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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0844-15T1

COACHES REALTY, LLC,

Plaintiff-Appellant,

v.

ZONING BOARD OF ADJUSTMENT
FOR THE BOROUGH OF WALLINGTON,
and CJ ESTATES, LLC,

Defendants-Respondents.

Submitted November 17, 2016 – Decided March 29, 2017

Before Judges O'Connor and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-
9038-14.

Aronsohn Weiner Salerno Bremer & Kaufman,
P.C., attorneys for appellant (Gerald R.
Salerno, on the brief).

Respondents have not filed a brief.

PER CURIAM

Plaintiff Coaches Realty, LLC, appeals from the September
8, 2015 Law Division order affirming defendant Borough of

Wallington Zoning Board of Adjustment's (Board) decision to grant defendant CJ Estates, LLC (applicant), its application for, among other things, a use and height variance pursuant to N.J.S.A. 40:55D-70(d). After reviewing the record and applicable legal principles, we reverse.

I

The salient evidence adduced at the hearing before the Board on applicant's submission for a use and height variance was as follows. Applicant purchased property in the business zone of Wallington Borough. On the property was an empty warehouse, which the previous owner ceased using because of periodic flooding. Applicant proposed to remove most of the warehouse and, from what remained, planned to construct a two-story, ten-unit apartment house. Because the proposed use would be for residential purposes, applicant required a use variance pursuant to N.J.S.A. 40:55D-70(d).

To prevent any flooding of the apartments, applicant proposed to put the building on stilts, elevating the apartments sufficiently enough to make them invulnerable to flooding. Although vehicles would be parked in the lot at ground level, underneath the building, applicant theorized the owners would remove their cars when flooding was forecasted.

Applicant called an architect and an engineer as expert witnesses in support of its application. The architect noted applicant sought a height variance because the anticipated height of the apartment building would be twenty-eight feet, three feet above the twenty-five-foot maximum height permitted in the business zone. The architect also testified the property was "more user friendly" as a residential than business use, because the property was in a flood zone.

Applicant's engineer testified the impervious coverage created by the warehouse would be reduced by fifteen percent if the warehouse were substantially removed and converted into an apartment building. The engineer opined the reduction in impervious coverage would diminish the flooding on the property to some extent. In addition, water that would run down the downspouts on the new building would be diverted into a seepage pit, reducing the storm water that presently occurs when it rains. Finally, the engineer stated the property was unusable for a commercial or business use because the property was susceptible to flooding. However, because the new structure on the property would be smaller, thus reducing the impervious coverage, he concluded the proposed use would "advance the [State's] standards in terms of uses and reasons to grant a use variance."

The engineer did not address why all businesses were precluded from using the site. While those businesses that must operate at ground level may not have found the site suitable because of periodic flooding, the expert provided no reason why other kinds of businesses could not function in a building elevated on stilts, such as the one applicant proposed to build. When pressed whether he had fully investigated his contention all businesses were precluded from operating at the site, the engineer deferred to the opinion of applicant's principal, Jacob Rys.

Rys testified he owned both residential and commercial properties in Wallington and, based upon his background and experience, no other business could be conducted at the site because it was in a flood zone. He further stated no business could use the new structure applicant wished to build. However, Rys was not qualified as an expert. He also did not identify on what he relied to conclude no business could make use of the site. Rys failed to explain why a business could not adapt to the flooding problem and, for example, build the kind of structure applicant sought to construct.

The Board approved applicant's request for a use and height variance. In its resolution, the Board summarized some of the testimony and then provided the following conclusory statement:

The applicant has shown that it can satisfy the positive criteria for the granting of a use variance. There [sic] record supports the change of use to a viable use which will allow the property to be a benefit, rather than a hindrance to the neighborhood and the adjoining properties. The applicant has satisfied the Medici[v. BPR Co., 107 N.J. 1 (1987),] standard to warrant the rezoning of the property.

Plaintiff filed a complaint in lieu of prerogative writs in the Law Division, challenging the Board's decision on the ground it was arbitrary, capricious, and unreasonable. The trial court affirmed the Board, finding:

[Applicant has] sufficiently satisfied the positive and negative criteria needed for the granting of a "d" use variance. Here the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone. The small lot size, lack of parking, and lack of a loading zone make this site unsuitable for a business use. Further, the flooding issues make this site most suitable for a building on stilts, as proposed here. The proposed use would serve the general welfare because the proposed site is particularly suitable for residential use.

Further, the proposed use does not impair the zone plan or zoning ordinance. If the property is only used for business purposes, it will likely remain vacant, as it has been for many years. The zoning plan and ordinance encourages and supports use of land in the Borough of Wallington, and thus will not be impaired if this proposal is approved.

This appeal ensued.

II

On appeal, plaintiff contends the Board's decision is not supported by the evidence and the Board failed to properly apply the law. We agree and reverse.

An appellate court applies the same standard as the Law Division when reviewing a zoning board's decision to grant or deny a variance. Bressman v. Gash, 131 N.J. 517, 529 (1993); D. Lobi Enters., Inc. v. Planning/Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009). We will uphold a board's decision to grant a use variance if the "board's decision comports with the statutory criteria and is founded on adequate evidence." Burbridge v. Mine Hill, 117 N.J. 376, 385 (1990) (citing Fobe Assocs. v. Mayor of Demarest, 74 N.J. 519, 538 (1977)).

However, "[v]ariations to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound zoning." Ibid. (quoting Kohl v. Mayor & Council of Fair Lawn, 50 N.J. 268, 275 (1967)). Thus, though deference is given to a zoning board's decision, "a reviewing court gives less deference to a grant than to a denial of a use variance." Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 75 (App. Div. 2006) (citing Funeral Home Mgmt., Inc. v. Basralian, 319 N.J.

Super. 200 (App. Div. 1999)). A court "must consider whether a zoning board of adjustment 'in the guise of a variance proceeding, [has] usurp[ed] the legislative power reserved to the governing body of the municipality to amend or revise the [zoning] plan" Ibid. (quoting Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555, 561 (App. Div. 1996)).

An applicant seeking a use variance must show there exist "special reasons" – commonly referred to as the positive criteria – why the variance should be granted. N.J.S.A. 40:55D-70(d)(1). "Special reasons" are those that promote the general purposes of zoning, enumerated in N.J.S.A. 40:55D-2. See Burbridge, supra, 117 at 386 (citing Kohl, supra, 50 N.J. at 276). "Special reasons" generally fall into one of three categories:

(1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility, see Sica v. Bd. of Adjustment of Wall, 127 N.J. 152, 159-60 (1992); (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone, see Medici v. BPR Co., 107 N.J. 1, 17 n.9 (1987); and (3) where the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use." Smart SMR, [Inc. v. Borough of Fair Lawn Bd. of Adjustment,] 152 N.J. [309,] 323 [(1998)] (quoting Medici, supra, 107 N.J. at 4).

[Saddle Brook Realty, supra, 388 N.J. Super.
at 76.]

Here, the Board concluded, without elaboration, that applicant satisfied the positive criteria. The trial court affirmed, stating applicant would suffer undue hardship if compelled to use the property as required by the zoning ordinance, and that applicant's proposed use would serve the general welfare because the proposed site is particularly suitable for residential use. We find no support for the Board's and trial court's conclusions.

Clearly, the first and second categories do not apply. The proposed use is not inherently beneficial, and there was no evidence applicant would suffer undue hardship if compelled to use the property in conformity with the permitted uses in the zone. Although Rys made the claim no business could be conducted at this site, there was no evidence Rys was qualified to render this opinion.

Moreover, even if Rys were qualified to opine no commercial enterprise could exist at this site, such opinion was a net opinion. A net opinion is one that is not factually supported by the record and to which no weight may be accorded. See generally Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). A "board cannot rely upon unsubstantiated allegations, nor can it

rely upon net opinions that are unsupported by any studies or data." Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 435 (App. Div. 2009) (citing Cell S of N.J. v. Zoning Bd. of Adj., 172 N.J. 75, 88 (2002)). We are aware this site is susceptible to periodic flooding, but the record was devoid of competent evidence to support the premise no business could operate in a structure elevated on stilts, such as the one applicant intended to build.

The third category of special reasons refers to those uses that "would fill a need in the general community, where there is no other viable location, and where the property itself is particularly well-fitted for the use either in terms of its location, topography or shape." Funeral Home Management, supra, 319 N.J. Super. at 210. Applicant failed to provide any evidence its proposed use was necessary to fulfill a need in the community, let alone no other location was available for his proposed use and the subject property was well-suited for renting out apartments.

An applicant for a use variance must also satisfy what are known as the "negative criteria." Specifically, an applicant must show the variance "can be granted without substantial detriment to the public good," and "the variance will not

substantially impair the intent and the purpose of the zone plan and zoning ordinance." Price v. Himeji, 214 N.J. 263, 286 (2013) (quoting N.J.S.A. 40:55D-70). "The showing required to satisfy the first of the negative criteria focuses on the effect that granting the variance would have on the surrounding properties." Ibid. (citing Medici, supra, 107 N.J. at 22 n.12.).

"The proof required for the second of the negative criteria must reconcile the grant of the variance for the specific project at the designated site with the municipality's contrary determination about the permitted uses as expressed through its zoning ordinance." Ibid. (citing Medici, supra, 107 N.J. at 21). This requires, "in addition to proof of special reasons, an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance." Medici, supra, 107 N.J. at 21.

Here, the Board found the variance would be a benefit to the adjoining properties. While the Board did not articulate the reasons in support of this finding, there is evidence in the record the structure applicant wished to build on the property would reduce some of the flooding. However, the evidence did not specify the extent to which the adjoining properties would

actually benefit if the flooding on the subject property were reduced.

The second negative criteria requires a board of adjustment to provide clear and specific findings the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance. Ibid. Here, the Board merely stated applicant "satisfied the Medici[v. BPR Co., 107 N.J. 1 (1987),] standard to warrant the rezoning of the property." First, the property was not "rezoned." Second, the Board did not make any of the required findings. Third, there was no evidence of what the intent and purpose of the master plan and zoning ordinance was at the time of the application, making impossible a finding the proposed variance would not be inconsistent with the intent and purpose of the plan and zoning ordinance.

The trial court noted the proposed use does not impair the zone plan or zoning ordinance because "the zoning plan and ordinance encourages and supports use of land in the Borough of Wallington." However, the infirmity afflicting the Board's findings similarly afflicts the trial court's decision. That is, there is no evidence in the record to support the conclusion the second negative criterion was met. Accordingly, because applicant failed to show all the necessary positive and negative

criteria, we reverse the Law Division order and vacate the Board's resolution granting the use variance.

Finally, the Board failed to address why it granted the height variance. Generally, such a deficiency requires a remand to the Board for reconsideration and specific factual findings. See Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 123 (App. Div. 2000). However, because a reversal of the Board's decision to grant the use variance is warranted, a remand on the decision to grant the height variance is unnecessary.

Reversed.

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



CLERK OF THE APPELLATE DIVISION