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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2729-15T2

JOHN GIERCYK,

Plaintiff-Appellant,

v.

CITY OF ESTELL MANOR PLANNING/  
ZONING BOARD; HENDRICKS  
HOUSE, INC.; and THE FOUR  
B'S,

Defendants-Respondents.

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Submitted May 10, 2017 – Decided December 18, 2017

Before Judges Carroll and Gooden Brown.

On appeal from Superior Court of New Jersey,  
Law Division, Atlantic County, Docket No.  
L-0717-15.

John Giercyk, appellant pro se.

Nehmad Perillo & Davis, PC, attorneys for  
respondents Hendricks House, Inc. and The Four  
B's (Stephen R. Nehmad and Michael R. Peacock,  
on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

Plaintiff appeals from the January 21, 2016 Law Division order affirming City of Estell Manor Planning/Zoning Board's (Board) grant of a "D" use variance<sup>1</sup> and site plan waiver to Hendricks House, Inc.<sup>2</sup> (Hendricks), a non-profit corporation that operated two drug and alcohol residential rehabilitation facilities in New Jersey. We affirm.

We derive the following facts from the record. Hendricks had a contract to purchase property from the Four B's, GP, located in Estell Manor's Highway Commercial Zoning District (HC Zone). The property contained a 13,275 square-foot, one-story building on a thirty-four acre lot. In addition, the property contained a paved parking lot with twenty-seven parking spaces, a loading area, walkways, a small basketball court, site lighting, and a storm water management basin. Previously, the Department of Corrections used the property as a treatment facility housing up to thirty-two juvenile offenders.

Hendricks sought approval from the Board to open a drug and alcohol rehabilitation facility for up to forty-four female residents on the property. Hendricks applied to the Board for an interpretation of the zoning ordinance to determine whether the

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<sup>1</sup> See N.J.S.A. 40:55D-70(d).

<sup>2</sup> Hendricks House, Inc., was improperly pled as Hendricks House, LLC.

proposed use was identical to the prior use and therefore within the ambit of the previously granted use variance for the property. In the alternative, Hendricks sought a use variance because institutional uses were not permitted in the HC Zone. Hendricks also sought a waiver of site plan approval, as no new development was proposed with the project.

The Board conducted two hearings on the application on December 2, 2014 and January 6, 2015. In support of the application, the Board heard testimony from Audrey Carter, the Executive Director of Hendricks, Terrence Combs, a licensed professional planner, and Sandy Mersky, a professional engineer. Several members of the public raised concerns in opposition to the application, citing safety issues as well as past septic issues that impacted neighboring properties.

At the hearing, Carter testified that Hendricks was "a licensed residential treatment facility" funded by State and local government and had been in operation for over twenty years. Carter detailed the acute need for substance abuse treatment facilities for women, the in-depth licensing process Hendricks undergoes, Hendricks' methodical operational structure, and the restrictive screening criteria for its residents. Carter also testified that the only anticipated changes to the facility involved "clean[ing] it up."

Combs confirmed that Hendricks would rehabilitate the building inside and outside but proposed "no expansion of the footprint" or improvements. Combs emphasized, however, that Hendricks would correct existing violations in the septic system. Mersky's testimony pertained solely to the proposed upgrades to the septic system. Mersky testified that although the current system was compliant, it would be replaced with a system designed to accommodate the "flows" that would be generated by the residents, and a treatment unit would be added to ensure optimal efficiency. According to Mersky, there would be no change to the site plan because the majority of the work would be underground and the existing disposal field would be used.

Combs testified that the proposed use "would fall under . . . the definition[] [for] institutional use, but . . . institutional uses are not listed as permitted in any of the zones." Combs opined that, from a planning perspective, the prior use and the proposed use were "substantially similar" and "inherently beneficial[,]" which is presumed to satisfy the positive criteria. Further, there would be "no change to the character of the area." In addition, according to Combs, the

"site is particularly suited"<sup>3</sup> for the proposed use, as "[t]here will be no modifications or improvements to the building other than material layouts."

Combs recommended that the Board grant the variance because there was very little detriment to the public. To support his opinion, Combs pointed to the fact that eighty-eight percent of the property was still "wooded and undisturbed[,]" there were "significant and substantial natural buffers" surrounding the property, and, given the "low-intensity use" and "low traffic volumes[,]"<sup>4</sup> there was "no noise or waste produced that would be detrimental to surrounding properties."

Following the hearings, the Board determined that the proposed use differed from the previous use because of the difference in the resident population. However, the Board granted a use variance and a site plan waiver by a vote of 6-1. The Board memorialized its approval in a resolution dated February 3, 2015. In its resolution, the Board summarized the testimony, imposed conditions on its approval to address public concerns, and found

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<sup>3</sup> In Sica v. Board of Adjustment, the Court held that in cases where the use is inherently beneficial, "we have never required . . . that the site be particularly suitable . . . ." 127 N.J. 152, 160 (1992).

<sup>4</sup> According to Combs, traffic would be minimal because the residents were not permitted to have vehicles and there were only ten employees on site.

that the proposed use was "an 'inherently beneficial use' under N.J.S.A. 40[:]55D-4" because it provides "essential health care for an underserved population . . . ."

On March 26, 2015, plaintiff, an Estell Manor resident and homeowner, filed a five-count complaint in lieu of prerogative writs contending that the Board's decision was arbitrary, capricious, or unreasonable.<sup>5</sup> Plaintiff alleged that, in approving the variance, the Board improperly deemed the proposed use an inherently beneficial use and failed to engage in the requisite balancing test enunciated in Sica v. Board of Adjustment, 127 N.J. 152, 165-66 (1992).<sup>6</sup> Plaintiff also alleged that "[t]he Board should not have waived the site plan requirement" because the application presented an intensification of use, and the "[s]ite

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<sup>5</sup> In his complaint, plaintiff asserted that "[he] did not formally object at either of the hearing dates, owing in part to his relationship with a member of the Board who happens to be his estranged wife." Plaintiff's wife cast the only negative vote.

<sup>6</sup> In Sica, the Court held that "when balancing the positive and negative criteria[,]" municipal boards should engage in the following four-part balancing test: (1) "identify the public interest at stake" that "may outweigh the negative criteria[;]" (2) "identify the detrimental effect that will ensue from the grant of the variance[;]" (3) "reduce the detrimental effect by imposing reasonable conditions on the use" and reduce "the weight accorded [to] the adverse effect . . . by the anticipated effect of those restrictions[;]" and (4) "weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good." 127 N.J. at 165-66.

plan review was necessary to properly evaluate the negative detriments to surrounding property owners." In addition, plaintiff alleged that the Board attorney tainted the voting process by leading Board members to incorrectly believe they would be personally sued if they voted to deny the application. Plaintiff claimed that to the extent Board members voted out of fear of personal liability, the Board attorney's advice improperly shifted the focus from the factors articulated in the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163. Finally, plaintiff alleged the Chairwoman was improperly recused from voting on the application. According to plaintiff, the Board should have offered the Chairwoman the opportunity to vote by attesting to the fact that, despite her absence from the first hearing, she had reviewed the transcript of that hearing.

The trial court conducted a bench trial on the record below on January 7, 2016. In a January 19, 2016 written opinion, Judge Julio L. Mendez rejected plaintiff's contentions, finding that the Board's resolution granting the use variance was "more than adequately support[ed]" by "the Board's findings of facts and conclusions" and "was not arbitrary, capricious or unreasonable." The judge also determined that the Board's decision to waive the requirement for site plan approval was reasonable.

In addressing the Board's balancing of the positive and negative criteria, Judge Mendez initially found that the Board "rightly considered Hendricks House an inherently beneficial use and considered the public interest at stake." Applying the definition of "inherently beneficial use" contained in N.J.S.A. 40:55D-4,<sup>7</sup> the judge noted

Audrey Carter ("Carter"), the executive director of Hendricks House, Inc., offered extensive testimony on the need of rehabilitation facilities for women in southern New Jersey. In 2010[,] approximately 14.3% of New Jersey residents, or 963,000 residents, were in need of drug and alcohol treatment. There is a greater need for rehabilitation centers in Atlantic County because the majority of treatment centers are located in northern New Jersey. In Atlantic County[,] 20.5% of residents, or 43,245 residents, were in need of drug and alcohol treatment; however[,] only [4124] Atlantic County residents actually received the treatment. The demand is even greater for female treatment facilities since most treatment facilities are for men.

The Board also heard testimony from Terrance Combs ("Combs"), a licensed professional planner, who opined that Hendricks was an inherently beneficial use.

Second, as to "the potential detriments of Hendricks' proposed use[,]" Judge Mendez stated:

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<sup>7</sup> Under N.J.S.A. 40:55D-4, an "'[i]nherently beneficial use' means a use which is universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare."



Combs also stated that a variance could be granted with very little detriment to the public because Hendricks' facility is a low intensity use that would cause very little noise and would have no lighting impacts offsite.

. . . The main concern surrounding Hendricks' application was whether the existing septic system could accommodate forty[-]four (44) persons. These concerns were addressed during the second hearing by Sandy Mersky, a professional engineer who specializes in septic systems. Mr. Mersky offered extensive testimony on the issue and explained to the Board that Hendricks planned to replace the existing septic system with a system that had a treatment unit in order to ensure that there would be no septic issues going forward. The replacement of the existing septic tank would not change the site plan since nearly all of the changes are underground.

Third, the judge addressed the conditions imposed by the Board to reduce any detrimental effect:

[T]he Board added two (2) conditions to the grant of the variance and site plan waiver. First, the Board required Hendricks to receive approvals from the Pinelands [C]ommission and any other governmental agency with jurisdiction over the septic system. Second, in response to a neighbor's safety concerns[, ] the Board required Hendricks to submit for approval a plan for a fence between the subject property and a neighboring property.

Finally, the judge determined that

[T]he Board properly granted Hendricks' application because the hearing record established that doing so would not cause substantial detriment to the public good. In

its resolution[,] the Board found that Hendricks' clients would be screened for prior criminal offenses and were required to come directly from another treatment facility, and the facility would cause no harmful or unpleasant odors, noise or glare beyond the confines of the structure. The Board concluded that the proposed use was an inherently beneficial use, the applicant intended to use an existing building and make essentially no site plan changes, and the proposed use would not create significant additional traffic.

Judge Mendez rejected plaintiff's contention that the Board misconstrued the implication of the Fair Housing Amendments Act, 42 U.S.C. §§ 3601-3631, or the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, explaining:

Under the Fair Housing Amendments Act (hereinafter "FHAA") municipalities must make "reasonable accommodations in rules, policies, practices, or services when such accommodations are necessary to afford such person equal opportunity to use and enjoy" housing. 42 U.S.C. 3604(f)(3)(B). When deciding an application involving a protected group, the FHAA requires a Board to consider whether the requested accommodation is "(1) reasonable and (2) necessary to (3) afford handicapped person[s] an equal opportunity to use and enjoy housing." Lapid-Laurel v. Zoning Bd. of Adjustment, 284 F.3d 442, 457 (3d Cir. 2002). This burden is initially on the applicant. If the applicant meets their burden, then the burden shifts to the Board to "prove that it could not have granted the variance without: (1) imposing undue financial administrative burdens; (2) imposing an undue hardship upon the Township; or (3) requiring a fundamental alteration in the nature of the program." Id. at 462.

Here, the variance was justified because there is no "Institutional Zone" in Estell Manor where Hendricks' proposed use would be permitted. The accommodation is reasonable because the property was previously used as a residential treatment and evaluation facility, a use that is almost identical to Hendricks' proposed use. Finally, there is no evidence that granting the variance would have caused undue financial and administrative burdens, undue hardship upon Estell Manor, or required a fundamental alteration in the nature of [the] zoning program. Therefore, under these circumstances the [c]ourt is of the opinion that the Board's counsel correctly advised the Board as to the applicable law. The [c]ourt is of the opinion that the Board performed its function correctly under the law.

Likewise, the judge rejected plaintiff's contention that the Board's grant of the use variance would substantially alter the character of the district. Applying Township of Dover v. Board of Adjustment, 158 N.J. Super. 401, 412-13 (App. Div. 1978), Judge Mendez concluded:

The proposed use is almost identical to the prior approved use of the property. Hendricks is not making substantial modifications to the site; the only modification, replacing the existing septic system, will be almost entirely underground. Hendricks has proposed no new construction or expanding the existing building. The [c]ourt also notes that the property sits in a very large lot with substantial buffers and is located on a commercial highway with no impact [to] any residential neighborhood. For those reasons, the Board's grant of the use variance does not

substantially alter the character of the district.

Finally, the judge upheld the Board's decision to grant Hendricks a site plan waiver, explaining:

Waivers from site plan approval may be granted as long as the waiver is "reasonable and within the general purpose and intent of the provisions for site plan review[.][]" N.J.S.A. 40:55D-51(b). Hendricks proposed no new construction or additions to the existing building on the property. Mr. Mersky testified that any replacement or upgrade to the property's septic system would be done within the existing system's footprint, and the footprint of the disposal field would not be enlarged. Members of the public raised concerns over storm water infiltration issues. Hendricks did not propose any modifications to the existing basin on the subject property. Moreover, Mr. Combs testified that Hendricks will perform routine maintenance on the existing basin to ensure proper infiltration. Under these circumstances, the Board's decision to waive the requirements of site plan approval was reasonable.

On January 21, 2016, the judge entered an order of judgment affirming the Board's decision. This appeal followed.

In reviewing a planning board's decision, we use the same standard used by the trial court. Cohen v. Bd. of Adjustment, 396 N.J. Super. 608, 614-15 (App. Div. 2007). Like the trial court, our review of a planning board's decision is limited. Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998). We give deference to a planning board's decision

and will reverse only if its action was arbitrary, capricious, or unreasonable. Zilinsky v. Zoning Bd. of Adjustment, 105 N.J. 363, 367 (1987). A planning board's decision is presumed to be valid, New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 160 N.J. 1, 14 (1999), in recognition of the fact that they possess "peculiar knowledge of local conditions[,]" which entitle such boards to wide latitude in the exercise of discretion. N.Y. SMSA, LP v. Bd. of Adjustment, 370 N.J. Super. 319, 331 (App. Div. 2004).

On appeal, plaintiff renews the arguments presented to the trial court. In addition, plaintiff raises specious claims that were not presented to the trial court. Regarding the latter, we find insufficient merit in defendant's arguments to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Moreover, this court "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). As to plaintiff's renewed arguments that were rejected by the trial court, we affirm substantially for the reasons set

forth in Judge Mendez's comprehensive and well-reasoned written decision. We add only the following comments.

Under N.J.S.A. 40:55D-70(d)(1):

The board of adjustment shall have the power to:

. . . .

In particular cases for special reasons, grant a variance to allow departure from . . . this act to permit . . . a use or principal structure in a district restricted against such use or principal structure . . . . A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board . . . .

An applicant seeking a use variance must demonstrate "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. Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 386 (1990) (citing Kohl v. Mayor of Fair Lawn, 50 N.J. 268, 276 (1967)). "Special reasons" generally fall into one of three categories:

(1) [W]here the proposed use inherently serves the public good, such as a school, hospital or public housing facility, see [Sica, 127 N.J. at 159-60]; (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, 152 N.J. at 323.]


[Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 76 (App. Div. 2006).]

An applicant for a use variance must also satisfy what are known as the "negative criteria." Specifically, an applicant must show that the variance "can be granted without substantial detriment to the public good[,]" and "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Price v. Himeji, LLC, 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, 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, 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, 107 N.J. at 21. However, "the enhanced standard does not apply to inherently beneficial uses" as found here. Sica, 127 N.J. at 155. Applying the above standards, we discern no reason to disturb the Board's or Judge Mendez's decision.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION