundamental right, such as free speech: “it must be narrowly drawn and must further a sufficiently substantial governmental interest.” *Id.* 452 U.S. at 68, 101 S.Ct. at 2182, 68 L.Ed.2d at 680. Thus, not only must a court assess the substantiality of the governmental interests asserted but it also must determine whether those interests could be served by means that would ***392** be less intrusive on free ****697** speech. *Id.* at 70, 101 S.Ct. at 2183, 68 L.Ed.2d at 681.

In the same year as *Schad*, the Supreme Court, in *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), dealt with the validity of statutory billboard prohibitions. *Metromedia* involved a San Diego ordinance that essentially prohibited “outdoor advertising display signs.” Under the ordinance scheme, onsite commercial advertising was permitted, but other commercial advertising and noncommercial communications using billboards were prohibited unless included in one of twelve exceptions provided in the ordinance. *Id.* at 494–95, 101 S.Ct. at 2885–86, 69 L.Ed.2d at 806–07. Appellants were companies

engaged in the outdoor advertising business in San Diego who owned a substantial number of billboards located in commercial and industrial zones within the city. While the billboards were used primarily for commercial advertising, they were also used to communicate a broad range of noncommercial social and political messages. The lower courts had upheld the ordinance based on their belief that the two purposes behind it, traffic safety and aesthetics, were within the City's legitimate interests. *Id.* at 497, 101 S.Ct. at 2887, 69 L.Ed.2d at 808. Thus the ordinance was perceived as a "proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare." *Id.* (quoting *Metromedia, Inc. v. City of San Diego*, 26 Cal.3d 848, 858, 610 P.2d 407, 411, 164 Cal.Rptr. 510, 514 (1980)).

The Supreme Court ruled that the ordinance was unconstitutional. In his plurality opinion, Justice White expressed the view that the ordinance, insofar as it regulated commercial speech, met constitutional guidelines established for determining governmental regulation of such speech,⁵ *393 *Metromedia, supra*, 453 U.S. at 512, 101 S.Ct. at 2895, 69 L.Ed.2d at 818, since the "common sense judgments of local lawmakers" on traffic safety and lack of a showing of an improper "ulterior motive" behind its esthetic judgments showed that the city's action did indeed directly advance these substantial interests. *Id.* at 509–11, 101 S.Ct. at 2893–94, 69 L.Ed.2d at 816–17. Nevertheless, the plurality struck down the ordinance because of its restrictive impact on non-commercial speech, which, due to numerous statutory exceptions, reached too intrusively into the realm of free speech by purporting to distinguish between kinds of protected speech by reference to their content. *Id.* at 513–15, 101 S.Ct. at 2895–96, 69 L.Ed.2d at 818–19. Lastly, the plurality rejected the City's argument that the ordinance was a reasonable "time, place and manner" restriction because adequate alternative channels were not available to parties wishing to express social or ideological views in an inexpensive and wide reaching manner. *Id.* at 515–17, 101 S.Ct. at 2896–97, 69 L.Ed.2d at 820.

This constitutional approach conforms to our own. One year prior to *Metromedia* and *Schad*, this Court in *State v. Miller, supra*, 83 N.J. 402, 416 A.2d 821, struck down a municipal sign ordinance as unconstitutional. In doing so we acknowledged that the preservation of aesthetics and property values was a legitimate goal of a municipal zoning ordinance. *Id.* at 409, 416 A.2d 821. Nevertheless, we ruled that ordinances seeking to further such a goal would be subject

to strict constitutional scrutiny requiring that their regulatory restrictions be closely "tied to a compelling municipal interest as well as to the uses permitted in a given zone." *Id.* at 414, 416 A.2d 821. In finding in that case that this standard had not *394 been satisfied, we reasoned **698 that the ordinance in question⁶ was too severe, amounting to a total ban on a form of political speech without providing an adequate alternative means of communicating. *Id.* at 413, 416 A.2d 821. Specifically, we concluded that "adequate alternative means of political communication" were not available where homeowners were precluded from putting signs and posters in their yards. *Ibid.*

In applying the test for determining the constitutional validity of an enactment that restricts or impinges on freedom of speech and expression, we are mindful that ordinarily legislative enactments are presumed to be valid and the burden to prove invalidity is a heavy one. *Velmohos v. Maren Eng'g Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), *vacated*, 455 U.S. 985, 102 S.Ct. 1605, 71 L.Ed.2d 844 (1982); *Levitt & Sons, Inc. v. Division Against Discrimination, etc.*, 31 N.J. 514, 158 A.2d 177, appeal dismissed, 363 U.S. 418, 80 S.Ct. 1257, 4 L.Ed.2d 1515 (1960). Municipal ordinances, like statutes, enjoy this presumption of validity. *Hutton Park Gardens v. West Orange Town Council*, 68 N.J. 543, 564, 350 A.2d 1 (1975); *Senate v. Mayor and Municipal Council of Clifton*, 66 N.J. 204, 219, 330 A.2d 321 (1974). Consistent with the judicial predisposition in favor of the validity of legislation, courts will readily impute a proper governmental purpose or interest as the object to be served by the enactment, and, if need be, infer an adequate factual basis to support legislative regulations, even in the absence of particular purposes or specific findings being expressed by the lawmakers. *Hutton Park Gardens v. West Orange Town Council*, 68 N.J. at 564–65, 351 A.2d 1; *Burton v. Sills*, 53 N.J. 86, 95, 248 A.2d 521 (1968).

*395 [5] Nevertheless, if an enactment directly impinges on a constitutionally protected right, the presumption in favor of its validity disappears. Courts are far more demanding of clarity, specificity and restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights. *See State v. Cameron*, 100 N.J. 586, 592, 498 A.2d 1217 (1985); *Paton v. LaPrade*, 469 F.Supp. 773, 778 (D.N.J.1978).

[6] As we noted in *Zilinsky v. Zoning Bd. of Adjustment of Verona*, 105 N.J. 363, 521 A.2d 841 (1987), while, as a general rule, zoning ordinances do not have to articulate

“tangible, specific objectives” in order to be valid, *id.* at 371, 521 A.2d 841, if an ordinance infringes on a fundamental right, “the burden is upon the municipality to articulate the objectives of [the] ... ordinance.” *Ibid.* This articulation, we stated, need not be in the ordinance itself. “[R]ather, the municipality may offer testimony at a court hearing held to decide the constitutionality of the ordinance.” *Ibid.*; *Riggs v. Long Beach Township*, *supra*, 109 N.J. at 615, 538 A.2d 808. Thus, an ordinance that substantially curtails freedom of expression clearly requires that the municipality shoulder the burden of proving its constitutional validity. The municipality must satisfactorily demonstrate a legitimate governmental interest that is to be served by the enactment and demonstrate a reasonable factual basis indicating that the regulation advances the governmental interest and is no more expansive than necessary in advancing that interest. *See Metromedia, Inc. v. San Diego*, *supra*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800; *State v. Miller*, *supra*, 83 N.J. 402, 416 A.2d 821.

[7] In this case the ordinance directly and drastically encroaches on a fundamental constitutional interest, freedom of speech and expression. It reasonably appears from the record that the curtailment effected by the ordinance would apply to both commercial forms of expression as well as noncommercial speech, which could **699 include political expressions. *See* *396 *Metromedia, Inc. v. San Diego*, *supra*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800; *State v. Miller*, *supra*, 83 N.J. 402, 416 A.2d 821. Because noncommercial speech is implicated, the burden of overcoming the charge of constitutional invalidity is particularly strenuous. *State v. Miller*, *supra*, 83 N.J. 402, 416 A.2d 821; *Schad v. Borough of Mt. Ephraim*, *supra*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671.

The ordinance fails to reveal either its particular governmental objectives or its factual underpinnings. As the Appellate Division noted, the record is almost completely devoid of any evidence concerning what interests of Stafford are served by the ordinance and the extent to which the ordinance has advanced those interests. Because the exercise of first amendment rights and freedom of speech are at stake, the municipality cannot seek refuge in a presumption of validity. It clearly had the burden to present and confirm those compelling legitimate governmental interests and a reasonable factual basis for its regulatory scheme in order to validate its legislative action. Its failure to do so is fatal.

We acknowledge that several possible interests can be hypothesized as objectives of the ordinance. One could be preserving aesthetics, *see Miller*, *supra*, 83 N.J. at 402, 416 A.2d 821; another, promoting traffic safety, *see, e.g., Metromedia*, *supra*, 453 U.S. at 507–09, 101 S.Ct. at 2892–93, 69 L.Ed.2d at 815; *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed.2d 533 (1949). It is not the scope of a ban, or even the fact that it may be municipal-wide, that is determinative of its validity, but rather the existence of a demonstrable legitimate governmental objective genuinely served by such a ban. Thus, even if we were to assume that a legitimate interest justified some regulation of signs and billboards within Stafford, there has been no demonstration of the factual basis for this particular regulatory scheme, namely, a total municipal-wide ban. This clearly implicates an important prong in the test of constitutional validity: that this ordinance constituted the least restrictive *397 means possible by which to serve such an interest.⁷

Finally, there has been no adequate showing that the ordinance left open alternative means of communication with the audience that was reached by the medium that is prohibited by the ordinance. *See Miller*, *supra*, 83 N.J. at 413, 416 A.2d 821. “While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive communication may be invalid if the remaining modes of communication are inadequate.” *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S.Ct. 2118, 2132, 80 L.Ed.2d 772, 791 (1984) (citations omitted); *see Metromedia, Inc.*, *supra*, 453 U.S. at 528–34, 101 S.Ct. at 2903–06, 69 L.Ed.2d at 828–31 (Brennan, J., concurring) (expressing dissatisfaction as to whether San Diego had actually proven its contentions regarding dangers found in billboards or shown that the solution constructed was drawn in a sufficiently narrow manner). Bell submits that he has occasionally used his billboards for noncommercial purposes and that they thus constitute a means of reaching the public for groups who could not afford other methods of getting their message across. While not required to disprove this, Stafford had the burden of showing that there were reasonably equivalent forms of communication available.

In sum, the Township of Stafford has not presented adequate evidence that demonstrates **700 its ordinance furthers a particular, substantial government interest, and that its ordinance is sufficiently *398 narrow to further only that interest without unnecessarily restricting freedom of

expression. Consequently, it has failed to demonstrate a basis for upholding the constitutionality of the ordinance.

IV.

In view of Stafford's failure to justify the passage of such a broad and encompassing ordinance that substantially curtails freedom of speech and expression, we are constrained to declare it facially unconstitutional. *Zilinsky, supra* 105 N.J. 363, 521 A.2d 841 This does not mean that Stafford is incapacitated from enacting an ordinance seeking to further a proper governmental objective and suitably restricted to meet that objective and satisfy the constitutional imperatives elucidated in *Schad*, *Metromedia*, and *Miller* in light of the problems peculiar to that municipality. Our only determination here is that the ordinance in question facially

infringes on a fundamental right without sufficient support in the record to justify its validity.

In light of this determination, we decline to address the other issues raised by the parties.

For these reasons, the judgment of the Appellate Division is therefore affirmed.

For affirmance —Chief Justice WILENTZ, and Justices CLIFFORD, POLLOCK, O'HERN, GARIBALDI, STEIN and HANDLER—7.

Opposed —None.

All Citations

110 N.J. 384, 541 A.2d 692

Footnotes

- 1 Stafford Ordinance No. 84–35 (amended by Ordinance No. 85–68, superseded by Ordinance No. 86–20).
- 2 During the pendency of this appeal, both parties sought to have the Court consider additional, ancillary issues. These issues, it appears, were the subject of only marginal consideration by both the trial court and Appellate Division. Accordingly, we deny the requests of the parties to address these issues, with the exception of our treatment of the validity of Ordinance 86–20. *Infra* at 696 n. 4.
- 3 Nevertheless, a court may in some cases address constitutional issues despite the absence of strict necessity for doing so. See, e.g., *Schaad v. Ocean Grove Camp Meeting Ass'n*, 72 N.J. 237, 370 A.2d 449 (1977), overruled on other grounds, *State v. Celmer*, 80 N.J. 405, 404 A.2d 1, cert. denied, 444 U.S. 951, 100 S.Ct. 424, 62 L.Ed.2d 321 (1979); *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877, 71 S.Ct. 123, 95 L.Ed.2d 638 (1950); *Public Serv. Coordinated Transp. v. Newark Elizabeth Indep. Bus Owners Ass'n*, 3 N.J. 118, 69 A.2d 22 (1949).
- 4 The original ordinance, No. 84–35, was subsequently amended by Ordinance No. 85–68 for the purpose of curing certain publication defects in 84–35 and also to incorporate 84–35 into the overall municipal zoning ordinance. Ordinance 85–68, in turn, was later replaced by Ordinance 86–20. Since “the operative terms of the ordinance[s], upon which the trial court had ruled, remained unchanged ...,” *Riggs v. Long Beach Township*, 101 N.J. 515, 524–25, 503 A.2d 284 (1986), rev'd on other grounds, 109 N.J. 601, 538 A.2d 808 (1988), the existence of the latter ordinance in no way affects the merits or justifies a remand of the matter. In the interests of simplicity and clarity, we will refer to the statutory scheme in question as “the ordinance.” Because the Township relied primarily on the current ordinance as a basis for its actions, the appellate court correctly applied the law that was operative at the time of its decision. See *Kruvant v. Cedar Grove*, 82 N.J. 435, 440–42, 414 A.2d 9 (1980).
- 5 The plurality relied on the following four-part test for use in the commercial speech context:

(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. [*Metromedia, supra*, 453 U.S. at 507, 101 S.Ct. at 2892, 69 L.Ed. at 815 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563–66, 100 S.Ct. 2343, 65 L.Ed.2d 341, 349–51 (1980)).]

- 6 The ordinance in *Miller* required permits for all signs exceeding six square feet and permitted only the following types of signs in residential zones: (1) decorative name and address plates; (2) “for sale” or “for rent” signs and signs identifying firms doing work on the premises; (3) signs maintained by the local, state or federal government; (4) identification signs for churches, schools, etc. The defendant in that case was convicted of violating the ordinance after he erected a four-by-eight-foot sign on his front yard carrying a message concerning a matter of public interest.
- 7 On this record Stafford itself arguably has shown that a much more narrow ordinance could have been tailored, *i.e.* the current ordinance, prohibiting signs even if not interfering with traffic safety, replaces one that was much more directly related to that goal. Ordinance 84–35 (which has itself been superseded, *supra* at 696 n. 4) repealed Ordinance 77–22, which, as amended by Ordinance 78–19, had read:

SIGNS —No sign or billboard of any type shall be erected or permitted which obstructs driving vision, traffic signals, sight triangles, traffic direction, identification signs, or the sight obstruction of the traveling public to another sign or billboard on the same property or on a nearby property.

172 N.J.Super. 479

Superior Court of New Jersey, Law Division,
Burlington County.

Robert S. MESSER, Plaintiff,

v.

TOWNSHIP OF BURLINGTON, Township Council
of Burlington Township and Zoning Board of
Adjustment of Township of Burlington, Defendants.

Jan. 28, 1980.

Synopsis

Property owner filed suit seeking relief from township board of adjustment's denial of a zoning variance, the refusal of township council to entertain plaintiff's appeal, and the provisions of the new zoning ordinance. The Superior Court, Law Division, Haines, J. S. C., held that: (1) provisions of the new ordinance limiting appeals to the council to cases involving approval of "d" variances was proper under statute; (2) the rezoning procedure authorized by new ordinance was not prohibited by any section of the Municipal Land Use Law; (3) township was authorized to establish rezoning procedures, but some of the particulars of the new zoning ordinance were invalid; and (4) although township's new zoning ordinance contained a "separability" provision, such provision would not save the ordinance's rezoning section, since its infirmities were too significant, and the valid portions were not independent of the invalid portions.

Judgment for defendants.

West Headnotes (15)

[1] Zoning and Planning 🔑 Nature and form of remedy and jurisdiction

Provisions of new zoning ordinance limiting appeals to the township council to cases involving the approval of "d" variances was proper under statute providing, in pertinent part, that "Any interested party may appeal to the governing board (1) any final decision of a board of adjustment approving an application for development * * * and (2) if so permitted by ordinance, any other final decision of a board of

adjustment." N.J.S.A. 40:55D-17, subd. a, 70, subd. d.

[2] Zoning and Planning 🔑 Modification or amendment; rezoning

An amendment to a zoning ordinance, effective during the course of an appeal from a decision of a board of adjustment, must be considered by, and is binding upon, the appellate tribunal.

[3] Zoning and Planning 🔑 Proceedings to Modify or Amend

Rezoning procedure authorized by new township zoning ordinance was not prohibited by any section of the Municipal Land Use Law. N.J.S.A. 40:55D-1 et seq., 62, subd. b.

[4] Statutes 🔑 Initiative
Statutes 🔑 Referendum

Terms "initiative" and "referendum" refer to methods by which legislation may be adopted by the people; they have no application to the legislative enactments of governing bodies.

[5] Zoning and Planning 🔑 Proceedings

Adoption of procedures relating to zoning matters must not add unreasonably to the burdens imposed on an applicant for zoning relief; such additions violate statutory directives.

[6] Zoning and Planning 🔑 Proceedings to Modify or Amend

Township was authorized to establish rezoning procedures, but some of the particulars of the new zoning ordinance were invalid.

[7] Zoning and Planning 🔑 Power and Authority

Statutory powers of boards of adjustment do not include authority to hear matters relating to the amendment of a zoning ordinance; however,

planning boards are authorized by statute to “perform such other advisory duties as are assigned to it by ordinance or resolution of the governing body for the aid and assistance of the governing body or other agencies or officers,” which broad power clearly authorizes such boards to consider rezoning applications authorized by township ordinance. [N.J.S.A. 40:55D–25](#), subd. b(3), 70, 76.

1 Case that cites this headnote

[8] **Zoning and Planning** 🔑 Procedural Requirements

Zoning and Planning 🔑 Proceedings to Modify or Amend

Zoning ordinances and their amendments must be prepared in accordance with the requirements of the Municipal Land Use Law, and the ordinance should so provide. [N.J.S.A. 40:55D–1 et seq.](#)

[9] **Zoning and Planning** 🔑 Power and Authority

While rezoning provision of new zoning ordinance authorized board of adjustment and planning board to determine whether there is “a substantial likelihood that the zoning regulations currently in existence will unconstitutionally deprive the applicant of his rights to property,” it is not the function of the board of adjustment or the planning board to decide constitutional questions of this kind.

[10] **Trial** 🔑 Questions of Law or Fact in General
Questions of law are the peculiar province of the courts.

[11] **Zoning and Planning** 🔑 Circumstances affecting validity of amendment in general

While new zoning ordinance provided that, if the township council should decide to adopt an amendment, it was required to be one which “meets the general health, safety and welfare

concerns of the community,” and while these are appropriate standards for such an amendment, they are not the only ones to be considered; the council must be permitted to consider all of the standards set forth in the Municipal Land Use Law. [N.J.S.A. 40:55D–1 et seq.](#)

[12] **Municipal, County, and Local Government** 🔑 Particular local laws

Although township's new zoning ordinance contained a “separability” provision, such provision would not save the ordinance's rezoning section, since its infirmities were too significant, and the valid portions were not independent of the invalid portions.

[13] **Zoning and Planning** 🔑 Permit, variance and alteration of regulations distinguished

When a variance application involves matters within the jurisdiction of a board of adjustment, the applicant cannot be compelled to seek an amendment to the zoning ordinance.

[14] **Zoning and Planning** 🔑 Validity of regulations in general

New zoning ordinance was entitled to a presumption of validity.

[15] **Zoning and Planning** 🔑 Dismissal

Since provisions of new zoning ordinance, except as they related to seven acres of plaintiff's property once zoned commercial, had not been challenged, and since there was no administrative proceeding under the new ordinance, under these circumstances the suit of plaintiff, who was denied a variance, had to be dismissed, except for the issue challenging the constitutionality of the ordinance insofar as it eliminated commercial zoning.

Attorneys and Law Firms

****1060 *482** Frederick W. Hardt, Burlington, for defendants Tp. of Burlington and Tp. Council of Burlington (Sever, Hardt & Main, Burlington, attorneys).

John E. Harrington, Mount Holly, for plaintiff (Hartman, Schlesinger, Schlosser & Faxon, Mount Holly, attorneys).

****1061** Ernest A. Ferri, Burlington, for defendant Zoning Bd. of Adjustment of Tp. of Burlington (Ferri & Heath, Burlington, attorneys).

Opinion

HAINES, J. S. C.

Plaintiff is partial owner of 92.5 acres of land in Burlington Township, Burlington County, New Jersey which he proposes to develop. Eighty-five and one-half acres of his land were zoned to permit single-family detached dwellings on 20,000 to 40,000 square foot lots. Plaintiff prefers to build single-family houses on smaller lots and townhouses on this part of his property. The remaining seven acres are zoned and planned by plaintiff for commercial purposes. His application to the Burlington Township ***483** Board of Adjustment for a variance which would permit his proposed development was denied. He appealed the denial to the township council. Before the appeal was heard a new zoning ordinance was adopted for the township. It placed all of plaintiff's property, including the seven acres planned for commercial use, in a residential zone and permitted construction of single-family detached houses only on 20,000 square foot lots. In addition, the new ordinance limited appeals from the board of adjustment to the township council to those cases in which the board approved a "d" variance, [N.J.S.A. 40:55D-70\(d\)](#), as permitted by [N.J.S.A. 40:55D-17\(a\)](#). Consequently, plaintiff was advised that council no longer had jurisdiction to consider the appeal and it was dismissed.

Plaintiff seeks relief here from the denial of the board, the refusal of the council and the provisions of the new ordinance. He argues that (1) the township council erred when it refused to consider his appeal; (2) the decision of the board of adjustment was arbitrary and (3) the new ordinance, insofar as it eliminated the commercial zoning, is unconstitutional. Defendants, in addition to denying these claims, contend that the basic nature of the relief sought by the plaintiff may be granted only through an amendment to the zoning ordinance. [Dover Tp. v. Dover Tp. Bd. of Adj.](#), 158 N.J.Super. 401,

[411-414](#), 386 A.2d 421 (App.Div.1978). The new ordinance establishes an application procedure for "rezoning," a term appearing often enough in zoning literature to be acceptable. It denotes nothing more than an amendment to a zoning ordinance which changes use restrictions. Plaintiff did not pursue this route since it was not in existence at the time he made his application to the board of adjustment, and defendants now say that this constitutes a failure to exhaust his administrative remedies.

After pretrial defendant township moved for summary judgment as to all issues. Meanwhile, the record of the proceedings below and the new zoning ordinance were submitted to the ***484** court. It was agreed that all issues, except the constitutional challenge, would be submitted for decision on the basis of this material, without a trial. This opinion therefore disposes of the submitted issues by way of final judgment, determining the summary judgment motion as a part of that disposition.

A. The Appeal to the Township Council

[1] The provisions of the new zoning ordinance limiting appeals to the township council to cases involving the approval of "d" variances is proper under [N.J.S.A. 40:55D-17\(a\)](#) which provides in pertinent part:

Any interested party may appeal to the governing body (1) any final decision of a board of adjustment approving an application for development pursuant to (N.J.S.A. 40:55D-70d), and (2) if so permitted by ordinance, any other final decision of a board of adjustment

[2] It has long been the rule in this jurisdiction that an amendment to a zoning ordinance, effective during the course of an appeal from a decision of a board of adjustment, must be considered by, and is binding upon the appellate tribunal. [Socony Vacuum v. Mt. Holly](#), 135 N.J.L. 112, 51 A.2d 19 (Sup.Ct.1947); [Saint Joseph's Hospital v. Finley](#), 153 N.J.Super. 214, 225, 379 A.2d 467 (App.Div.1977). Consequently, the township council was bound by the provisions of the new ordinance and no longer ****1062** had jurisdiction over the appeal. Its refusal to entertain it was proper.

B. The Validity of the Rezoning Provisions of the New Ordinance

Burlington Township's new zoning ordinance authorizes the filing of rezoning applications. It requires the board of adjustment and the planning board to hear these applications. These boards are to make findings of fact to reach conclusions of law and then recommend the granting or the denial of the application *485 in accordance with review standards set forth in the ordinance. On receipt of the recommendation council conducts a hearing and decides whether to amend the zoning ordinance. Rezoning is acknowledged to be a legislative act "left to the sole discretion of the Township Council," and any amendment authorized by council "may be consistent with the applicant's request, contrary to the applicant's request, or a modification of the applicant's request. . . ." When an amendment is authorized, procedures for its adoption must follow those set forth in the Municipal Land Use Law, *N.J.S.A. 40:55D-1 et seq.*

These provisions are not mentioned in our zoning statutes, have not been considered in our judicial decisions and no literature concerning them has been brought to the court's attention. They are unique and their validity must be determined.

[3] [4] The procedure is not prohibited by any section of the Municipal Land Use Law. *N.J.S.A. 40:55D-62(b)* requires that "no zoning ordinance and no amendment or revision to any zoning ordinance shall be submitted to or adopted by initiative or referendum." It is the only express prohibition of particular amending procedures. These prohibitions do not affect the township ordinance. The terms "initiative" and "referendum" refer to methods by which legislation may be adopted by the people; *Sparta Tp. v. Spillane*, 125 N.J.Super. 519, 523, 312 A.2d 154 (App.Div.1973); they have no application to the legislative enactments of governing bodies. Moreover, the rezoning procedure authorized by the township merely permits the initiation of a request for an amendment and does not affect the discretion which the governing body has in such matters.

N.J.S.A. 40:55D-62(a) provides that "the governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon." The method by which a governing body may launch an amendment for consideration is not set forth. The procedure is legislative. It may be commenced in any of the myriad ways *486 in which legislation is brought about, e.g., through public petition, correspondence,

public appearances and communications of all kinds from the community. Plaintiff could have appeared before the township council and requested an amendment to the zoning ordinance; the governing body, if it so chose, could have acceded to his request. The procedure established by Burlington Township's new ordinance establishes one method by which legislative needs may be brought to its council's attention. The authority to adopt this section of the ordinance may be found in the statutory delegation of the power to amend to which it is incidental. *Juzek v. Hackensack Water Co.*, 48 N.J. 302, 314-315, 225 A.2d 335 (1966).

[5] The adoption of procedures relating to zoning matters must not add unreasonably to the burdens imposed upon an applicant for zoning relief; such additions violate statutory directives. *Oakwood at Madison v. Madison*, 72 N.J. 481, 523, 371 A.2d 1192 (1977); *Yousefian v. Wayne Tp.*, 152 N.J.Super. 111, 125, 377 A.2d 796 (Law Div.1977). The rezoning procedure here adds no such burdens. On the contrary, it confers a benefit by providing an additional approach to the legislative ear. It does not require an applicant to forsake other, informal means with which to promote zoning legislation.

[6] [7] [8] [9] [10] [11] I conclude that the Township was authorized to establish rezoning procedures. The particulars of the ordinance adopted here, however, require consideration. Some of them are invalid. The ordinance requires the board of adjustment and the **1063 planning board to hear applications for rezoning. *N.J.S.A. 40:55D-70* and 76 set forth the powers of boards of adjustment. These powers do not include any authority to hear matters relating to the amendment of the zoning ordinance. Planning boards, however, are authorized by *N.J.S.A. 40:55D-25(b) (3)* to "perform such other advisory duties as are assigned to it by ordinance or resolution of the governing body for the aid and assistance of the governing body or other agencies or officers." *487 This broad power clearly authorizes such boards to consider the rezoning applications authorized by the township ordinance. A rezoning application is to consist in part of "a properly completed rezoning information form." Nothing in the ordinance defines the information which is to be supplied. Reasonable standards, though couched in general terms, are necessary to avoid discrimination. *Ward v. Scott*, 11 N.J. 117, 123-124, 93 A.2d 385 (1952). The board of adjustment and planning board, in making their findings, are to consider "whether any action short of rezoning will properly protect the interest of the community," "the existing Master Plan," "conditions

existing within the community”, “the best interest of the community” and “community benefits.” These considerations certainly may be addressed when deciding whether new legislation is advisable. However, zoning ordinances and their amendments must be prepared in accordance with the requirements of the Municipal Land Use Law, and the ordinance should so provide. The board of adjustment and planning board are to reach “conclusions of law” concerning the application. The only “conclusion of law” required appears to be a determination that there is “a substantial likelihood that the zoning regulations currently in existence will unconstitutionally deprive the applicant of his rights to property.” It is not the function of the board of adjustment or the planning board to decide constitutional questions of this kind. Questions of law are the peculiar province of the courts. *Honigfeld v. Byrnes*, 14 N.J. 600, 603-604, 103 A.2d 598 (1954); *Jantusch v. Verona*, 41 N.J.Super. 89, 96, 124 A.2d 14 (Law Div.1956), *aff’d* 24 N.J. 326 (1957). Finally, if the township council decides to adopt an amendment, it is required to be one which “meets the general health, safety and welfare concerns of the community.” These are appropriate standards for such an amendment, but they are not the only ones to be considered. The council must be permitted to consider all of the standards set forth in the Municipal Land Use Law.

[12] The ordinance contains a “separability” provision. It provides that if any part of the ordinance is adjudged to be *488 invalid, the remainder shall remain effective. This clause will not save the rezoning section. Its infirmities are too significant; the valid portions are not independent of the invalid portions. It cannot be said that it would have been adopted by council if all of its invalid portions were deleted.¹ *Ingramort v. Fort Lee*, 72 N.J. 412, 422, 371 A.2d 34 (1977). As a consequence, there are no administrative procedures which plaintiff is required to exhaust.

[13] The exhaustion argument suffers from an additional infirmity. The rezoning procedure has nothing to do with variances. When a variance application involves matters within the jurisdiction of a board of adjustment, the applicant cannot be compelled to seek an amendment to the zoning ordinance. Consequently, defendant board either had jurisdiction to grant the variance or it did not. If jurisdiction was lacking because plaintiff sought relief obtainable only through an amendment to the zoning ordinance, the application would have to be dismissed. The dismissal would be sustained here on that ground; there would be no question of exhaustion of administrative remedies since such remedies would have no relation to the variance procedure.

C. The Merits of Plaintiff's Contentions

[14] [15] Plaintiff faces an insurmountable difficulty in connection with his effort **1064 to reverse the board of adjustment. The record below concerns an application made under the old zoning ordinance, no longer in existence. The new zoning ordinance is entitled to a presumption of validity. *Bern v. Fair Lawn*, 65 N.J.Super. 435, 450, 168 A.2d 52 (App.Div.1961). Its provisions, except as they relate to the seven acres once zoned commercial, have not been challenged. There is no record of any administrative proceeding under the new ordinance; there was no such proceeding. Under the circumstances, plaintiff's suit, except for *489 the constitutional issue, must be dismissed. There is no basis for a remand to the board of adjustment for further hearings; a new application is necessary, on proper notice, since entirely new considerations are now involved.

All Citations

172 N.J.Super. 479, 412 A.2d 1059

Footnotes

- 1 The clause, however, is clearly sufficient to save all of the ordinance except its rezoning section. The invalid portion is entirely independent.



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41 N.J.Super. 89

Superior Court of New Jersey.

Law Division.

Arthur J. JANTAUSCH and Ann M. Jantausch, Plaintiffs,

v.

BOROUGH OF VERONA, a municipal
corporation of New Jersey, and Verona Board
of Adjustment, New Jersey, Defendants.

No. L—4597—55 P.W.

|

July 12, 1956.

Synopsis

Action in lieu of prerogative writ to review a decision of the board of adjustment revoking a permit issued by building inspector for alterations of plaintiffs' home and for operation of a beauty salon therein. The Superior Court, Law Division, Weintraub, J.S.C., held that issuance of a permit for alteration of a home in a one-family district for use as a beauty salon was within authorization of zoning ordinance permitting within one-family residence districts, alteration or use of buildings for home occupations incident to their use as residences.

Issuance of building permit affirmed.

West Headnotes (15)

[1] Zoning and Planning **Review in general**

A party attacking action of a municipal board of adjustment may join other appropriate claims for relief such as estoppel, or a claim that an ordinance in question is invalid.

[5 Cases that cite this headnote](#)

[2] Action **Joinder of Causes of Action Under Codes and Practice Acts**

The settled policy of the Superior Court, Law Division, is to adjudge all cognate disputes in a single action.

[3] Zoning and Planning **Grounds in general**

Where a building permit is regularly issued in accordance with an ordinance, it may not be revoked after reliance unless there is fraud.

[12 Cases that cite this headnote](#)

[4] Zoning and Planning **Effect of determination in general; res judicata and collateral estoppel**

Where there is no semblance of compliance with or authorization for the issuance of a building permit under an ordinance, such deficiency is deemed jurisdictional and reliance on the permit will not bar even a collateral attack on the issuance of such permit after the expiration of a time limitation applicable to direct review.

[11 Cases that cite this headnote](#)

[5] Zoning and Planning **Time for Proceedings**

Where appeal from issuance of building permit by building inspector to municipal board of adjustment was within time, reliance upon the permit in the intervening period would not suffice to sustain a plea of estoppel nor would laches be found under the circumstances.

[16 Cases that cite this headnote](#)

[6] Zoning and Planning **Permits, certificates, and approvals**

Where action of a municipal board of adjustment in revoking a building permit did not involve exercise of powers essentially administrative, court was not limited in review of such action to a determination of whether board's action was arbitrary, capricious or unreasonable. *R.S. 40:55–39, 47*, N.J.S.A.

[2 Cases that cite this headnote](#)

[7] Municipal, County, and Local**Government** 🔑 Executive or administrative construction

The interpretation of an ordinance is a purely legal matter as to which an administrative agency has no peculiar skill superior to that of the courts.

32 Cases that cite this headnote

[8] Municipal, County, and Local**Government** 🔑 Judicial review or intervention

Where an issue is one of law, a court's duty and authority is not curtailed by the circumstance that such issue happens to reach it via a municipal board of adjustment.

4 Cases that cite this headnote

[9] Municipal, County, and Local**Government** 🔑 Judicial role in general

The meaning of an ordinance raises a question peculiarly suited to judicial treatment rather than disposition by an administrative board in a quasi-judicial function.

3 Cases that cite this headnote

[10] Municipal, County, and Local**Government** 🔑 Business, Occupations, and Economic Activity

The word "occupation" may embrace all gainful activities, profession or business, whether pursued as an employee or self-employer.

3 Cases that cite this headnote

[11] Zoning and Planning 🔑 Home occupations

Issuance of a permit for alterations of a home in a one-family district for use as a beauty salon was within authorization of zoning ordinance permitting within one-family residence districts, alteration or use of buildings for home occupations incident to their use as residences.

10 Cases that cite this headnote

[12] Evidence 🔑 Businesses and Occupations

Court would judicially notice that in a bulletin issued by the Small Business Administration of the United States Department of Commerce, in dealing with home businesses, included "beauty-parlors" among them.

1 Case that cites this headnote

[13] Evidence 🔑 Public records and documents in general

Court would judicially notice the records of the Board of Beauty Culture Control in determining the total number of beauty salons in a borough.

[14] Customs and Usages 🔑 Generality

Where four out of ten beauty salons were in residential districts of a borough, the practice of operating such salons in such districts would be deemed sufficient to denominate such practice as customary.

3 Cases that cite this headnote

[15] Municipal, County, and Local Government 🔑 Judicial role in general

Legislative power must be exercised by a municipality itself, and it may not ask the courts to write a better or different ordinance.

5 Cases that cite this headnote

Attorneys and Law Firms

****15 *91** John W. Lebeda, Caldwell, for plaintiffs.

William J. Camarata, Montclair, for defendants (Fred G. Stickel, III, Newark, of counsel).

Opinion

WEINTRAUB, J.S.C.

Plaintiffs obtained from the building inspector a permit for the alteration of their home and the operation of a beauty salon therein. Property owners within 200 feet appealed to the board of adjustment, which, after hearing, determined that the issuance of the permit ‘for the use disclosed was in error’ and revoked ‘this permit *92 insofar as the use for a beauty salon is concerned.’ Plaintiffs thereupon instituted the present action in lieu of prerogative writ to review the decision of the board.

The zoning ordinance, adopted in 1939, established four one-family residential districts. Section 6.1, applicable to all residential districts, provides:

‘6.1 General Provisions—Use

‘Within any one-family residence district no buildings shall be erected or altered or used in whole or in part for any other than the following specified purposes:

****16** ‘6.11 Single detached house used as a residence by not more than one family.

‘6.12 A residence containing the professional office of its resident owner or lessee.

‘6.13 Home occupations incidental to the use as a residence, provided that such occupations shall be conducted solely by resident occupants of the building, and that no display of products shall be visible from the street.

‘6.14 A church or any place of worship, including parish house or Sunday School Building.

‘6.15 Buildings used for private horticultural or agricultural purposes, private garages or stables, and private dog kennels.’

The word ‘profession’ is defined in section 2:

‘Profession. Includes the following: physician, surgeon, dentist, osteopath, chiropractor, lawyer, real estate or insurance broker, architect and civil, electrical, mechanical or industrial engineer.’

The ordinance does not define ‘home occupations.’

Conceiving the contemplated beauty culture activity would constitute a home occupation, plaintiffs sought the permit, and the building inspector, being of a like view, issued it.

The property is in One-Family Residence District B. The dwelling is a split-level, one-family house with a two-car garage, physically at ground level beneath the bedrooms in the second story of the home.

The application for the permit disclosed the purpose to divide the two-car garage into a one-car garage and a beauty salon; the salon to be divided into a reception room, with two booths with chairs, two sinks and stools, lavatory, and beauty salon equipment. The exterior changes consisted of ***93** the removal of the large overhead door, the substitution of an overhead door for the one-car garage and, in the words of the board of adjustment, ‘the installation of an attractive colonial style door for the salon portion.’ The alterations have in fact been completed in accordance with the filed plans.

I.

[1] [2] At the hearing before the board of adjustment evidence was offered that plaintiffs expended some \$3,000 on the strength of the permit, and that some of the appellants were aware of the proposed use and the alterations during their progress and failed to express dissent, although the proof does not indicate their acquiescence. On this basis, plaintiffs urge the permit may not be revoked. At the pretrial conference the existence of the issue was challenged by defendants. Plaintiffs had complained in the general form annexed to the rules of court (Form 35) which is silent as to specific challenges, and assumed the issue of estoppel could thus be projected. The suggested form at most embraces issues within the jurisdiction of the board, and estoppel would not seem to be among them. Yet a party attacking the action of a board of adjustment may join other appropriate claims for relief, as, for example, a claim that the ordinance itself is invalid, and since our settled policy is to adjudge all cognate disputes in a single action and the borough itself is a party defendant, I permitted the issue of estoppel to be included in the pretrial order. [Dolan v. DeCapua](#), 16 N.J. 599, 109 A.2d 615 (1954).

[3] [4] Our cases clearly settle the controlling principles at the extreme poles of the problem. Where the permit is regularly issued in accordance with the ordinance, it may not be revoked after reliance unless there be fraud. [Grossman](#)

v. Mayor, etc., Jersey City, 6 N.J.Misc. 688, 142 A. 558 (Sup.Ct.1928); ****17** Citizens Holding Co. v. Board of Adjustment of the City of Newark, 7 N.J.Misc. 61, 144 A. 329 (Sup.Ct.1929); Lehigh Valley R.R. v. Mayor, etc., Jersey City, 7 N.J.Misc. 154, 144 A. 578 (Sup.Ct.1929), ***94** affirmed o.b. 106 N.J.L. 248, 147 A. 555 (E. & A. 1929); Freeman v. Hague, 106 N.J.L. 137, 147 A. 553 (E. & A. 1929); Kornylak v. Hague, 8 N.J.Misc. 481, 150 A. 669 (Sup.Ct.1930); Horwitz v. Jones, 12 N.J.Misc. 375, 171 A. 552 (Sup.Ct.1934). On the other hand, 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. Lynch v. Borough of Hillsdale, 136 N.J.L. 129, 54 A.2d 723 (Sup.Ct.1947), affirmed o.b. 137 N.J.L. 280, 59 A.2d 622 (E. & A. 1948); V. F. Zahodiakin Engineering Corp. v. Zoning Board of Adjustment of City of Summit, 8 N.J. 386, 86 A.2d 127 (1952) Garrou v. Teaneck Tryon Co., 11 N.J. 294, 94 A.2d 332, 35 A.L.R.2d 1125 (1953); cf. State v. Yaccarino, 3 N.J. 291, 70 A.2d 84 (1949), and Morris v. Borough of Haledon, 24 N.J.Super. 171, 93 A.2d 781 (App.Div.1952). And reliance in such circumstances has been held not to constitute a special reason within R.S. 40:55—39(d), N.J.S.A. Keller v. Town of Westfield, 39 N.J.Super. 430, 121 A.2d 419 (App.Div.1956); cf. Dolan v. DeCapua, supra (16 N.J. at page 610, 109 A.2d 615).

But what of the intermediate situation in which the administrative official in good faith and within the ambit of his duty makes an erroneous and debatable interpretation of the ordinance and the property owner in like good faith relies thereon? The Dictum in favor of estoppel contained in Freeman v. Hague, supra (106 N.J.L. at page 140, 147 A. 553) perhaps falls in this area. Cf. Sun Oil Co. v. Clifton, 16 N.J.Super. 265, 269, 84 A.2d 555 (App.Div.1951), and Kurowski v. Board of Adjustment of Bayonne, 11 N.J.Super. 433, 440, 441, 78 A.2d 429 (App.Div.1951). In Adler v. Department of Parks and Public Property, Township of Irvington, 20 N.J.Super. 240, 89 A.2d 704 (App.Div.1952), however, a permit was held revocable notwithstanding that the barrier to its validity depended upon the resolution of an issue of construction, which, although ultimately not too debatable, yet was sufficiently substantial to render doubtful a charge that the administrative official acted without any reasonable basis or that the owner proceeded without good faith.

***95** On the other hand, in Marini v. Borough of Wanaque, 37 N.J.Super. 32, 116 A.2d 813 (App.Div.1955), the court held the review to be out of time and rejected the contention that the issuance of the permit could be attacked collaterally out of time, saying (p. 40) that 'If anything, it was a mistaken or irregular exercise of a ministerial function' rather than action which is utterly void as in V. F. Zahodiakin Engineering Corp. After thus concluding that time barred the attack, the court additionally found laches in the period of delay after full knowledge. That case involved a building ordinance rather than a zoning ordinance but the difference would not seem to be a telling one.

[5] I have no doubt as to the good faith of plaintiffs and the building inspector. Additionally, whether the building inspector's view of the ordinance was sound or not it cannot be said to be unreasonable. There should be some point at which the owner of property who acts in such circumstances becomes secure. Proceedings for a declaratory judgment would serve that end but, realistically, resort to litigation is cumbersome in this context. The line drawn must, however, give due consideration to the rights of other property owners, and in the light thereof it probably should not be drawn at any point prior to the expiration of the right to appeal. Even here a difficulty lies in the absence of statutory provision for notice to neighboring property owners of an application for a permit, and hence the fairness of this approach may be questionable. See ****18** Adams v. Jersey City, 107 N.J.L. 149, 151 A. 863 (E. & A. 1930), and Holloway v. Township of Pennsauken, 12 N.J. 371, 375, 97 A.2d 141 (1953). At any rate, the appeal to the board of adjustment was, according to the stipulation of the parties, within time. This being so, reliance upon the permit in the intervening period should not suffice to sustain a plea of estoppel. Nor should laches be found in such circumstances. It may be added that proof of laches as to some appellants to the board could not bind other affected property owners and hence a finding of laches as to some would be of no practical significance.

***96 II.**

[6] [7] Defendants urge the issue to be whether the determination of the board of adjustment was arbitrary, capricious or unreasonable. The asserted test obtains only where the board's action under R.S. 40:55—39, N.J.S.A., involves administrative expertness and the exercise of powers essentially administrative. See, for example, Tomko v. Vissers, 21 N.J. 226, 121 A.2d 502 (1956); Beirn v. Morris,

14 N.J. 529, 103 A.2d 361 (1954); *Cummins v. Board of Adjustment of the Borough of Leonia*, 39 N.J.Super. 452, 121 A.2d 405 (App.Div.1956). Review is thus limited in such cases in harmony with the traditional approach that the judiciary will not merely substitute its independent judgment for that of the body entrusted by the Legislature with the administrative function. *Beirn v. Morris*, *supra* (14 N.J. at page 538, 103 A.2d 361). But the interpretation of an ordinance is a purely legal matter as to which the administrative agency has no peculiar skill superior to the courts'.

[8] Where the issue is thus one of law, the court's duty and authority are not curtailed by the circumstance that the issue happens to reach it Via the board of adjustment. It cannot be that diametric results must be reached under the same ordinance depending upon whether the issue arises in proceedings before the board of adjustment or upon a complaint in the magistrate's court or in an action to restrain a violation under R.S. 40:55—47, N.J.S.A. See *Delpriore v. Ball*, 281 App.Div. 214, 118 N.Y.S.2d 53 (App.Div.1953).

[9] On the contrary, the meaning of an ordinance raises a question 'peculiarly suited to judicial treatment rather than disposition by an administrative board in a quasi-judicial function' and hence exhaustion of the administrative review was held not to be required in *Honigfeld v. Byrnes*, 14 N.J. 600, 603, at page 604, 103 A.2d 598, at page 600 (1954), wherein the court added from *Nolan v. Fitzpatrick*, 9 N.J. 477, 89 A.2d 13 (1952), that "the opinions of the administrative tribunals would not be persuasive as they would be on questions of fact within *97 their purview." The difference in judicial approach to an administrative agency's construction of an act and an agency's exercise of its expert discretion, is illustrated by two opinions recently delivered by the Supreme Court upon the same day. *Bogue Electric Co. v. Board of Review, etc.*, 21 N.J. 431, 122 A.2d 615 (1956) and *Paterson Publishing Company, Inc., v. New Jersey Bell Telephone Company*, 21 N.J. 460, 122 A.2d 599 (1956).

This is not to say that the views of others, both the board of adjustment and the building inspector, should not receive respectful consideration, but rather that an erroneous interpretation by either is not secured from judicial disagreement by some special insulation impenetrable except upon a finding of arbitrariness, capriciousness, or unreasonableness. In fact, the board disclaimed any special advantage. The question had never before reached it. It observed that 'It is hard to reflect back to 1939 and determine

what the framers of this ordinance intended to cover by the use of this term (home occupations).'

III.

We come then to the meritorious question, whether the proposed use is within the authorization of section 6.13 of the ordinance.

****19** It seems clear that the calling of a beautician may not be described as a profession. It has not been so denominated by the statute relating to beauty culture. N.J.S.A. 45:4A—1 et seq. Rather it is there described as an 'occupation,' N.J.S.A. 45:4A—1, 2, 4, and also as a 'business', N.J.S.A. 45:4A—2. The calling does not have the attributes of a profession as that term is ordinarily used. See *Trinka Services, Inc. v. State Board of Mortuary Science of New Jersey*, 40 N.J.Super. 238, 122 A.2d 668 (Law Div.1956). There is no evidence in the ordinance that a wider sweep was intended.

[10] Is it a home occupation? The word 'occupation' is most comprehensive. It may embrace all gainful activities, professional or business, and whether pursued as an *98 employee or self-employer. 67 C.J.S., p. 74. Hence plaintiffs' proposed activity must be deemed an occupation within the meaning of the ordinance unless there be found therein a purpose to restrict its natural scope.

[11] Is the proposed activity 'incidental to the use as a residence'? I think it clearly is. A use is thus incidental so long as the main use of the dwelling remains residential and the occupational activity is factually subordinate. *Bassett, Zoning* (1940), p. 101. The circumstance that the relatively small area here to be used for beauty culture was initially part of the garage rather than of some other portion of the structure is of no consequence. The dwelling would remain predominantly a dwelling.

So also the proposed use would be 'conducted by resident occupants of the dwelling,' namely, by Mrs. Jantausch alone. *Lemp v. Township of Millburn*, 129 N.J.L. 221, 28 A.2d 767 (Sup.Ct.1942); *State v. Mair*, 39 N.J.Super. 18, 120 A.2d 487 (App.Div.1956).

Thus far there is no conflict with the ordinance. Defendants assert the ordinance as a whole evidences a purpose to exclude beauty culture from home occupations. The court, of course, must consider the entire enactment to find the legislative purpose. The point made is that in section 8 'beauty parlor' is listed in the enumeration of uses permitted

in business districts, which fact, defendants urge, shows it was not embraced in home occupations in section 6.13. This does not follow unless one can say that home occupations do not include business activities. If home occupations do not include business activities, I fail to understand what they do include, unless the distinction sought to be advanced is between employment and self-employment, and nothing in the ordinance so intimates. In fact, section 5.81 authorizes a sign for home occupations, a provision which would be inappropriate if home occupations embraced solely employment for others, and the provision in section 6.13 'that no display of products shall be visible from the street' plainly imports that merchandising of some kind was affirmatively contemplated.

99** It is suggested that the inclusion of 'beauty parlor' in section 8 demonstrates it is not a home occupation because section 8 also authorizes the conduct in a business district of 'Any use specified in Sections 6 and 7' and hence, if beauty culture is a home occupation, it would already be authorized in business districts by virtue of the quoted language and the specification of 'beauty parlor' would thus be superfluous. The fallacy lies in the circumstance that the inclusion by reference to section 6 would have authorized such activity in the business districts Only as home occupations, with the limitations thereon contained in section 6.13. Hence, if beauty culture is a home occupation it would still be necessary and appropriate to authorize such activity in section 8 without the restrictions contained in section 6.13, and this conclusion is supported by the fact that section 8 also specifies 'professional office' notwithstanding that a professional office, with the restrictions contained in section 6.12, is also authorized by the very *20** reference to section 6 in section 8 upon which defendants' argument rests.

Defendants ask the court to read into section 6.13 limitations that (1) the home occupation be a 'customary' home occupation; (2) it be not a 'business'; (3) no portion of the dwelling may be set aside exclusively for the home occupation; (4) no equipment may be used other than equipment normally found in the home.

In support of the first two suggested limitations defendants refer to the discussion in Bassett, Zoning (1940), pp. 100, 101 and Information Report No. 54 dated September, 1953 of the American Society of Planning Officials. Both references contain discursive reviews of the area and are more revealing as to the types of ordinances adopted and treatment given them in accordance with their particular phrasing than of immutable rules which are to be applied inexorably to

all ordinances without regard to the language used. These references serve perhaps to illustrate the techniques which a legislative body may or may not choose to adopt to contain home occupations within the ambit which it thinks compatible ***100** with a residential district. At any rate, let us consider each suggested restriction.

Section 6.13 does not confine home occupations to 'customary' ones. It could have so provided, as has been done in other ordinances which have been judicially reviewed. In defining 'Accessory Buildings' section 2 refers to 'customary' uses, and hence the word was within the easy reach of the draftsman if he intended a like limitation upon home occupations. I suppose some limitation could be found in the use of the word 'home' to modify 'occupations.' I have doubts that 'home' carries the limitation 'customary' but, for discussion, let us assume it does.

What would 'customary' mean in the present setting? There are many, many home occupations; so much so, that general legislation has been adopted to subject home work to regulation and licensing by the State Department of Labor and Industry. [R.S. 34:6—120](#) et seq., N.J.S.A. Thereunder permits have been issued for some 50 specific categories of activities. Is 'customary' to be measured by reference to the state or to a more restricted area, perhaps the borough itself?

And is 'customary' a mathematical concept in this context, and if it is, does it require the conduct of beauty culture in the home to be The habitual or The usual mode of operation measured on the basis of all beauty work in the area? Bassett (p. 100) cites the milliner and the lawyer as persons engaged in customary home occupations. Today many milliners, perhaps a majority, operate independently of the home. Certainly, in this area, most lawyers so operate. Do they cease to be customary home occupations? No doubt the degree of use is a factor. [Dolan v. DeCapua](#), [13 N.J.Super. 500, 508, 80 A.2d 655 \(Law Div.1951\)](#). The practice should be sufficient to justify the observation that is not unique or rare. It should be appreciable or perhaps substantial. It should be sufficient to constitute a recognized mode of activity in the field, but it need not be the more prevalent one. It seems to me that no more can be implied in the word 'home,' either directly or through the intermediate implication therein of a requirement that it be 'customary.'

***101** Bassett (p. 101) says a manicure parlor 'probably' is not a customary use, but then observes that 'Very likely a woman hairdresser or a man barber working in their respective homes would not be complained against by

neighbors, but if the woman displayed advertising or the man a barber pole the building inspector would object.' He refers to no decisions. In fact, no case has been found by counsel or the court in which a beauty salon has been held not to be a home occupation, except upon the basis of the specific language in the ordinance. See [Dobres v. Schwartzman](#), 191 Md. 19, 59 A.2d 684 (Ct.App.1948); ****21** [Bonasi v. Board of Adjustment of Haverford Township](#), 382 Pa. 307, 115 A.2d 225 (Sup.Ct.1955); [Board of Adjustment v. Levinson](#), 244 S.W.2d 281 (Tex.Civ.App.1951).

[12] On the other hand, there is substantial evidence that a beauty salon may be a home occupation. In its bulletin No. 95, revised as of March 1955, the Small Business Administration of the United States Department of Commerce, in dealing with 'home businesses' (used in the sense of home occupations), includes 'beauty-parlors' among them. The bulletin is not part of the record, but I have judicially noticed it. The practice in New Jersey was sufficient to lead the Legislature to prohibit 'any person to sleep in or use for residential purposes any room used wholly or in part as a beauty shop,' [R.S. 45:4A—16](#), N.J.S.A.; and Rule 8 of the Board of Beauty Culture Control provides 'The entrances to beauty shops located in private residences must permit patrons to enter the shop directly from the public thoroughfare without passing through any portion of the home,' and Rule 9 provides 'No portion of licensed premises shall be used for domestic or residential purposes.' Thus the statute and rules recognize a practice of conducting beauty shops in private residences, and in fact plaintiffs hold the requisite approval.

[13] [14] Addressing the inquiry to the immediate locality, defendants offered a realtor who testified that in some 2,000 transactions he did not come upon this operation in homes. The witness' experience is not particularly revealing. More ***102** helpful would have been the experience of inspectors of the Board of Beauty Culture Control or suppliers in the beauty culture field. At any rate, the testimony shows four beauty shops presently conducted in residential districts of the borough, three antedating the ordinance and one commencing shortly after its enactment. Defendants dismiss these operations as 'nonconforming' uses, but why are they not evidential of a customary use? There was no evidence as to the total number of beauty salons in the borough in 1939 when the ordinance was adopted, but the records of the Board of Beauty Culture Control, which I have judicially noticed, show the present total to be ten. It seems to me that when four of ten are in the residential districts, the practice is sufficient to denominate it as customary. Doubtless, with urbanization and increased emphasis from the subject, the tendency is to

expand into separate establishments, but this development, as indicated above with reference to the practice of law or millinery, is not enough to destroy the customary aspect of the calling as a home occupation.

With respect to the limitation that the home occupation be not a 'business', Bassett (p. 101) cites two trial court opinions in New York not officially reported. Perhaps they turned on the phrasing of ordinances. It seems to me to be a plain contradiction in terms to say a home occupation may not be a 'business' as that word is ordinarily understood; and if thereby it is meant that a home occupation may be only an employment for another rather than self-employment, the ordinance here under consideration negates the distinction, as I have pointed out above.

The third suggested limitation, that no portion of the home be used solely for the home occupation, is not supported by any reference to authority or to practice. So long as the main use of the dwelling remains residential I see no significance in the circumstance that a part of the structure is used exclusively for the occupation. In fact, the bulletin of the Small Business Administration, cited above, specifically recommends that course, and the practice surely is commonplace ***103** among home occupations of a professional nature. It may be noted, for whatever impact it may have, that the statute relating to home work authorizes the Commissioner to require precisely such physical separation. [R.S. 34:6—129](#), N.J.S.A. The ordinance does not proscribe the practice.

****22** Nor is there anything in the ordinance which prohibits the use of equipment other than equipment usually found in the home. The borough might have so provided, as was done in the ordinances considered in [State ex rel. Kaegel v. Holekamp](#), 151 S.W.2d 685 (Mo.Ct.App.1941) and [State ex rel. A. Hynek & Sons Co. v. Board of Appeals of City of Racine](#), 267 Wis. 309, 64 N.W.2d 741, 66 N.W.2d 623 (Sup.Ct.1954), but it did not. The bulletin of the Small Business Administration, cited above, treats this factor as usual in home businesses.

It is urged that the statute relating to beauty culture and the rules of the board thereunder with regard to physical separation of the shop, minimum space (150 square feet), separate entrance (usual in cases of professional offices), equipment, and the use of a sign visible to the public (the ordinance authorizes such sign), should operate to prevent beauty culture from being a home occupation. Support for that view is found in [Dobres v. Schwartzman](#), *supra* (59 A.2d, at

page 686) where, however, the primary basis for the judgment was the language of the ordinance itself. I am unable to accept that view because, if voluntary measures of such character do not deprive the operation of its status as a home occupation, I cannot understand why compulsory measures of no different character should have that consequence.

It boils down to this: The borough could have adopted any or all of a number of techniques to confine home occupations in such manner as, in its sole legislative judgment, would render them compatible with a residential district. The decision is wholly legislative, and as such is beyond the initiative of the board of adjustment or the courts. The borough was content to circumscribe the operations by the restrictions that they be incidental to the main purpose of *104 a residence, be occupant-conducted, and with a sign of limited size. It could have done more, but it did not; and I could not add to the restraints without exercising a legislative power which is not mine.

[15] This is not to deny or limit the legislative authority of the municipality. On the contrary, the greatest latitude in this area may be conceded. [Scarborough Apartments, Inc., v. City of Englewood](#), 9 N.J. 182, 87 A.2d 537 (1952). But the legislative power must be exercised by the municipality itself; it may not ask the courts to write a better or a different

ordinance. And it should speak clearly, [Hrycenko v. Board of Adjustment, Elizabeth](#), 27 N.J.Super. 376, 99 A.2d 430 (App.Div.1953), especially in view of the predicament of the citizen who seeks in good faith to utilize his property. His right so to do should not depend upon the outcome of litigation after the event in which a provision, which he apparently fully meets, assumes a new and different significance by a process of refined interpretation. And this should be so without reference to the principle of strict construction which has been held to apply to zoning ordinances. 8 McQuillin, *Municipal Corporations* (3rd ed. 1950), sec. 25.72, p. 123; 1 Yokley, *Zoning Law and Practice* (2d. ed. 1953), sec. 3, p. 4; [City of Newark v. Martin](#), 19 N.J.Super. 328, 88 A.2d 362 (Cty.Ct.1952), reversed on other grounds, 22 N.J.Super. 32, 91 A.2d 497 (App.Div.1952), and judgment reinstated sub nom. [City of Newark v. Pulverman](#), 12 N.J. 105, 95 A.2d 889 (1953); cf. [Marini v. Borough of Wanaque](#), supra (37 N.J. Super. at page 36, 116 A.2d 813).

The determination of the board of adjustment is reversed and the issuance of the building permit is affirmed.

All Citations

41 N.J.Super. 89, 124 A.2d 14

2006 WL 3153145

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.Superior Court of New Jersey,
Appellate Division.

Matt OUTDOOR, Plaintiff-Appellant,

v.

UPPER SADDLE RIVER BOARD OF
ADJUSTMENT and Borough of Upper
Saddle River, Defendants-Respondents.

Argued Oct. 12, 2006.

|

Decided Nov. 6, 2006.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Docket No. BER-L-6908-03.**Attorneys and Law Firms**[Paul Kaufman](#) argued the cause for appellant (Kaufman, Bern
& Deutsch, attorneys; Mr. Kaufman, of counsel; Mr. Kaufman
and Marilyn Gittleman, on the brief).[Gerald R. Salerno](#) argued the cause for respondent Upper
Saddle River Board of Adjustment (Aronsohn, Weiner &
Salerno, attorneys; Mr. Salerno, on the brief).[Robert T. Regan](#) argued the cause for respondent Borough of
Upper Saddle River.Before Judges [WEFING](#), C.S. FISHER and [YANNOTTI](#).**Opinion**

PER CURIAM.

***1** The Upper Saddle River Board of Adjustment denied plaintiff Matt Outdoor's application for the approvals it required to erect a billboard on a 0.54 acre triangular shaped lot¹ on Route 17 in the Borough's highway retail and commercial district. Because the Borough's zoning ordinance at the time prohibited billboards, plaintiff initially sought a use variance. When that application was denied, plaintiff filed this action in lieu of prerogative writs.

While this suit was pending, the Borough amended its ordinance, rendering billboards a conditional use in the highway retail and commercial district. That amendment warranted a remand to the board of adjustment for reconsideration.

The board of adjustment thereafter denied the application for a conditional use variance, causing plaintiff's filing of an amended complaint, which alleged that the amended ordinance was impermissibly vague and unconstitutional. By way of a written decision, Judge Menealos W. Toskos upheld the board's denial of the variance; he also upheld all but two of the conditions set forth in the amended ordinance.²

We affirm substantially for the reasons set forth in Judge Toskos's thoughtful and comprehensive written opinion, adding only the following comments.

When a local zoning law infringes on a protected fundamental right such as free speech "it must be narrowly drawn and must further a sufficiently substantial governmental interest." *Schad v. Bor. of Mt. Ephraim*, 452 U.S. 61, 68, 101 S.Ct. 2176, 2182, 68 L. Ed.2d 671, 680 (1981). This test requires that a reviewing court assess "the substantiality of the governmental interests asserted" and consider whether those interests "could be served by means that would be less intrusive on free speech." *Bell v. Twp. of Stafford*, 110 N.J. 384, 391-92 (1988). In *Bell*, the Court held that "preserving aesthetics" and "promoting traffic safety" are legitimate governmental interests that would permit a municipality to tailor the use of billboards within its borders. *Id.* at 396. As Judge Toskos recognized, the amended ordinance by no means intends or has the effect of excluding billboards from the municipality, as was the chief concern in cases such as *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L. Ed.2d 800 (1981) and *Bell v. Tp. of Stafford*, *supra*, but instead has as its aim the regulating of billboards so as to serve the legitimate governmental purposes of preserving neighborhood aesthetics and vindicating traffic safety concerns. As the judge observed, the amended ordinance is content-neutral and the restrictions it imposes on billboards in the municipality are narrowly tailored in order to satisfy these governmental concerns without infringing free speech and expression rights. The amended ordinance's regulation of the physical character of billboards, as Judge Toskos correctly held, presents only an incidental burden on speech.

***2** Affirmed.

All Citations

Not Reported in A.2d, 2006 WL 3153145

Footnotes

- 1 There are two buildings on the lot: a one-story building and a 625 square foot garage, which are used by an auto body retail store.
- 2 The amended ordinance declares that billboards “shall be permitted as a conditional use” in the highway retail and commercial district subject to the following requirements:
 - (1) The minimum lot area of the parcel proposed for the placement of a billboard shall be two (2) acres.
 - (2) The parcel shall have direct frontage on New Jersey State Highway Route 17.
 - (3) The minimum setback of the billboard from any property line or right-of-way line shall be a distance equal to the proposed height of the billboard.
 - (4) The maximum sign face of a billboard shall be five hundred (500) square feet.
 - (5) The base and support structure of the billboard shall be of a color that is compatible with the immediate area so as to make the structure as unobtrusive as possible.
 - (6) Lighting for the billboard shall be designed to minimize impacts to the surrounding area.
 - (7) The maximum permitted height of a billboard shall be fifty (50) feet.
 - (8) There shall be no more than one (1) billboard on a parcel, provided, however, that the billboard may be double-faced.

Judge Toskos determined that conditions (5) and (6) were not sufficiently “certain” or “definite” and concluded that they did not conform with [N.J.S.A. 40:55D-67\(a\)](#) and were invalid.

2025 WL 1638848

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

**GARDEN STATE OUTDOOR,
LLC**, Plaintiff-Appellant,

v.

EGG HARBOR TOWNSHIP, Egg Harbor
Township Planning Board, Defendants-Respondents.

DOCKET NO. A-2830-23

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Argued March 12, 2025

|

Decided June 10, 2025

On appeal from the Superior Court of New Jersey, Law
Division, Atlantic County, Docket No. L-1171-23.

Attorneys and Law Firms

[Justin D. Santagata](#) argued the cause for appellant (Cooper
Levenson, attorneys; [Justin D. Santagata](#) and Samantha
Edgell, on the briefs).

[Todd J. Gelfand](#) argued the cause for respondents (Barker,
Gelfand, James & Sarvas, PC, and [Marc Friedman](#), attorneys;
[Todd J. Gelfand](#), Jeffrey Sarvas, and [Marc Friedman](#), on the
brief).

Before Judges Currier, [Paganelli](#) and [Torregrossa-O'Connor](#).

Opinion

PER CURIAM

***1** Plaintiff Garden State Outdoor, LLC (Garden State)
appeals from the trial court's order of May 15, 2024: (1)
granting defendants' cross-motion for summary judgment
declaring Section 225-63C(4)(c) constitutional under the
Constitutions of the United States and New Jersey; (2)
upholding defendant Egg Harbor Township Planning Board's
(Planning Board) denial of Garden State's application for
variance relief pursuant to [N.J.S.A. 40:55D-70\(c\)\(2\)](#); and
(3) denying Garden State's request to require the Planning
Board to approve its application with reasonable conditions,
and for defendant Egg Harbor Township (Township) to

issue all necessary permits.¹ In conducting our de novo
review of the grant of summary judgment, we reverse the
trial court's determination that defendants sustained their
burden regarding the constitutionality of Section 225-63C(4)
(c). Consequently, we similarly vacate the remainder of the
order founded on that constitutional determination. We offer
no opinion regarding the actual constitutional validity of the
ordinance; instead, we only opine that based on the record,
summary judgment was incorrectly granted.²

We derive the facts and procedural history from Garden
State's complaint, the motion record, and the Planning Board's
hearings. In July 1993, the Township adopted Section 225-2
that set out the general purpose of the Township's zoning
ordinances. The introductory section provides:

It is the purpose of this chapter to
provide control in the interest of
orderly growth, development and land
use in the Township ... consistent with
existing development and with the
objectives, principles and standards
deemed beneficial to the interests
and welfare of the population of the
Township; to protect the established
character and the social and economic
benefits of both private and public
property; to secure safety from fire,
panic, flood and other dangers;
to provide adequate light, air and
convenience of access; to prevent
overcrowding of land or buildings;
to avoid undue concentration of
population; to conserve the value of
the buildings; to enhance the value
of land throughout the Township; and
to implement the goals and objectives
of the Pinelands Comprehensive
Management Plan.

As part of the Township's zoning scheme, Section 225-63
provides:

The following signs shall be permitted in business,
commercial and industrial districts as an accessory
structure to the principal use:

....

B. Freestanding signs, subject to the following conditions and regulations:

....

(8) A changeable message sign is one where the characters, letters or illustrations can be changed or rearranged without altering or changing the face of the sign. A changeable message sign cannot be animated with any flashing colors. Each changeable message shall be fixed for a minimum of 10 seconds before changing to the next message. After dusk, a dimmer light shall be used. No change in the message is permitted from 10:00 p.m. to 6:00 a.m.

***2**

C. Billboards and off-premises advertising signs shall be additional permitted principal uses in the GC, M-1 and RCD Zoning Districts, subject to the following regulations:

....

(4) Billboards or off-premises advertising signs shall not be located:

(a) Within 50 feet of a structure on the same lot.

(b) Within 500 feet of any residential district.

(c) Within 1,000 feet of an interchange or intersection.

According to its complaint, Garden State leases property in the Township “for purposes of erecting a digital billboard.” Further, in December 2022,

Garden State applied to the [Planning] Board to erect a digital billboard at the Property of 36 feet in height, where 70 feet is permitted, and more than 800 feet away from any residential use (“Application”). The Application required only minor bulk variance relief: (i) distance from an intersection, 350 feet proposed and 1,000 feet required; (ii) change in messaging every 8 seconds between 10:00[p.m.] and 6:00[a.m.]; (iii) front

yard setback for utility easement; and (iv) distance from an existing structure (solar panels), 8 feet proposed and 50 feet required.

Garden State stated the Planning “Board granted every bulk variance except dist[an]ce to an intersection.”

Garden State claimed the Planning Board members gave conflicting justifications for the 1000-foot intersection distance requirement. It alleged “the [Planning] Board members and [the Planning Board's] professionals consistently stated that they were concerned with ‘safety,’ ” but “conceded ... they were not even sure that ‘safety’ was the reason the 1,000-foot restriction existed.” Garden State claimed “[t]he [Planning] Board planner, for example, stated the 1,000-foot restriction was a ‘siting’ issue, not a ‘safety’ issue.”

Garden State asserted that its “engineer testified that the digital billboard did not create any ‘safety’ issue at the nearby intersection and presented data supporting that conclusion.” However, “[t]he [Planning] Board's engineer rejected that conclusion without any supporting data of his own.”

Further, Garden State alleged that “[t]he 1,000-foot restriction for intersections only applie[d] to digital billboards and other ‘off-premises advertising.’ ” It noted “ ‘[o]n-premises advertising’ and other signage can be within 1,000 feet of an intersection even though, by the [Planning] Board's and its professionals’ assertions, they would create the same ‘safety’ concerns.”

In addition, Garden State asserted that “[p]rior to adoption of the [Planning] Board's resolution of denial, [it] submitted a written request for the [Planning] Board to reconsider its denial on the basis that it violated the First Amendment and New Jersey's analogous free speech protection(s).” Our review of the Planning Board's hearing transcript similarly reveals Garden State raised constitutional concerns with the Planning Board during the hearing concerning its application.

In its complaint, Garden State sought “[a]n order declaring the 1,000-foot restriction unconstitutional.” In response to Garden State's complaint, defendants filed an answer. The trial court issued a case management order, providing a briefing schedule. Garden State filed its brief, and defendants filed a motion to dismiss.

*3 On April 12, 2024, the trial court heard the parties' oral arguments. During the hearing, the parties discussed whether the motion was for summary judgment or for dismissal. Nevertheless, after considering the parties' arguments, the court reserved its opinion.

On May 15, 2024, the trial court executed the order accompanied by a twenty-two-page written opinion. The court addressed Garden State's constitutional challenge to the ordinance. First, the court determined the ordinance was "content neutral" because "the language of the ordinance states that the [d]istance [r]egulation requirement applie[d] to all billboards and off-premises advertising signs regardless of their content."

Therefore, noting "[c]ontent-neutral laws must pass intermediate scrutiny in order to be deemed constitutional," the trial court stated the Township had "the burden of demonstrating that[:] (1) the ordinance serve[d] a substantial or important government interest; and (2) the ordinance [wa]s a reasonable fit that does not burden more speech than necessary," citing [U.S. v. O'Brien](#), 391 U.S. 367, 377 (1968).

The trial court found "that traffic safety, siting, and aesthetics [we]re important government interests promoted by" the ordinance. The court relied on the "interests ... set forth in [the Township's] Code [Section] 225-2, which la[id] out the purpose of the Zoning Chapter of the Code." The court stated that Code Section 225-2 "demonstrate[d] that the Township ha[d] a longstanding need to maintain these governmental interests," and found "that billboards, by their very nature, can be perceived as an aesthetic harm."

Moreover, the trial court applied the [Clark/Ward](#)³ test and found: (1) it was undisputed "the ordinance [wa]s content neutral"; (2) "there [we]re substantial government[] interest[s] promoted by the ordinance: traffic safety, siting, and aesthetics," and "the additional setback requirement advances the important interest of promoting open space, reducing road congestion, and promoting traffic safety by limiting the number of signage close to intersections"; and (3) "[d]efendants demonstrate[d] that its ordinance le[ft] open alternative channels of communication" "includ[ing] on-premises signs, internet advertising, direct mail, radio, newspapers, television, advertising circulars, advertising flyers, commercial vehicle sign advertising, and public transportation advertising," citing [Interstate Outdoor](#)

[Advertising, L.P. v. Zoning Board of Mount Laurel](#), 706 F.3d 527, 535 (3d. Cir. 2013).

Therefore, applying the summary judgment standard, the trial court found "there [wa]s no issue of material fact as to the constitutionality of ... [Section] 225-63C(4)(c)."

On appeal, Garden State contends: (1) "the trial court's citation to the 'purposes' section of the [d]istance [r]egulation is not, by itself, [the] competent evidence" required by [E & J Equities, LLC v. Board of Adjustment of the Township of Franklin](#), 226 N.J. 549, 557 (2016); and (2) it presented evidence "that the proposed billboard was 'safe' for traffic and was not aesthetically different than other signage in the zone," and "[t]here was no competent evidence to the contrary."

*4 We review the grant of summary judgment de novo, applying the same legal standards as the trial court. [Green v. Monmouth Univ.](#), 237 N.J. 516, 529 (2019).⁴ Under [Rule 4:46-2\(c\)](#),

[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

The right to freedom of speech is protected in the Constitutions of the United States, Amendment I, and the State of New Jersey, Article I, Paragraph 6. "[B]illboards ... are a medium of communication, and any regulation of that medium may not transgress" those protections. [E & J Equities](#), 226 N.J. at 556-57.

Nevertheless, “[b]illboards of any kind are subject to considerable regulation. Regulations on billboards are justified because ‘signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.’ ” *Id.* at 567 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994)).

The New Jersey Supreme Court “conclude[d] that an ordinance or statute regulating signs, including billboards of any form, and affecting commercial as well as noncommercial speech should be examined in accordance with the *Clark/Ward* time, place, and manner standard.” *Id.* at 580.

The New Jersey Supreme Court noted ordinances carry “a presumption of validity, [citing] *Bell [v. Stafford]*, 110 N.J. [384], ... 394 [(1988) however,] when faced with a constitutional challenge to its legislation,” a governmental entity must establish the regulation is: (1) “content neutral,” (2) “narrowly tailored to serve a recognized and identified government interest,” and (3) “that reasonable alternative channels of communication exist to disseminate the information sought to be distributed.” *E & J Equities*, 226 N.J. at 582 (first citing *Ward*, 491 U.S. at 791; and then citing *Clark*, 468 U.S. at 293).

*5 In addressing the “identified governmental interest,” the New Jersey Supreme Court stated “aesthetics and the safety of motorists ... have long been recognized as legitimate and substantial government interests, particularly related to billboards.” *Id.* at 583 (citing *Metromedia v. City of San Diego*, 453 U.S. 490, 507-08 (1981)). Indeed, the Court had no “quarrel with the proposition that aesthetics and public safety are substantial government interests, particularly when the medium of expression is an outdoor, off-premises advertising device.” *Id.* at 585 (citing *Metromedia*, 453 U.S. at 507-08).

Nevertheless, “when a governmental entity restricts speech, it must do more than simply invoke government interests that have been recognized over time as substantial. In other words, there must be a modicum of support for the invoked government interest.” *Id.* at 583. “A governing body seeking to restrict expression cannot simply invoke those interests with scant factual support informing its decision-making and expect to withstand a constitutional challenge.” *Id.* at 585.

Defendants argue *E & J Equities*’s “modicum of support” requirement is limited to “the proofs necessary for the adoption of [a] new ordinance,” and is inapplicable here

because this matter “concerned a variance from an existing ordinance.” In addition, defendants focus on the Court’s use of the phrase “[a] governing body seeking to restrict,” and distinguishes this matter because here “[d]efendants were not ‘seeking’ anything; rather it was [Garden State] who was ‘seeking’ a variance from an already existing ordinance.” Further, defendants contend the Planning Board does “not have the power to determine the constitutionality of [an] ordinance,” citing *N.J.S.A. 40:55D-25*. Finally, defendants assert “case law ... demonstrates that looking to the ‘purposes’ section of an existing ordinance ... is the proper method identifying the substantial government interest and the constitutionality of the restriction.” We are not persuaded.

First, there is nothing in the Court’s decision that would confine the “modicum of support” requirement solely to new ordinances. Instead, recognizing the constitutional importance of free speech, a governmental entity must provide a “modicum of support” to sustain its restriction. Indeed, to interpret the Court’s direction otherwise could leave constitutionally infirm ordinances in place.

Second, defendants’ argument regarding which party was “seeking” relief is misguided. The Township’s ordinance certainly sought to restrain Garden State’s freedom of speech on its leasehold.

Third, Garden State’s complaint sought the trial court, not the Planning Board, to invalidate the ordinance as unconstitutional. We recognize Garden State’s comments during the Planning Board’s hearing and its letter after the hearings, addressing the constitutional validity of the ordinance, foreshadowed the impending lawsuit, but Garden State did not request the Planning Board to usurp its statutory powers.

Lastly, defendants cite to *Metromedia*, *Hucul Advertising, LLC v. Chart Township of Gaines*, 748 F.3d 273, 277-78 (6th Cir. 2014), and *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005), for the proposition that because we are concerned with an existing ordinance, we only need to consider the Township’s “codified statements [to conclude there is] sufficient evidence of ‘substantial governmental interests’ as a matter of law.” We disagree.

Metromedia “involve[d] the validity of an ordinance of the city of San Diego, Cal., imposing substantial prohibitions on the erection of outdoor advertising displays within the city.” 453 U.S. at 493. The stated “purpose was ‘to eliminate

hazards to pedestrians and motorists brought about by distracting sign displays’ and ‘to preserve and improve the appearance of the City.’ ” *Ibid.*

*6 The United States Supreme Court stated there could be no “substantial doubt that the twin goals that the ordinance seeks to further -- traffic safety and the appearance of the city -- are substantial governmental goals. It [wa]s far too late to contend otherwise with respect to either traffic safety ... or [a]esthetics.” *Id.* at 507-08.

Nonetheless, the Court tested the reasonableness of the assertion that “billboards are real and substantial hazards to traffic safety,” *id.* at 509; and noted “[a]esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose.” *Id.* at 510. Therefore, the Court did not merely look to the stated purpose of the ordinance, but instead analyzed the stated purposes.

Further, in *Hucul*, there was no dispute “that the asserted governmental interests [we]re significant,” *Hucul*, 748 F.3d at 278; and in *Prime Media*, “[t]he parties d[id] not dispute” the “legitimate governmental interests— aesthetics and traffic safety.” *Prime Media*, 398 F.3d at 819. Therefore, defendants’ reliance on these cases is misplaced because the asserted purposes were not in dispute.

Having dispensed with defendants’ arguments regarding the applicability of *E & J Equities*, and its other arguments, we consider, under *Rule 4:46-2*, the *E & J Equities*’s “modicum of support” requirement—the Township’s burden of persuasion—to determine if there was a “genuine issue as to any material

fact challenged and [if defendants were] entitled to a judgment or order as a matter of law.” *R. 4:46-2(c)*.

Applying the summary judgment standard, defendants’ sole reliance on the generic introduction to the zoning ordinances fails to satisfy the requisite support. Indeed, that type of reliance was rejected by the New Jersey Supreme Court. *See E & J Equities*, 226 N.J. at 583 (“[W]hen a governmental entity restricts speech, it must do more than simply invoke government interests that have been recognized over time as substantial.”). Further, defendants’ reliance on the stated purpose, without more, falls short of even the “scant factual support” the Court warned of in *E & J Equities*. *Id.* at 585.

In addition, we note Garden State proffered evidence to support the notion that the Township’s interests, which Garden State asserts are safety and aesthetics, were inapplicable to Garden State’s application. While the trial court did not assess that evidence in its opinion regarding the constitutional argument, giving Garden State all reasonable inferences, it raises a material dispute of fact under *Rule 4:46-2*, and provides further support for our conclusion that summary judgment was incorrectly granted to defendants.

Therefore, we conclude defendants failed to sustain their burden, as a matter of law, for summary judgment and reverse the order.

Reversed.

All Citations

Not Reported in Atl. Rptr., 2025 WL 1638848

Footnotes

- 1 We refer to the Planning Board and the Township collectively as defendants.
- 2 Given our conclusion that summary judgment was incorrectly granted, we need not reach the trial court’s analysis of Garden State’s application for a variance from the ordinance. We offer no opinion on the merits of Garden State’s application.
- 3 *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

- 4 The trial court converted defendants' motion to dismiss, [Rule 4:6-2\(e\)](#), to a motion for summary judgment, [Rule 4:46-2](#). Conversion is permissible under [Rule 4:6-2\(e\)](#) "[i]f ... matters outside the pleading are presented to ... the court ... and all parties [are] given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion." Garden State asserts [Rule 4:6-2\(e\)](#) was not complied with. The assertion is of no moment considering our opinion. Nonetheless, we note the [Rule](#)'s notice provisions must be complied with and the submission of certifications serves to convert a [Rule 4:6-2\(e\)](#) dismissal motion into a motion for summary judgment. See [Nobrega v. Edison Glen Assocs.](#), 167 N.J. 520, 526 (2001).