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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0433-16T4

JACK'S FRIENDLY SERVICE,
INC.; FAIRFIELD MANAGEMENT,
INC.; and A.D.P.P.
ENTERPRISES, INC.,

Plaintiffs-Appellants,

v.

TOWNSHIP OF FAIRFIELD ZONING
BOARD OF ADJUSTMENT and J&J
DEVELOPMENT GROUP, LLC,

Defendants-Respondents.

Submitted January 10, 2018 – Decided March 23, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-6049-
15.

Weiner Law Group LLP, attorneys for appellants
(Steven R. Tombalakian, on the brief).

Prime Law, attorneys for respondent, J&J
Development Group, LLC (Timothy M. Prime and
Sara R. Szymborski, on the brief).

Louis P. Rago, attorney for respondent
Township of Fairfield Zoning Board of

Adjustment, joins in the brief of respondent J&J Development Group, LLC.

PER CURIAM

Plaintiffs Jack's Friendly Service, Inc.; Fairfield Management, Inc.; and A.D.P.P. Enterprises, Inc. appeal from an August 19, 2016 order affirming the use variances, bulk variances, and site plan approvals granted by defendant Township of Fairfield Zoning Board of Adjustment (the Board) in favor of defendant J&J Development Group, LLC (J&J) and dismissing plaintiff's complaint. For the reasons that follow, we affirm.

We glean the following facts from the record. On May 22, 2014, J&J filed an application with the Board pursuant to the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, seeking preliminary and final major site plan approval, along with two use variances and numerous bulk variances. J&J intended to build and operate a convenience store and fueling station on a parcel of land (the property) on Passaic Avenue in Fairfield Township (the Township). The property, as it existed at the time of the application, housed a vacant office building and a Chase Bank, which has a lease containing renewal options extending until October 31, 2032. Due to the bank's lease, the convenience store building had to be designed around the existing Chase Bank, resulting in a need for several bulk variances. Furthermore,

additional approvals were necessary because the property is located within the 100-year floodplain, as is the majority of the Township.

The property is also located within the Township's Commercial Neighborhood Zone (C-1), which does not permit fueling stations. As a result, it was subsequently determined J&J would need two use variances, one to permit the fueling station and another to permit three principal uses (a fueling station, convenience store, and existing Chase Bank) on the property where only one is permitted.

On August 6, 2014, the Board notified J&J its application had been deemed complete. After J&J provided legal notice to the interested parties in accordance with the MLUL, the Board held public hearings on October 21, 2014; November 25, 2014; January 20, 2015; February 17, 2015; March 17, 2015; April 21, 2015; May 19, 2015; and June 2, 2015.

Over the course of these hearings, J&J presented testimony from six witnesses: James Angeloni, the manager of J&J and current owner of the property; Steve Cattani, a civil engineer; Mark Whitaker, a civil engineer; David Crawford, an architect; Paul Phillips, a professional planner; and Elizabeth Dolan, a traffic engineer. Plaintiffs presented testimony from three witnesses: Gordon Meth, a traffic engineer; Roger DeNiscia, a professional planner; and Jack Tabibian, the owner of Jack's Friendly Service.

The Board presented testimony from three professionals: Lawrence Gonnello, the Township Engineer; Harold Maltz, an independent traffic engineer; and Russell Stern, a land use planner and independent consultant.

During the hearing process, twelve of the bulk variances initially sought were eliminated. Another five were modified to reduce the extent of the dimensional variances sought.

At the conclusion of the June 2, 2015 public hearing, the seven-member Board unanimously approved J&J's application for site plan approvals and the bulk and use variances. On August 4, 2015, the Board issued a comprehensive fourteen-page Resolution of Memorialization (Resolution) setting forth its findings, conclusions, and decision. However, the Resolution required the application to be reviewed and approved by the New Jersey Department of Environmental Protection (NJDEP) and either the Township's Construction Code Official or the Township's Flood Damage Appeal Board concerning any possible flooding issues.

As part of its analysis, the Board considered the record with regard to the positive and negative criteria necessary to grant the requested use variances. In particular, the Board recounted Phillips' testimony in the Resolution, noting:

14. With regard to the positive criteria [Phillips] indicated that the subject property is particularly suited for the proposed mixed

uses, including the convenience store with fuel sales, due to its physical and locational characteristics. He indicated that it was important to note that the subject property is already developed with two existing buildings which are somewhat dated and no longer appropriate for a high-visibility intersection that is now developed with retail and service commercial uses on the other three corners. He stated that two of the three uses proposed on the subject property (bank and convenience store) are permitted principal uses in the zone. Mr. Phillips also indicated that, while the proposed gasoline sales component of the operation is not a permitted use in the C-1 zone, it is complementary to a convenience store and appropriate in this type of location. The site has adequate area to accommodate the proposed uses.

In Mr. Phillips' view the use of the subject property for office buildings is no longer appropriate given the state of the economy. In his opinion the proposed Wawa and bank would be the "economic drivers" of success for this property and the fuel station would be a natural ally of the Wawa facility. Both would need each other to survive. Mr. Phillips also was of the view that the proximity to [U.S.] Route 46 and the nearby intersection made the subject property very appropriate for the proposed use; there was sufficient acreage; and the proposed uses do not abut any residential areas. With regard to the issue of the floodplain, although Mr. Phillips was of the view that it was certainly preferable to have the Wawa and the fuel facility out of the floodplain area, this was not possible on this site and he indicated that the NJDEP and the Township Flood Board would also have to review and approve the construction.

With regard to the positive criteria Mr. Phillips was of the view that the purposes of

the MLUL would be advanced by approving the Application, more specifically, N.J.S.A. 40:55D-2[(a)] and [(g)]. Further, he was of the opinion that the grant of a use variance would advance the Township's Master Plan objectives to insure that any prospective development and/or redevelopment is responsive to Fairfield's environmental features; that buffer zones are available to separate incompatible uses; and to encourage new development and redevelopment of properties to take into account the aesthetic character of the community.

15. With regard to the negative criteria it was Mr. Phillips' opinion that this criteria was satisfactorily addressed and the granting of the variances would not result in any substantial detriments to the public good, zone or Master Plan. He indicated that the subject property can accommodate the proposed modifications to the existing development and new commercial uses without adversely impacting adjoining properties of the surrounding area. He stated that gas sales are now part and parcel of nearly all new convenience store developments and the site can adequately and safely accommodate the operation from the standpoint of site access and circulation, as well as provide sufficient setbacks and buffers. Further, adjacent uses are non-residential in character and established residential developments are largely removed from the site. Banks and convenience stores are already permitted in the zone and gas sales are now typically located on the same lot and in conjunction with convenience stores. Mr. Phillips was also of the opinion that the market for office development in Northern New Jersey and other locations has fundamentally changed, and that the subject property would not be compatible with office use any longer, especially given the fact that a portion of the site has remained vacant for quite some time. In

summary, the combination of less demand for office space, and industry changes relative to convenience store operations, would appropriately support a non-permitted use on the subject property.

After recounting the testimony and other evidence presented, along with the arguments of the parties and objectors, the Board reached the following conclusions:

Based upon the testimony and evidence presented the Board finds that [J&J] has met the requirements for the granting of a use variance, dimensional variances, and preliminary and final site plan approval for the reasons specified by the witnesses which are set forth in the body of this Resolution. More specifically, the Board has noted that [J&J] has made numerous revisions to the site plan since the initial filing, and the revisions have significantly improved the site plan and has resulted in a reduced number of dimensional variances.

The Board is of the view that [J&J]'s presentation was persuasive, and is convinced that what [J&J] is seeking is not a rezoning of the site, but a site specific application for the uses presented. The Board notes that this site has deteriorated over the years and there is simply no other permitted use that has deemed it fit to occupy this property. The proposal presented by [J&J] will result in a significant improvement of the subject property and the Board notes that the NJDEP and the Township Flood Board will review the Application in terms of the possible flooding issue. The Chase Bank is already present and will be located on this site for numerous years given the status of their lease. The bank is now smaller and more aesthetically pleasing and, in point of fact, the impervious coverage will be reduced from 90.6% to 76.3%

by virtue of modifications made to the site plan. The property has been underutilized and the proposed Application will make it commercially viable and aesthetically pleasing. At the present time the site is "an embarrassment" and the property is in need of development and an improved visual environment. The traffic circulation, and the intersection, are busy but will work appropriately based upon the testimony heard. Further, the architecture proposed is pleasing.

. . . Based upon the testimony and evidence presented the Board finds that [J&J] has met their burden for the reasons specified by the witnesses as set forth in the body of this Resolution. More specifically, there are no residential areas within a reasonable distance of the subject property, and the proposed use of the property is practical and will be clearly a positive step toward commercial revitalization of this property and area. The Board notes the adjoining property uses are consistent with the proposed Application, including other gas stations. The site will be visited mainly by "pass by" traffic and both the intersection and the ingress/egress to the site will be able to appropriately accommodate the traffic. This Application represents the best use of the subject property under the circumstances and is substantially consistent with the concepts set forth in the Master Plan.

On August 27, 2015, plaintiffs filed their complaint in lieu of prerogative writs challenging the Board's Resolution. On August 11, 2016, the trial court heard oral argument. Plaintiffs argued the Board erred by: (1) finding J&J had satisfied the special requirements for a use variance articulated in Saddle Brook Realty,

LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67 (App. Div. 2006); (2) failing to apply the enhanced quality of proof standard articulated in Medici v. BPR Co., 107 N.J. 1 (1987); and (3) delegating its exclusive power to grant variances to the Township Flood Board. At the conclusion of oral argument, the trial judge issued an oral decision affirming the Board's actions and dismissing plaintiff's complaint.

The trial court first addressed plaintiffs' argument that the Board erred by finding special reasons supporting the use variance based on economic utility. Finding the argument to be without merit, the court noted the Board: (1) relied on Phillips' testimony that the physical and locational characteristics of the "property render it particularly suitable for the proposed purpose, proposed use;" and (2) "expressly found that the site was particularly suitable for the proposed mixed uses." It further observed "site suitability does not require an applicant to establish unique or superior suitability as compared to other sites." (citing Price v. Himeji, LLC, 214 N.J. 263 (2013)). The court concluded the Board's findings of special reasons rested on sufficient evidence in the record and did not appear to be arbitrary or capricious.

The trial court next addressed plaintiffs' argument that the Board erred in finding J&J had satisfied the negative criteria prescribed by the MLUL, specifically, the need to establish the

variance "can be granted without substantial detriment to the public good and will not impair the intent and purpose of the zone plan and the ordinance." N.J.S.A. 40:55D-70(d). Plaintiffs argued J&J failed to satisfy the enhanced quality of proof standard imposed by the Court in Medici, noting when the governing body reexamined the master plan, it elected to continue the prohibition of fueling stations in C-1 zones.

The trial court concluded this argument was without merit. Noting the extensive factual record and support provided by Phillips, the trial court concluded the Board reasonably found defendant met the enhanced quality of proof standard. In reaching that conclusion, the court stated:

Phillips noted initially that the lot was an outlier in the overall C-1 zone given the fact that in the master plan reexamination of 2012, lots within C-1 zone are generally characterized as small within close proximity to residential development. Neither of those things describe this particular site. Phillips noted that the Chase bank and the Wawa convenience store are both conforming uses and that . . . only the attached fueling station was [nonconforming].

With respect to the fueling station, Phillips indicated that the recent industry trends . . . are evidence of decline in office space use, as well as brick and mortar banking. Moreover, he testified that modern day convenience stores typically involve the sale of fuel. Phillips added that that proposed use[] was not inconsistent with the surrounding uses. While he conceded that the

fueling stations are not provided for in any zone within the township but observed that while the master plan has been reviewed in 2012, it was unclear whether there was a comprehensive review of the entire ordinance or the zone plan for the township.

Taken together, Phillips argued these factors reflected minimal, if any, impact on the intent and purpose of the zone plan and the ordinance. In adopting Phillips' view, the board expressly found that the purported use represents the best use of the subject property under the circumstances and is substantially consistent with the concept set forth in the master plan. Stated differently, the board found that the purported use[] was not inconsistent with the intent and purpose of the master plan and the zoning ordinance as required by Medici.

Given the extensive factual record, support discussed above, the board's findings that [J&J] met the enhanced quality of proof standard appears to this [c]ourt to have been reasonable. And once again, the presumption of the validity of their findings should remain [intact].

Finally, the trial court rejected plaintiff's argument that the Board erred by conditioning approval of the variance upon further review and approval by the NJDEP and either the Township's Flood Damage Appeal Board or the Township's Construction Code Official as to any flooding issues. The trial court concluded the referral of floodplain issues to the Flood Board and NJDEP was not an unlawful delegation of the power to zone. The court noted land use approvals are often conditioned upon approval by other boards,

such as county planning boards, and flood zone issues are not "particularly within the knowledge and expertise of the members of the [zoning] board."

This appeal followed. On appeal, plaintiffs raise the following points:

POINT I

PARTICULAR SITE SUITABILITY COULD NOT HAVE BEEN PROVEN ABSENT A SHOWING THAT THE NEW GASOLINE STATION PROPOSED BY J&J WOULD SOMEHOW ENHANCE THE GENERAL WELFARE BY SATISFYING SOME NON-EXISTENT NEED IN A TOWNSHIP THAT HAS DEEMED TO PROHIBIT NEW GASOLINE STATIONS ENTIRELY.

POINT II

THE BOARD COMPLETELY FAILED TO APPLY THE ENHANCED QUALITY OF PROOF STANDARD REQUIRED UNDER THE MEDICI DECISION.

POINT III

THE BOARD'S UNAUTHORIZED DELEGATION OF VARIANCE POWER RESULTED IN FURTHER ERROR.

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) (citation omitted). 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). Decisions of zoning boards constitute quasi-judicial actions of municipal administrative

agencies, Willoughby v. Planning Bd. of Deptford, 306 N.J. Super. 266, 273 (App. Div. 1997), and they are presumed to be valid, Cell S. of N.J., Inc. v. Zoning Bd. Of Adjustment of W. Windsor Twp., 172 N.J. 75, 81 (2002). Zoning boards 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) (quoting Pierce Estates Corp. v. Bridgewater Twp. Zoning Bd. of Adjustment, 303 N.J. Super. 507, 514 (App. Div. 1997)).

"[A]n overriding principle governing judicial review of variance decisions by boards of adjustment is that, assuming an adequate basis in the record for a board's conclusions, deference to the judgment of local zoning boards ordinarily is appropriate." Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 58 (1999). We will reverse a planning board's decision only if its action was so arbitrary, capricious, or unreasonable as to amount to an abuse of discretion. Zilinsky v. Zoning Bd. of Adjustment, 105 N.J. 363, 367 (1987). The burden is on the challenging party to show the board's decision was arbitrary, capricious, or unreasonable. Cell S. of N.J., 172 N.J. at 81; Smart SMR, 152 N.J. at 327. Further, "the Board 'has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal.'" Kramer v. Bd. of Adjustment,

45 N.J. 268, 288 (1965) (quoting Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (App. Div. 1960)).

Under N.J.S.A. 40:55D-70(d), a board of adjustment has 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

Less deference is given to a grant of a use variance. Saddle Brook, 388 N.J. Super. at 75. "[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 Burbridge v. Mine Hill, 117 N.J. 376, 385 (1990)). To uphold a use variance, a reviewing court must find the board's decision both meets the statutory criteria and is supported by adequate evidence. Ibid.

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, 117 N.J. at 386

(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; (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the use would serve the general welfare because the proposed site is particularly suitable for the proposed use.

[Saddle Brook, 388 N.J. Super. at 76 (citations omitted).]

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 "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Price, 214 N.J. at 286 (quoting N.J.S.A. 40:55D-70). As explained by the Court in Price:

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. 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." Id. at 21.

[Ibid.]

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.

Applying these standards, we discern no reason to disturb the Board's or the trial court's decisions, which are supported by sufficient, credible evidence in the record. The record supports the Board's finding that J&J established the positive and negative criteria for the issuance of the use variance; namely, that special reasons exist for the variance and that the variance can be granted without substantial detriment to public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

Plaintiffs' remaining argument regarding the alleged delegation of the variance power to the Township's Flood Damage Appeal Board lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION