SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1620-15T4

CHARLES BAKER and SHARON BAKER,

Plaintiffs-Appellants,

v.

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF JACKSON and A&A TRUCK PARTS, INC.,

Defendants-Respondents,

and

V&S PRECAST CORPORATION,

Defendant.

Argued March 21, 2017 – Decided April 18, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3667-14.

Ronald S. Gasiorowski argued the cause for appellant (Gasiorowski & Holobinko, attorneys; Mr. Gasiorowski, of counsel; Cathy S. Gasiorowski, on the brief).

Sean D. Gertner argued the cause for respondent Zoning Board of Adjustment for the Township of Jackson (Gertner & Gertner,

L.L.C., attorneys; Mr. Gertner, of counsel and on the brief).

Steven Pfeffer argued the cause for respondent A&A Truck Parts, Inc. (Levin, Shea & Pfeffer, P.A., attorneys; Mr. Pfeffer, on the brief).

PER CURIAM

Plaintiffs Charles and Sharon Baker appeal a November 16, 2015 Law Division order dismissing their action in lieu of prerogative writs challenging the Jackson Township Zoning Board of Adjustment's (Board) resolution approving variances for property owned by defendant A&A Truck Parts, Inc. (defendant). We reverse and remand for further proceedings consistent with this opinion.

I.

Defendant owns a forty-acre parcel of property (subject property) in the Township of Jackson (Township). The subject property is located within the "Light Manufacturing Office/Light Industrial Zone" (LM Zone) under the Township's zoning ordinance. "[U]ses of buildings and structures" in the LM Zone are restricted to certain activities including "[l]ight manufacturing," and "warehousing or storage of goods and products." Jackson Twp. Ord. § 244-62(A)(8), (17), http://ecode360.com/15721432.

Defendant is in the business of buying used equipment, trucks, and trailers, dismantling them, and selling the parts. In August 2013, defendant applied to the Board for variances allowing a used truck and trailer dismantling, recycling, storage, and retail facility (proposed facility) at the subject property. The proposed facility included an enclosed 280,000 square foot truck recycling structure, a 64,000 square foot canopy structure for truck dismantling, and a 108,000 square foot canopy structure for metal recycling operations.

Defendant required a use variance because metal recycling is not permitted in the LM Zone. Defendant also required variances for the proposed seventy-one foot height of the canopy structure because it exceeded the LM Zone's fifty-five foot height limitation, and for the approval of sixty parking spaces because, based on the size of the proposed facility, the Township's ordinance otherwise required ninety-seven parking spaces.

Prior to the hearings on defendant's application, the Board's professional planner, Stuart B. Wiser, P.A., sent the Board a "review letter" outlining defendant's application, and explaining that defendant required a use variance under N.J.S.A. 40:55D-70(d)(1), a height variance under N.J.S.A. 40:55D-70(d)(6), a bulk variance under N.J.S.A. 40:55D-70(c) for the

proposed number of parking spaces, and possibly other variances. Wiser requested that defendant address its conformity with local ordinance section 244-62(E)(5), which states that "[a]ll industrial activities or processes shall take place within a completely enclosed building" because defendant's truck dismantling and metal recycling operation was to take place under the open canopy structure rather than in an enclosed building.[1]

On August 6, 2014, and September 17, 2014, the Board held public hearings on defendant's application. Defendant's president, John O'Connell, testified defendant had previously obtained the Board's approval for a similar facility at a nearby site in the Township referred to as the "Bismark property." O'Connell explained the Bismark property "was not big enough" for the proposed facility and that the subject property was better suited for the facility because it has more usable property and "no water."

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[1] In separate letters, the Board's traffic consultant and engineer advised that defendant must address the quantity and intensity of the expected traffic operations at the site of the proposed facility and that defendant's plan required design waivers not addressed in its application, including waivers for landscaping and buffering requirements around the perimeter of the site.

Defendant's expert planner, Ian Borden, P.P., testified the subject property was located in the LM Zone, where "[r]ecycling is not a permitted use" and thus defendant sought a "D variance" for the proposed facility. Borden explained that defendant's proposed use of the subject property "is very similar to the uses that are permitted in the [LM] Zone," and would "substantially conform to the light industrial standards." Like O'Connell, Borden stated defendant opted to relocate its proposed facility from the Bismark property to the subject property because "there are more buildable areas than the [twenty] acres on the Bismark site." [2]

Borden also testified concerning the planned operations at the proposed facility. He explained defendant's employees would dismantle vehicles under the canopy structure and place the parts in various storage locations on the property. Defendant's planned retail operations included selling truck parts, for example, to "a company [that] needs a transmission, needs an engine, [or] needs a tire." The retail traffic would not be "typical" traffic because companies "will make arrangements just to come to the site and pick [] up" their purchases.

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[2] The Bismark property was larger than the subject property but due to water conditions, only twenty acres of the property were available for defendant's proposed facility.

Borden acknowledged a height variance was necessary for the canopy structure where defendant's employees would dismantle vehicles with an excavator. He explained that the structure's seventy-one foot height was required to permit the excavator to operate. The canopy structure included paneling which extended from the ceiling downward for approximately forty feet, thus exposing the lower thirty-one foot portion of the structure to the outside. Borden noted that the proposed canopy was "the same height that was approved on the Bismark site."

Like O'Connell, Borden testified that the dismantling of the vehicles would take place within the footprint of the canopy structure. O'Connell and Borden explained that only defendant's storage operation would be conducted outside.

Borden testified concerning defendant's need for a variance for the number of proposed parking spaces. He explained that ninety-seven parking spaces were required under the local ordinance based on the size of the proposed facility, but defendant required only sixty spaces. Borden testified there would be forty-five employees at the facility and therefore

sixty parking spaces was adequate and would allow for future growth.[3]

At the close of the hearings,[4] a unanimous Board granted defendant's application. On October 15, 2014, the Board adopted a resolution approving defendant's application "for variance and [m]ajor [s]ite [p]lan approval" for the subject property.

On December 4, 2014, plaintiffs filed an action in lieu of prerogative writs challenging the Board's resolution. The Law Division heard oral argument and issued a written decision addressing plaintiffs' contentions, and concluding the Board properly approved defendant's application. The court entered an order on November 16, 2015. This appeal followed.

II.

Our "standard of review for the grant or denial of a variance is the same as that applied by the Law Division." Advance at Branchburg II, LLC v. Branchburg Twp. Bd. of

[3] Borden also addressed the need for additional "waivers" that were not addressed in defendant's application, including waivers for a proposed barbed-wired fence surrounding the property, and waivers from the requirement that defendant provide "topographic features within 200 feet of the site," certain landscaping, curbs and sidewalks, and conduct a traffic study. The waivers are not at issue on appeal.

[4] There was additional testimony presented concerning environmental and storm water issues at the subject property. The testimony is not relevant here.

Adjustment, 433 N.J. Super. 247, 252 (App. Div. 2013). Local boards of adjustment have "peculiar knowledge of local conditions [and] must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 597 (2005). A local board's decision "enjoy[s] a presumption of validity, and a court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion." Price v. Himeji, 214 N.J. 263, 284 (2013).

"We defer to a municipal board's factual findings as long as they have an adequate basis in the record," Branchburg, supra, 433 N.J. Super. at 252, and determine whether the board's decision "is not so arbitrary, capricious, or unreasonable as to amount to an abuse of discretion." New Brunswick Cellular Tel. Co. v. S. Plainfield Bd. of Adjustment, 160 N.J. 1, 14 (1999) (internal quotation marks and citation omitted). "[T]he burden is on the challenging party to show that the zoning board's decision was 'arbitrary, capricious, or unreasonable.'" Price, supra, 214 N.J. at 284 (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)).

Further, "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). When "reviewing the grant of a use

variance, a court must consider whether a 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)). We review a board's conclusions of law de novo. Wyzykowski v. Rizas, 132 N.J. 509, 518 (1993).

Plaintiffs first assert there was insufficient evidence supporting the Board's approval of defendant's application for a use variance. Plaintiffs contend defendant did not establish the positive or negative criteria under N.J.S.A. 40:55D-70(d)(1), and the Board therefore erred in granting the requested use variance for the facility. Plaintiffs also claim the Board erred by failing to make the requisite findings of fact concerning the positive and negative criteria.

Municipalities are vested with authority to "impose conditions on the use of property through zoning by a 'delegation of the police power' that must 'be exercised in strict conformity with the delegating enactment—the [Municipal Law Use Law (MLUL), N.J.S.A. 40:55D-1 to -163]." Price, supra, 214 N.J. at 284 (quoting Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95, 101 (2011)). There is a preference

under the MLUL that "municipal land use planning [be] by ordinance rather than by variance," and the statute therefore "carefully defines the grounds on which [the] authority [to grant a variance] may be exercised." Ibid.

Local boards of adjustment may grant a use variance under N.J.S.A. 40:55D-70(d)(1) where the applicant proves both special reasons, otherwise known as positive criteria, as well as negative criteria. Id. at 285; accord Smart SMR of New York, Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998)). "'[S]pecial reasons' takes its definition and meaning from the general purposes of the zoning laws" and the court "must look to the purposes of the [MLUL] . . . to determine what is a special reason." Burbridge v. Mine Hill Twp., 117 N.J. 376, 386 (1990) (citation omitted). For the negative criteria, the applicant must prove "the variance 'can be granted without substantial detriment to the public good' and that it 'will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.'" Sica v. Bd. of Adjustment of Wall, 127 N.J. 152, 156 (1992) (quoting N.J.S.A. 40:55D-70(d)).

Defendant contends the Board correctly concluded that he satisfied the positive and negative criteria. We first consider the standard for the Board's assessment of the postive criteria. Special reasons are not defined by the MLUL, "but subsequent

judicial interpretations have 'infus[ed] substantive meaning into the "special reasons" standard.'" Price, supra, 214 N.J. at 285 (quoting Coventry Square Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 295 (1994)). "Our case law recognizes three categories of circumstances in which the 'special reasons' required for a use variance may be found." Saddle Brook Realty, supra, 388 N.J. Super. at 76. Defendant, however, relies solely on the special reason that the use of the property "would serve the general welfare because 'the proposed site is particularly suitable for the proposed use.'"[5] Nuckel, supra, 208 N.J. at 102 (quoting Saddle Brook Realty, supra, 388 N.J. Super. at 76); accord Sica, supra, 127 N.J. at 159-60.

A use variance founded on the special reason that the "property is particularly suitable for a project requires an evaluation of whether the use, otherwise not permitted in the zone, when authorized for the particular parcel, will promote the general welfare as defined in the MLUL." Price, supra, 214 N.J. at 287. A determination that a property is particularly

[5] The two other recognized categories of special reasons are "where the proposed use inherently serves the public good, such as a school, hospital, or public housing facility, [and] where the property owner would suffer 'undue hardship' if compelled to use the property in conformity with the permitted uses in the zone." Saddle Brook Realty, supra, 388 N.J. Super. at 76 (citations omitted).

suitable for the proposed use requires "an analysis that is inherently site specific." Id. at 288. This standard does not require proof that the property is unique, in the sense that it is "the only possible location for the particular project." Id. at 287, 290-93. Rather,

> [I]t is an inquiry into whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone. Most often, whether a proposal meets the test will depend on the adequacy of the record compiled before the zoning board and the sufficiency of the board's explanation of the reasons on which its decision to grant or deny the application for a use variance is based.
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> [Id. at 293 (emphasis added).]

The Board was also required to determine if defendant satisfied the negative criteria. Determination of the "negative criteria" involves two independent questions: whether the variance "can be granted without substantial detriment to the public good," and whether "the variance will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Id. at 286 (quoting N.J.S.A. 40:55D-70).

We have explained that the first inquiry "focuses on the potential effects of the variance on the surrounding properties." Branchburg, supra, 433 N.J. Super. at 255; Medici

v. BPR Co., 197 N.J. 1, 22 n.12 (1987). "The board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute 'substantial detriment to the public good.'" Medici, supra, 107 N.J. at 22 n.12 (quoting Yahnel v. Jamesburg, 79 N.J. Super. 509, 519 (App. Div. 1963)).

"Satisfaction of the second prong of the negative criteria analysis normally requires the applicant also 'demonstrate through "an enhanced quality of proof . . . that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance."'" Branchburg, supra, 433 N.J. Super. at 255 (quoting Smart SMR, supra, 152 N.J. at 323).

A board of adjustment's decision granting a use variance must be reduced "to writing in the form of a resolution that includes findings of fact and conclusions of law." New York SMSA, L.P. v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 332 (App. Div. 2004); see also N.J.S.A. 40:55D-10(g) (requiring that a board memorialize its decisions in a resolution, which "shall include findings of fact and conclusions based thereon"). The resolution must contain sufficient findings, based on the proofs submitted, to permit a reviewing court to determine if the board "analyzed the

applicant's variance request in accordance with the [MLUL] and in light of the municipality's master plan and zoning ordinances." New York SMSA, supra, 370 N.J. Super. at 333. "Without such findings of fact and conclusions of law, the reviewing court has no way of knowing the basis for the board's decision." Ibid.

Here, plaintiffs first argue the Board failed to make the requisite findings of fact and conclusions concerning the positive and negative criteria. We agree. The resolution states that the Board considered and relied on information provided by defendant and the witnesses, subject to later review if any misrepresentations were discovered. The resolution also summarizes the evidence presented during the hearings. The Board's "findings of fact and conclusions of law," however, are limited to the following:

> 1. [Defendant] is a contract purchaser of the subject property and has a proprietary interest in this application; and
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> 2. The subject property is located at Wright DeBow Road and is designated as Block 401, Lot 9 in the LM zone; and
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> 3. [Defendant] has applied for a use variance to utilize the area as a recycling center and warehouse and office building with truck roll-off facilities and retail sales and seeks to receive a use variance for the use along with additional bulk and

> design which was outlined in the Board Planner's letter of July 30, 2014; and
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> 4. There may be Jackson Township Affordable Housing and/or Development Fee obligations triggered and [defendant] must comply with the Township's affordable housing requirements; and
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> 5. The granting of this application can occur without substantial detriment to the public good and it has been determined that it will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

We are convinced the Board's resolution is inadequate and suffers from the same deficiencies that caused us to find the resolution in New York SMSA to be inadequate. Id. at 332-33. In New York SMSA, we considered a resolution denying a variance that summarized the testimony and arguments developed at board hearings, and stated in a conclusory fashion that the applicant failed to satisfy the positive and negative criteria. Id. at 329.

On appeal, the board argued that "the summary nature of its memorializing resolution is irrelevant because the verbatim public hearing transcripts . . . support[ed] its decision." Id. at 331-32. We disagreed, explaining that under N.J.S.A. 40:55D-10(g), a municipal agency is required to "include findings of fact and conclusions based thereon in each decision on any application." Id. at 332. We found the resolution "substantively

deficient" because "a mere recital of testimony or conclusory statements couched in statutory language," without any actual analysis, precludes the reviewing court's ability to evaluate the basis for the board's decision. Id. at 332-33; see also Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div. 1998) (finding a resolution deficient where its findings and conclusions were stated in cursory fashion), certif. denied, 118 N.J. 216 (1989).

Here, the resolution "merely identifies the applicant, describes the proposed site, summarizes . . . the testimony presented," and its legal conclusions are untethered to any findings of fact. New York SMSA, supra, 370 N.J. Super. at 333. Its conclusions consist of nothing more than cursory statements parroting the law, without any logical explanation for the Board's decision. See Harrington Glen, Inc. v. Bd. of Adjustment of Leonia, 52 N.J. 22, 28 (1968) (a "summary finding couched in the conclusionary language of the statute" is insufficient). The resolution also does not include any findings or conclusions concerning the positive criteria, and only addresses the negative criteria by paraphrasing the legal standard, stating the variance "can occur without substantial detriment to the public good and . . . will not substantially impair the intent and purpose of the zone plan and zoning ordinance." See Sica,

supra, 127 N.J. at 156 ("The [MLUL] requires proof of both positive and negative criteria."). It "is exactly [of] the sort . . . that has repeatedly been recognized as deficient by the courts." New York SMSA, supra, 370 N.J. Super. at 333 (string citation omitted).

The Board's resolution failed to contain "sufficient findings, based on the proofs submitted, to satisfy a reviewing court that [it] analyzed the master plan and zoning ordinance, and determined that the [Township's] prohibition of the proposed use is not incompatible with a grant of the variance." Medici, supra, 107 N.J. at 23. A reviewing court's determination of whether a use variance was properly granted is dependent on the sufficiency of the "board's explanation of the reasons on which its decision . . . is based." Price, supra, 214 N.J. at 293. The lack of that explanation here prevented the Law Division, and prevents us, from determining the propriety of the Board's approval of defendant's request for a use variance.

Plaintiffs also correctly argue the Board failed to consider and make any findings concerning defendant's alleged need for a bulk variance, N.J.S.A. 40:55D-70(c), because the defendant's proposed dismantling operation will take place under the canopy structure and not in an enclosed building as required under section 244-62(E)(5) of the Township's ordinance.

Wiser's July 30, 2014 review letter to the Board raised the potential need for a bulk variance or waiver due to this phase of defendant's operations. As the Court observed in Price, "a use variance, by its nature, carries with it the implication that the ordinary bulk and density requirements of the zone will not be applied." Price, supra, 214 N.J. at 300. That does not, however, mean that in its consideration of a use variance the Board could ignore other applicable limitations under the local ordinance. Id. at 301. The Board can "consider the other requested variances as ancillary to the" requested use variance. Ibid.

We are constrained to reverse the court's order and vacate the Board's inadequate resolution approving defendant's application. We remand the matter to the Board for reconsideration of its resolution in accordance with this opinion. We do not express an opinion on the merits of defendant's application and do not suggest any particular outcome is required. We also do not foreclose the Board from reopening the hearing and considering additional evidence prior to rendering its final decision. We add only the following comments.

On remand, any disposition of defendant's application must be based only on the evidence presented during the hearing on

this application. Medici, supra, 107 N.J. at 23 (explaining that a board's findings must be "based on the proofs submitted"). Defendant argues the Board incorrectly relied on testimony and evidence presented during its prior hearing on the Bismark property and we agree it would be improper for the Board to do so. To be sure, in the hearings on defendant's pending application there were references to the testimony and evidence introduced during the Bismark proceeding. The deficiencies in the Board's resolution, however, makes it impossible to discern the extent to which, if at all, the Board may have improperly relied upon evidence in the Bismark proceeding in making its decision here. Any decision reached by the Board shall not be based in whole or in part on evidence presented in any other proceeding, including the prior proceeding concerning defendant's application for the Bismark property. Ibid.

Reversed. The Board's resolution is vacated and the matter is remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.