SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.*

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CONSTITUTIONAL LAW — FIRST AMENDMENT — MUNICIPAL ZONING ORDINANCE PROHIBITING BILLBOARDS IS SUBJECT TO FIRST AMENDMENT GUARANTEES—*Bell v. Township of Stafford*, 110 N.J. 384, 541 A.2d 692 (1988).

Wesley K. Bell owned and lawfully constructed a number of billboards on two lots (lot 26A and lot 8) located along Route 72 in the Township of Stafford, New Jersey. 110 N.J. at 388, 541 A.2d at 694. In the early 1970's, the Department of Transportation (DOT) condemned a portion of lot 26A and subsequently cut down a billboard located on the property. At the same time, the DOT mistakenly cut down a billboard located on lot 8, which had not been condemned. Despite an order from the township not to do so, Bell reconstructed a billboard on the uncondemned portion of lot 26A. Bell also attempted to reconstruct the billboard on lot 8, but was ordered by the township to halt construction until a building permit had been obtained. *Id.*, 541 A.2d at 695.

The township filed two separate actions against Bell in the New Jersey Superior Court, Chancery Division, claiming that building permits were needed to construct and maintain billboards on lot 26A and lot 8. The same judge heard both actions and in each case held for the township. Bell subsequently filed three building permit applications, one for each of the billboards on lot 26A and lot 8, and the third for the relocation of a billboard on a lot which he had recently purchased. In the interim, the township amended its local ordinance to prohibit all off-premises billboards within any zoning district in Stafford. Based in part on the amended ordinance, Bell's requests for the three building permits were denied.

Bell alleged that the ordinance was unconstitutional on its face. The trial court ruled against Bell. The appellate division, in an unpublished per curiam opinion, reversed and held that the ordinance was unconstitutional. *Id.* at 389, 541 A.2d at 695. The Supreme Court of New Jersey granted certification and affirmed the decision of the appellate division. *Id.* at 387, 541 A.2d at 694.

Justice Handler, writing for a unanimous court, first addressed the township's claim that the doctrine of "strict necessity" prohibited review of the constitutionality of the ordinance. *Id.* at 389, 541 A.2d at 695 (quoting *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947)). Pursuant to that doctrine, Justice Handler noted that a court is precluded from disposing of a case

on constitutional grounds when a nonconstitutional basis of disposition exists. *Id.* Recognizing that the township relied on the billboard ban in denying Bell his building permits, the court concluded that the constitutional validity of the ordinance was crucial to resolution of the dispute. *Id.* at 390, 541 A.2d at 696.

The court proceeded to determine the appropriate standard of review applicable in cases where a zoning law infringes upon the fundamental right of free speech and expression. *Id.* at 391, 541 A.2d at 696. Relying on precedent established by the United States Supreme Court, Justice Handler stated that the law must be "narrowly drawn and must further a sufficiently substantial governmental interest." *Id.* (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981)). Noting that the preservation of property values and aesthetics is a legitimate governmental goal, Justice Handler posited that a municipal sign ordinance must be closely "tied to a compelling municipal interest a [sic] well as to the uses permitted in a given zone." *Id.* at 393, 541 A.2d at 697 (quoting *State v. Miller*, 83 N.J. 402, 414, 416 A.2d 821, 827 (1980)). Additionally, the justice articulated that a municipality must also demonstrate that its ordinance is no more intrusive than necessary in advancing a governmental interest. *Id.* at 395, 541 A.2d at 698. Justice Handler further noted that a presumption of validity exists as to the constitutionality of a municipal ordinance. *Id.* at 394, 541 A.2d at 698. He stated, however, that if the ordinance impinges on a fundamental right, the presumption of validity disappears and the burden shifts to the municipality to prove its legitimate governmental interests. *Id.* at 395, 541 A.2d at 698.

Noting that the ordinance affected both commercial and noncommercial forms of expression, the court determined that the township's ordinance drastically encroached on Bell's first amendment freedom of speech. *Id.* Thus, the court determined that the presumption of the ordinance's validity was lost. *Id.* at 395-96, 541 A.2d at 698-99. Furthermore, the court found the record devoid of any governmental objectives or factual underpinnings supporting the township's ban on billboards. *Id.* at 396, 541 A.2d at 699. Although it hypothesized some important governmental objectives, the court concluded that the township failed to show that a total ban was the least restrictive means available to serve such an interest. *Id.* at 396-97, 541 A.2d at 699. Further, the court determined that the township had likewise failed to show that alternate means of communication were

available. *Id.* at 397, 541 A.2d at 699. Thus, the court determined that the zoning ordinance was intrusive and overbroad and accordingly declared it facially unconstitutional. *Id.* at 398, 541 A.2d at 700.

While holding the zoning ordinance unconstitutional on its face, the New Jersey Supreme Court concluded that it is "the existence of a demonstrable legitimate governmental objective genuinely served by such a ban" that is determinative of a ban's validity, not its scope. *Id.* at 396, 541 A.2d at 699. Thus, the court suggested that satisfying the compelling governmental interest test in an action involving a municipal-wide ban may be possible, but highly improbable, due to the heightened level of scrutiny applied by the court in analyzing such an enactment. Hence, by striking down the statute, the court recognized the proper scope of first amendment protection. Emphasizing the broad power and authority vested in each municipality to enact their own zoning schemes, the court demonstrated the need for such power to conform to constitutional guarantees.

Anne M. Dalena

SCOPE OF REVIEW—LIMITATIONS—APPELLATE REVIEW OF TRIAL COURT'S FINDINGS REGARDING CONSUMER FRAUD ACT IS LIMITED—*Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063 (1988).

While attending the 1984 New York Boat Show, Philip Meshinsky, owner of a high performance boat, met Gerald Berton, the president of Nichols Yacht Sales, Inc. (Nichols). 110 N.J. at 467, 541 A.2d at 1064. Nichols described its business as the "exclusive distributors of high-performance boats" in the tri-state area and utilized the well-recognized "Hawk Racing Team" trademark in its advertisements. Although Berton had experience in high-powered boating, he was not an authorized representative of Hawk products. *See id.* at 471, 541 A.2d at 1066. At Berton's suggestion, Meshinsky placed a deposit on a Hawk-powered speedboat. *Id.* at 468, 541 A.2d at 1064-65. He intended to finance the remaining balance through a loan. Contrary to Meshinsky's request, Nichols submitted the loan application

prior to Meshinsky's acceptance of the boat. *Id.*, 541 A.2d at 1065. After the bank denied the loan application, one of Nichols's employees falsified Meshinsky's signature on a second loan application and misrepresented the terms of the sale. *Id.* at 468-69, 541 A.2d at 1065.

Meshinsky initially refused delivery of the boat because it did not perform at the level of speed anticipated by the contract. *Id.* at 469, 541 A.2d at 1065. Based on Berton's assurances that performance would improve, Meshinsky accepted delivery. When performance did not improve, Meshinsky refused to make loan payments and rescinded the contract. Subsequently, he purchased a comparable boat at a greater price. *Id.* at 469-70, 541 A.2d at 1065.

Meshinsky sued Nichols for breach of contract and alleged violations of the Consumer Fraud Act (Act). *Id.* at 470, 541 A.2d at 1065. The trial court, in a non-jury trial, awarded judgment on Meshinsky's contract claim, but dismissed his claims for cover damages and prejudgment interest. *Id.*, 541 A.2d at 1065-66. Further, the court found that Nichols's commercial sales practices were not unconscionable, and therefore, rejected Meshinsky's claim for treble damages under the Act. *Id.*, 541 A.2d at 1066. Additionally, the trial court found that the installment loan was between Nichols and the bank, and that Meshinsky had failed to prove that he had suffered any general or specific loss from Nichols's conduct in obtaining the loan.

In an unpublished opinion, the appellate division held for the plaintiff on all counts. The appellate division concluded that the plaintiff was entitled to Uniform Commercial Code (UCC) "cover" damages under N.J. STAT. ANN. § 12A:2-712 (West 1962) by virtue of his having purchased another boat. *Meshinsky*, 110 N.J. at 470, 541 A.2d at 1066. The court further determined that the plaintiff was entitled to prejudgment interest. *Id.* at 47-71, 541 A.2d at 1066.

The appellate division next analyzed the trial court's denial of Meshinsky's consumer fraud claims. *Id.* at 471, 541 A.2d at 1066. The court determined that Nichols's use of the "Hawk Racing Team" trademark and its conduct concerning the second loan application constituted unconscionable commercial activities. The appellate division, therefore, found that Nichols violated the Act and granted Meshinsky treble damages. On appeal, the New Jersey Supreme Court upheld the appellate division's award of "cover" damages and prejudgment interest, but re-

versed its decision to grant recovery under the Act. *Id.* at 479, 541 A.2d at 1070.

Justice Stein, writing for a unanimous court, first addressed whether the appellate division properly awarded damages under the Act. *Id.* at 472, 541 A.2d at 1066. The court noted that the legislature originally intended for the Act to be under the exclusive jurisdiction of the Attorney General. *Id.*, 541 A.2d at 1067. Justice Stein explained that the Attorney General must show that the Act was violated, but does not have to prove that the consumer had been "misled, deceived or damaged." *Id.* at 473, 541 A.2d at 1067. Under the 1971 amendment to the Act, the court stated that a private plaintiff must show that an "ascertainable loss" resulted from the seller's unlawful conduct. *Id.*

Determining that the appellate division exceeded its scope of review, the supreme court adopted the trial court's findings. *Id.* at 474-75, 541 A.2d at 1068. Justice Stein stated that there was insufficient evidence to demonstrate that Nichols's usage of the trademark had significantly influenced Meshinsky's decision to purchase the boat. *Id.* The court also affirmed the trial court's finding that Meshinsky had suffered no ascertainable loss from the loan transaction or from Nichols's use of the "Hawk Racing Team" trademark. *Id.* at 475, 541 A.2d at 1068.

The supreme court, however, affirmed the appellate division's allowance of "cover" damages, noting that the plaintiff satisfied all of the requirements under the UCC. *Id.* at 477-78, 541 A.2d at 1069-70. The court also affirmed the appellate division's grant of prejudgment interest to Meshinsky, finding that the trial court abused its discretion in denying the award. *Id.* at 478, 541 A.2d at 1070.

The *Meshinsky* court gave proper deference to the trial court's findings in denying plaintiff recovery under the Consumer Fraud Act. Although a reviewing court may be compelled to grant relief by reinterpreting a lower court's findings, it may only do so within the proper boundaries of appellate review. Recognizing these boundaries, the court correctly awarded damages under the applicable provisions of the UCC where it determined that the trial court abused its discretion.

Louise Elizabeth Xifo

EMPLOYMENT LAW—WORKERS' COMPENSATION ACT—POLICY DIRECTING EMPLOYEES TO PARK IN SPECIFIED AREA IS SUFFICIENT TO CREATE EMPLOYER CONTROL FOR THE PURPOSE OF DETERMINING WHETHER INJURIES SUSTAINED BY AN EMPLOYEE AROSE OUT OF A RISK INCIDENTAL TO EMPLOYMENT—*Livingstone v. Abraham & Straus, Inc.*, 111 N.J. 89, 543 A.2d 45 (1988).

Abraham & Straus (A&S), a regional retail store, was a main, or "anchor," tenant at the Monmouth Mall. 111 N.J. at 91, 543 A.2d at 46. Although A&S neither owned nor maintained any specific portion of the mall parking lot, its customers and employees had general access to the facilities pursuant to A&S's lease agreement with the mall. To further benefit its business, A&S desired that the parking spaces near the store remain available for customers. *Id.*, 543 A.2d at 47. Thus, A&S instructed its employees to park their cars at the lot's outermost boundary. A&S employee Marlene Livingstone arrived at the mall for work one morning and, in compliance with A&S's instructions, parked her car at the outer fringe of the lot. *Id.*, 543 A.2d at 46. As she walked across the lot towards A&S's employee entrance, Livingstone was struck by an automobile operated by a fellow employee and sustained injuries.

Livingstone filed a workers' compensation claim for her injuries. *Id.* at 92, 543 A.2d at 47. The Division of Workers' Compensation denied her claim, finding that her accident was not compensable. The compensation judge determined that A&S did not have actual or exclusive control over the parking facilities. *Id.* at 92-93, 543 A.2d at 47. Therefore, because the injuries did not arise out of the ordinary course of employment, as defined in N.J. STAT. ANN. § 34:15-36 (West 1988) (Act), Livingstone's injuries were not compensable. *Livingstone*, 111 N.J. at 92-93, 543 A.2d at 47. A divided appellate division reversed, rejecting the compensation judge's property-based interpretation of control as too narrow. *Id.* at 93, 543 A.2d at 47. The court held that the parking directive, as a form of control exercised over employees, was a "determinative factor" in its decision. *Id.* at 93-94, 543 A.2d at 48. A&S appealed, and a divided supreme court affirmed the judgment of the appellate division. *Id.* at 106, 543 A.2d at 54.

Writing for the majority, Justice Stein declined to adopt the appellate division's "control over the employee" standard and

instead shifted the court's focus to the issue of A&S's control over the premises. *Id.* at 103-06, 543 A.2d at 53-54. Justice Stein began by reviewing the broad remedial objective of the New Jersey Workers' Compensation Act, and acknowledged that the problem with achieving this objective was that the original Act did not contain a definition of employment. *Id.* at 95, 543 A.2d at 49. Thus, it was left to the court to develop principles capable of properly identifying work-related injuries. *Id.* at 95-96, 543 A.2d at 49. To this end, the court created the "going and coming" rule. *Id.* at 96, 543 A.2d at 49. The court stated that the rule was developed by the judiciary for the purpose of determining compensability and ordinarily precluded the awarding of benefits for "injuries sustained during routine travel to and from an employee's regular place of work." *Id.* (quoting *Watson v. Nassau Inn*, 74 N.J. 155, 158, 376 A.2d 1215, 1217 (1977)). The majority stated, however, that the rule has limited application as a result of numerous exceptions. *Id.* at 96-98, 543 A.2d at 49-50. Contemporaneous with the judiciary's struggle to arrive at a proper application of the "going and coming" rule, several courts held that parking lots "owned, maintained, or provided by employers" were part of an employer's premises. *Id.* at 99, 543 A.2d at 51.

Justice Stein also found persuasive the 1979 amendment to the Act which restricted the applicability of the "in the course of employment" provision and thus eliminated compensation for most minor partial disabilities. *Id.* at 100, 543 A.2d at 51. The legislation, however, did not address the principle of control. *Id.* at 101-02, 543 A.2d at 52-53. Thus, the court held that given the comprehensive nature of the legislation, this overt silence constituted an implied assent to the legitimacy of the doctrine of an employer's control over employees in parking lots. *Id.* at 102-03, 543 A.2d at 52-53.

Concluding that employee injuries in employer controlled parking lots were within the "course of employment" requirement under the Act and its 1979 amendments, Justice Stein next addressed whether A&S controlled the lot. *Id.* at 104, 543 A.2d at 53. The majority held that A&S's power to designate a portion of the parking lot for its employees' use was tantamount to A&S owning the lot. *Id.* at 104-05, 543 A.2d at 53-54. Justice Stein also opined that requiring employees to park in a distant corner of the lot created an additional daily hazard. *Id.* at 105-06, 543 A.2d at 54. A&S was therefore obligated to assume responsibility

for injuries its employees sustained from this hazard. *Id.* at 106, 543 A.2d at 54. The court concluded that while A&S did not, "in the formal property law sense" exercise control over the lot, A&S's control was of sufficient nature to satisfy the terms and intent of the Act. *Id.* at 105, 543 A.2d at 54.

In a vigorous dissent, Justice Clifford denounced the majority's definition of control as "quirky," asserting that the definition had the continued confusion brought about by the "going and coming" rule. *Id.* at 106, 543 A.2d at 54-55 (Clifford, J., dissenting). Justice Clifford stated that the language of N.J. STAT. ANN. § 34:15-36 (West 1988) was "plain and unambiguous" and clearly required that a parking lot be under an employer's control in order for an employer to be held liable. *Livingstone*, 111 N.J. at 108, 543 A.2d at 55 (Clifford, J., dissenting). In Justice Clifford's opinion, A&S exercised no such control. *Id.* at 109, 543 A.2d at 56 (Clifford, J., dissenting). The justice therefore concluded that Livingstone's injuries were not compensable under the Act. *Id.*

The 1979 amendments to the Workers' Compensation Act sought to reduce judicial latitude in compensation cases by enacting more specific standards of compensability. The avowed purpose of the legislative amendments was to narrow the effect of recent " 'going and coming rule' decisions by defining and limiting the scope of employment." *Id.* at 101, 543 A.2d at 51-52. In this regard, the *Livingstone* case represents a practical failure of the amendments. The divided court's decision is a clear indication that the legislation, though well-intentioned, was not effective in refining the scope of the "going and coming rule." By expanding the Act's language and drawing inferences from legislative silence, the majority's decision imperils, if not defeats, the spirit and purpose of the amendments. Justice Clifford's dissent, while taking a less sympathetic view as to the scope of compensable workers' compensation injuries, is consistent with the ideal that initially motivated the legislature — to provide a more efficient standard for allocating awards to those most in need of compensation.

David S. Catuogno

REMEDIES—DAMAGES—JURY MUST BE INSTRUCTED, UPON REQUEST OF COUNSEL, THAT DAMAGE AWARD IS NOT SUBJECT TO INCOME TAX LIABILITY—*Bussell v. DeWalt Products Corp.*, 105 N.J. 223, 519 A.2d 1379 (1987).

On June 27, 1980, Guy Bussell's left thumb and first three fingers were severed when he was bumped by a co-worker while operating a radial saw for his employer. 105 N.J. at 225, 519 A.2d at 1380. Bussell filed suit against DeWalt Products Corporation, the manufacturer of the saw, alleging strict liability in tort for his injuries.

At trial, several experts were called to testify regarding the assessment of damages. One of the experts, an economist, testified that certain calculations could be made to ascertain the lost lifetime earnings of the plaintiff resulting from his disability. The economist was asked by Bussell's attorney if his calculations had been adjusted to reflect the effect of income tax liability. The economist testified in the negative, explaining that such a computation would be difficult. He stated, however, that the gross-wage calculation arrived at should reflect the impact of future income tax liability. *Id.* at 225-26, 519 A.2d at 1380. DeWalt's attorney did not question the economist on cross-examination on this particular issue, but moved to have the entire testimony stricken as "speculative." *Id.* at 226, 519 A.2d at 1380. The attorney's motion was denied. DeWalt's attorney then requested that a specific charge be given to the jury, instructing it not to add an additional sum of money to the amount of the verdict since any amount awarded to Bussell was not taxable income within the meaning of the current tax laws. The trial court, responding to Bussell's attorney's concern that a jury charge of this nature could reduce the verdict award, agreed to give a general charge regarding the nontaxability of personal injury awards, but refused the defense counsel's request for a specific charge. The jury, however, was never instructed as to the nontaxability of personal injury damage awards. The jury returned a verdict in favor of Bussell for $600,000.

The appellate division reversed the trial court's decision, holding that upon the specific request of counsel, instructions must be given to a jury regarding the nontaxability of personal injury awards. The court averred that failure to charge the jury on this issue was "clearly capable of producing an unjust result." *Id.* Accordingly, the court remanded the matter for a reassess-

ment of the damage award. The New Jersey Supreme Court granted certification and reversed the appellate court's decision. *Id.* at 225, 519 A.2d at 1379. The court held that upon request of counsel, a trial court must instruct a jury regarding the nontaxability of personal injury awards. *Id.* Notwithstanding this decision, however, the court further determined that the failure to give such an instruction in this case was not reversible error. *Id.*

Justice Stein, writing for the majority, commenced the court's analysis by addressing the fact that both federal and New Jersey tax codes exclude personal injury damage awards from gross income calculations. *Id.* at 226-27, 519 A.2d at 1380. Noting that the "goal in setting damages is to compensate the plaintiff fairly and accurately for his losses," the court emphasized that this objective could be achieved by a court giving clear and complete jury instructions regarding the tax implications of personal injury damage awards. *Id.* at 227, 519 A.2d at 1380-81. The court further reasoned that if juries were instructed that personal injury damage awards were not taxable as gross income, this instruction, when given, would avoid "improperly inflated damage awards." *Id.*, 519 A.2d at 1380.

The court further dismissed as "unpersuasive" the plaintiff's argument that an instruction on taxability would lead to a jury's confusion. *Id.*, 519 A.2d at 1381. After reviewing its prior decision in *Tenore v. Nu Car Carriers*, 67 N.J. 466, 341 A.2d 613 (1975), where the court held that a jury instruction on the nontaxability of a wrongful-death damage award was proper, the *Bussell* court applied the reasoning in *Tenore* and held that when requested, the court should instruct the jury that personal injury damage awards are exempt from federal and state income taxes. *Id.* at 228-29, 519 A.2d at 1381-82. In reaching its conclusion, the court was convinced that such an instruction would prevent excessive damage awards occurring from a jury's erroneous assumption that the judgment is taxable. *Id.* at 229, 519 A.2d at 1382.

Addressing the appellate division's finding that the failure to provide the tax liability instruction was reversible error, the court found no basis that such failure inflated the jury's damage award. *Id.* at 230, 519 A.2d at 1382. In reviewing the testimony by the economics expert, the court found that the reference made to taxes was limited. *Id.* In addition, the supreme court observed that the trial court's jury instructions provided two satisfactory methods for calculating damages. *Id.* at 231, 519 A.2d at 1383. Thus, the court concluded that the instructions, in conjunction

with Bussell's other offerings of proof, supported the jury's damage award to the plaintiff. *Id.*

Concurring in part and dissenting in part, Justice Pollock agreed with the majority's holding that jury instructions were to include a charge pertaining to tax liabilities of damage awards. *Id.* (Pollock, J., concurring in part and dissenting in part). Justice Pollock, however, agreed with the appellate division's determination that the trial court's failure to properly instruct the jury regarding the nontaxability of personal injury damage awards was reversible error. *Id.* Reasoning that the direct relationship between the tax liability instruction and the damage award was too significant to dismiss, Justice Pollock concluded that while the error did not affect the outcome of the liability issue, it was sufficient to remand the case to the trial court for a reassessment of the damage award. *Id.* at 232, 519 A.2d at 1383 (Pollock, J., concurring in part and dissenting in part).

The New Jersey Supreme Court's decision in *Bussell* ensures that upon the request of counsel, the jury will be instructed that personal injury damage awards are not subject to tax liability. By extending the reasoning of *Tenore* to personal injury awards, the court's commitment to achieving consistency in jury instructions, regardless of the alleged action, is advanced. In addition, because jury awards are determined in part by the combination of testimony presented at trial and jury instructions, the guidance given by the *Bussell* court to both the trial court and the bar is especially significant. In providing such guidance, the *Bussell* holding reflects the court's continued emphasis on ensuring fair and equitable judgments.

Kate Lommel Ciravolo

ZONING—MUNICIPAL LAND USE LAW—MINOR VARIANCE SHOULD BE PERMITTED UNDER NEW c(2) STANDARD WHEN BENEFITS OF THE VARIANCE OUTWEIGH ANY DETRIMENT—*Kaufmann v. Planning Board*, 110 N.J. 551, 542 A.2d 457 (1988).

In 1985, the Warren Township Planning Board approved a subdivision plan and variance application requested by Douglas and Mary Lou Otte to divide their property into two noncon-

forming lots. 110 N.J. at 555-56, 542 A.2d at 459. The plan called for an existing house to remain on the smaller of the two lots and for a new house to be built on the larger lot. *Id.* at 554-55, 542 A.2d at 458-59. Each of the proposed lots met or exceeded the residential zone minimum lot area of 20,000 square feet. The municipality required variance approval of the subdivision plan because the proposed lots' widths of 83.74 feet did not conform to the minimum frontage requirement of 100 feet.

The planning board approved the variance application on two separate statutory grounds. *Id.* at 556, 542 A.2d at 459. Finding that the zoning requirement imposed "peculiar and exceptional practical difficulty to the applicant," the planning board determined that the Ottes qualified for a "hardship" variance under N.J. STAT. ANN. § 40:55D-70(c)(1) (West 1988) (the c(1) variance). *Kaufmann*, 110 N.J. at 556, 542 A.2d at 459. The Ottes' application also satisfied the newly-enacted variance standard under N.J. STAT. ANN. § 40:55D-70(c)(2) (West 1988) (the c(2) variance). *Kaufmann*, 110 N.J. at 556, 542 A.2d at 459. The board granted the c(2) variance on the grounds that the proposed residences would promote the public welfare and that the benefits gained from the deviation outweighed any detriment.

Richard and Laura Kaufmann, whose property adjoined the Ottes' property, brought suit to have the variance set aside. *Id.* at 554, 542 A.2d at 458. The New Jersey Superior Court, Law Division set aside the variance, finding that the applicants did not satisfy the c(1) hardship criteria because the property was readily marketable. *Id.* at 556, 542 A.2d at 459. The trial court also rejected the c(2) claim because "the purpose of area, width, and depth requirements is to preserve the essential residential character of the community . . . [and] a deviation from those standards could not be said to advance the purposes of zoning." *Id.* The New Jersey Superior Court, Appellate Division affirmed for substantially the same reasons. The New Jersey Supreme Court granted certification to review the decision regarding the c(2) variance.

Justice O'Hern, writing for a unanimous court, acknowledged that the question of the application of the c(2) standard was one of first impression. *Id.* at 553, 542 A.2d at 458. The justice reviewed the recent statutory amendments and found that the legislature intended to shift authority over municipal land use to local planning boards. *Id.* at 557, 542 A.2d at 460. Accordingly, Justice O'Hern warned that courts do not sit in judgment

of the wisdom of a particular zoning scheme. *Id.* Rather, Justice O'Hern found that judicial review was limited to determining whether the action taken by a local board was within the parameters established by the enabling statutes. *Id.* at 558, 542 A.2d at 460.

Justice O'Hern developed the parameters for the application of the new c(2) variance through review of the general intent of the Municipal Land Use Law (MLUL) and the purposes behind the addition of the c(2) variance. *Id.* at 561, 542 A.2d at 462. The justice determined that the c(2) variance was added to broaden a planning board's authority by providing an alternative to the limited c(1) hardship variance. *Id.* at 560-61, 542 A.2d at 462. Justice O'Hern recited a litany of anticipated c(2) variance examples which would not qualify as c(1), including a variance for an addition to a one-family home on an undersized lot and a side-yard variance for the addition of a garage. *Id.* (citations omitted). Justice O'Hern noted that "[t]he minimal impact of these examples is reassuring but none of them appears particularly to advance the purposes of zoning." *Id.*

Acknowledging the confusion surrounding the c(1) "hardship" standard, Justice O'Hern admonished that the confusion "should not slosh over into the interpretation of the c(2) standard." *Id.* at 562, 542 A.2d at 463. The justice stated that the c(2) variance is "entirely different." *Id.* Justice O'Hern explained that the c(2) variance was created to accommodate deviations of lesser moment. *Id.* at 563, 542 A.2d at 463.

Justice O'Hern further refined the application of the c(2) variance by referring to the specific language of the legislation. *Id.* at 560, 542 A.2d at 461. The justice noted a c(2) variance is appropriate and should be granted when "the purposes of this act would be advanced by [the] deviation . . . and the benefits of the deviation would substantially outweigh any detriment . . . ." *Id.* Justice O'Hern explained that the c(2) standard should not be used merely to advance the purposes of the owner, but must advance the purposes of the zoning ordinance. *Id.* at 563, 542 A.2d at 463.

Finally, Justice O'Hern concluded that the board's decision in this case was supported by the facts. *Id.* at 564, 542 A.2d at 463-64. The justice stated that the benefits gained by granting the variance advanced the purposes of the zoning ordinance by increasing the population density in that part of town. *Id.* at 564, 542 A.2d at 464. Moreover, Justice O'Hern found the detriment

to be minimal, since the deviation from the ordinance was consistent with other properties in the vicinity. *Id.* Thus, Justice O'Hern determined that the planning board had undertaken the appropriate balancing of concerns and was within its statutory authority to grant the Ottes' variance. *Id.*

The court's holding in *Kaufmann* is a refreshing reaffirmation of the power of local rule. Noting the restraints imposed on local authority, however, the court appropriately recognized that planning is the cornerstone of good government, and as such, individual decisions must be made pursuant to a plan's stated objectives. The flexible balancing test incorporated in the c(2) variance adequately effectuates these goals, while providing relief to landowners.

Lawrence E. Behning