SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1119-15T1

JENNIFER VAN SCHOICK,

Plaintiff-Appellant,

v.

JACKSON TOWNSHIP ZONING
BOARD OF ADJUSTMENT and
J.C. INDUSTRIES, LLC,

Defendants-Respondents,

and

ALLAN SIESEL and
GLADYS SIESEL,

Defendants.

Argued December 21, 2017 – Decided January 16, 2018

Before Judges Simonelli, Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3389-14.

R.S. Gasiorowski argued the cause for appellant (Gasiorowski & Holobinko, attorneys; R.S. Gasiorowski, on the briefs).

Christopher J. Dasti argued the cause for respondent Jackson Township Zoning Board of Adjustment (Dasti, Murphy, McGuckin, Ulaky, Koutsouris & Connors, attorneys; Christopher J. Dasti, of counsel and on the brief).

Marguerite Kneisser argued the cause for respondent J.C. Industries, LLC, (Carluccio, Leone, Dimon, Doyle & Sacks, LLC, attorneys; John Paul Doyle, of counsel and on the brief; Marguerite Kneisser, on the brief).

PER CURIAM

Plaintiff Jennifer Van Schoick appeals from the Law Division's August 10, 2015 order requiring defendant Jackson Township Board of Adjustment (Board) to amplify its findings of fact and reasoning supporting its decision to grant defendant J.C. Industries, Inc. (defendant) a use variance to expand its business operations on property it planned to acquire in Jackson Township (Township). Plaintiff also challenges the trial court's October 5, 2015 order, following its review of the Board's Amended Resolution, affirming the Board's decision to grant defendant's use variance application. After reviewing the record in light of the contentions advanced on appeal, we conclude that plaintiff's arguments are without merit, and we affirm substantially for the reasons set forth in Judge Mark Troncone's comprehensive written decision rendered on September 23, 2015.

The parties are fully familiar with the underlying procedural history and facts of this case and, therefore, only a brief summary

is necessary here. Defendant operates a construction contracting and excavation business on Lot 53 in Block 2201 of the Township's Tax Map. In August 2009, defendant agreed to purchase an adjoining lot, Lot 46, from defendants Allan and Gladys Siesel.[1] Lot 46 consists of 1.9 acres of land, but only 1.3 acres of the property are usable due to environmental restrictions.

When defendant purchased Lot 46, it was zoned for Light Manufacturing (LM), just like the parcel it already owned. Plaintiff owns a property that adjoins Lot 46. She lives in a single-family house and operates a dog boarding business on the property. Plaintiff's property was also in the LM zone.

In November 2010, defendant applied to the Board for preliminary and final site plan approval for the construction of a warehouse on Lot 46. Soon thereafter, the Township rezoned defendant's two lots, plaintiff's property, and other lots in the area to the Multi-Family Residential (MF) zone.

Defendant then applied for a use variance pursuant to N.J.S.A. 40:55D-70(d) to continue with its construction plans. Following a public hearing, the Board voted four to three in favor of defendant's application, but this was one vote short of the two-thirds majority the Board needed to approve a use variance.

[1] The trial court dismissed the Siesels from the litigation and they are not involved in the present appeal.

Defendant sought review of the Board's decision in the Law Division. However, on May 6, 2014, it abandoned the litigation, and decided to submit another application for a use variance.

In its new application, defendant made at least eleven amendments to its original filing in order to address the Board's concerns. These revisions included increased buffers along the property line; relocation of a fence; reduction in travel lane sizes to be built on the property; relocation of a dumpster; addition of light shields to prevent light pollution to neighboring properties; relocation of the proposed building by ten feet; altering the fence to include slots preventing visual distractions; consolidation of Lots 46 and 53; and agreement as to certain conditions of use.

At a public hearing in September 2014, defendant presented unrefuted expert testimony that its application satisfied the positive and negative criteria and that special reasons existed to grant the variance. The Board's own engineer agreed with defendant's expert. Plaintiff appeared in opposition to defendant's application, and expressed her concerns that defendant's proposal would adversely affect the business she operated on her property.

Following the hearing, the Board adopted a resolution unanimously approving defendant's application. In accordance with

Judge Troncone's August 10, 2015 order, the Board adopted an Amended Resolution setting forth its reasons for the approval on September 2, 2015.

Plaintiff thereafter filed a complaint in lieu of prerogative writs seeking to reverse the Board's action, contending defendant failed to meet its burden of proof and that the Board's action was arbitrary, capricious, and unreasonable. After thoroughly canvassing the record, Judge Troncone affirmed the Board's approval of the application.

In his written decision, the judge found there was substantial evidence in the record to support granting the relief sought by defendant. The judge noted that defendant presented unrefuted expert testimony that Lot 46 "could not reasonably be developed in accordance with the MF [z]oning requirements" because the MF zone had a ten-acre minimum lot requirement. Lot 46 had only 1.3 acres of developable land and, therefore, none of the uses permitted in the MF zone could be implemented on the property. Thus, Judge Troncone accepted the expert's conclusion that "a denial of the requested use variance would render the subject property into inutility." Therefore, the judge concluded that defendant established an undue hardship necessitating the grant of the requested variance.

The judge also found that permitting an expansion of defendant's business onto the adjoining property "would be consistent with other uses within the immediate area[,]" including defendant's current business operations, and plaintiff's dog boarding enterprise. Therefore, the judge found that approval of the application would not negatively impact plaintiff's property or her business.

Judge Troncone also rejected plaintiff's contention that approval of the application would substantially impair the purpose of the Township's zoning plan and ordinance. The judge found no support in the record for plaintiff's contention that the Township rezoned Lot 46 and the adjacent properties in 2010 for the express purpose of preventing the expansion sought by defendant.[2] Defendant's 1.9 acre property represented only three percent of the total acreage that was placed in the MF zone in 2010. Under these "unique circumstances affecting" Lot 46, the judge found the approval of defendant's application would constitute only a

[2] In response to plaintiff's contention, Judge Troncone directed the Board to provide all relevant public documents concerning the 2010 rezoning, and permitted the parties to submit supplemental briefs on this issue. After reviewing the documents, the judge concluded "that those records do not contain any specific reference to" Lot 46. Plaintiff's claim on appeal that the judge improperly supplemented the administrative record to include these public records is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

"relatively minor adjustment to the Township's zoning ordinance" and, therefore, was plainly "reasonable."

Finally, Judge Troncone found that the Board's Amended Resolution approving the use variance was "legally sufficient. The [R]esolution provides the 'whys and wherefores' supporting the Board's actions and; more importantly, is based upon substantial evidence. . . ." This appeal followed.

On appeal, plaintiff raises the same arguments she unsuccessfully pressed before the trial court. Plaintiff asserts that defendant failed to establish the positive and negative criteria necessary to warrant approval of the application. She also again claims the Board "usurped" the Township's zoning code, and that the Amended Resolution was deficient. We disagree.

"[W]hen reviewing the decision of a trial court that has reviewed municipal action, we are bound by the same standards as was the trial court." Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). Thus, our review of the Board's action is limited. See Bressman v. Gash, 131 N.J. 517, 529 (1993) (holding that appellate courts are bound by the same scope of review as the Law Division and should defer to the local land-use agency's broad discretion).

It is well-established that "a decision of a zoning board may be set aside only when it is 'arbitrary, capricious or

unreasonable.'" Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor, 172 N.J. 75, 81 (2002) (quoting Medici v. BPR Co., 107 N.J. 1, 15 (1987)). "[P]ublic bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. of Adjustment of Wall, 184 N.J. 562, 597 (2005). Therefore, "[t]he proper scope of judicial review is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Ibid.

To obtain a use variance, an applicant must satisfy both the so-called positive and negative criteria of N.J.S.A. 40:55D-70(d). See New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 160 N.J. 1, 6 (1999). Under the positive criteria, an applicant must show special reasons meriting a use variance. N.J.S.A. 40:55D-70(d)(1). As the New Jersey Supreme Court has stated, "'special reasons' takes its definition and meaning from the general purposes of the zoning laws" enumerated in N.J.S.A. 40:55D-2. Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 386 (1990). There are three circumstances in which such special reasons

> may be found (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, [107 N.J. at 17 n.9]; and (3) where the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use." [Smart SMR v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998)] (quoting Medici, 107 N.J. at 4).
>
> [Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95, 102 (2011) (quoting Saddle Brook Realty, L.L.C. v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 76 (App. Div. 2006)).]

The negative criteria require an applicant to prove 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." N.J.S.A. 40:55D-70(d). A proponent of a non-inherently beneficial commercial use, as here, must surmount an additional threshold. Since 1987, such an applicant is obliged to satisfy "an enhanced quality of proof" by securing "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. Thus, an applicant must reconcile the proposed use variance with the fact that the zoning ordinance omitted the use from those permitted in the district. Id. at 21-23. This burden

may be satisfied, for example, by evidence that "the character of a community has changed substantially since the adoption of the master plan" or that "a variance for a use omitted from the ordinance is not incompatible with the intent and purpose of the governing body when the ordinance was passed." Id. at 21.

Applying these criteria, we discern no basis for disturbing Judge Troncone's decision that the Board's findings fully supported its conclusion that defendant demonstrated undue hardship warranting the approval of its use variance application. Lot 46 was so small that it simply could not be developed for any of the uses permitted in the MF zone. Thus, the positive criteria were met because defendant would suffer "undue hardship" in the absence of the variance. Medici, 107 N.J. at 17 n.9. The uncontradicted expert testimony presented at the public hearing also provided a firm foundation for the judge's determination that defendant met the negative criteria because the impact of its proposed use of the property would be minimal on plaintiff and any adjoining landowners.

We also concur with Judge Troncone's determination that the Board did not usurp the Township's zoning power by granting defendant's application. As noted above, Lot 46 was only a small parcel that was zoned into "inutility" when the Township included it in the MF zone. Under these circumstances, the judge properly

concluded that the Board's approval of the application would have no meaningful impact upon the Township's overall zoning plan.

Finally, the Board's Amended Resolution set forth a comprehensive explanation of its decision to approve defendant's application. Therefore, Judge Troncone properly rejected plaintiff's contrary contention.

Affirmed.