SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3830-14T1

IAN BETZ,

Plaintiff-Respondent,

v.

BOARD OF ADJUSTMENT OF THE TOWNSHIP OF SOUTH ORANGE VILLAGE,

Defendant-Appellant.

Argued October 26, 2016 – Decided March 14, 2018

Before Judges Fuentes, Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1163-14.

Patrick J. Dwyer argued the cause for appellant (Nusbaum Stein Goldstein Bronstein & Kron, attorneys; Patrick J. Dwyer, on the briefs).

Elaine Berkenwald argued the cause for respondent.

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Defendant Board of Adjustment of the Township of South Orange (Board) appeals from the order of the Law Division overturning its denial of plaintiff Ian Betz's application to expand a preexisting nonconforming property from a four-family to a five-family unit structure. Plaintiff's property is located in a zoning district that is limited to one and two-family structures. The application constituted an expansion of a nonconforming use and thus required a variance under N.J.S.A. 40:55D-70(d)(2) of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -112.

In the resolution memorializing the decision to deny plaintiff's application, the Board found the expansion of this nonconforming use was detrimental to the intent and purpose of the municipality's zoning ordinance which measures density based on the number of units in a structure, not the number of dwelling units per acre. Plaintiff filed a complaint in lieu of prerogative writs pursuant to Rule 4:69-6(b)(3), challenging the Board's decision to deny the variance.

The Law Division judge reviewed the record developed by plaintiff and concluded the Board's decision to deny a variance to expand a preexisting nonconforming use was arbitrary because, in the judge's opinion, "there[] [was] no substantial detriment in adding the additional unit[.]" In this appeal, the Board argues

the trial court did not apply the deferential standard of review applicable under these circumstances. Consequently, the court usurped the Board's statutory role under the MLUL to determine local zoning matters.

After reviewing the record and mindful of our standard of review, we reverse. The following facts will inform our legal analysis.

Plaintiff has owned the four-family building at issue here since 1988. The four-family structure became a preexisting nonconforming use after the municipality enacted its 1922 zoning ordinance, which prohibits residential structures from housing more than two families in this zone. Plaintiff lives in an apartment on the second floor of the house and rents out the remaining three apartments.

Represented by counsel, plaintiff presented the testimony of architect William T. Dobson and land use consultant Lisa Phillips. Both of these witnesses were accepted by the Board as experts in their field. Dobson prepared the architectural floor plans of the proposed five-family structure. As Dobson explained, the proposed modifications "[would not cause an] increase in the lot coverage." At the fire marshal's request, he amended the floor plans and added an exit to comply with the requirements of the fire code.

The proposed plan increased the height of the attic to accommodate another bedroom.

In response to questions from the members of the Board, Dobson explained that the attic ceiling would be "probably nine and a half [or] ten feet [at the crown], then slope[] down to approximately six feet along the wall[s][.]" A Board member noted the attic has "a ceiling height [of] over seven feet" and observed its area thus "exceeds more than one-third of the area below[.]" Because plaintiff's house is located in a two-story zone, the proposed plan would require a height variance for a three-story structure. A Board member noted that although the building's exterior would remain unaltered, plaintiff's plan to repurpose the attic as a separate dwelling "change[es] the character of the building[,]" requiring plaintiff to install a sprinkler system and obtain a bulk variance. That same Board member opined that plaintiff would need to install sprinklers "[b]ecause [he cannot] have a multifamily dwelling of three stories in wood frame without sprinklers[.]" Dobson testified that he had not discussed this issue with plaintiff because his architectural drawings did not contain that "level of detail."

Dobson next addressed the availability of off-street parking. He testified that the proposed plan did not change the existing driveway or increase the size of the parking lot. He drew the

parking space markers into the existing area. The plan contained eleven parking spaces located twenty feet away from the garage. Cars would enter and exit via a single driving aisle. Dobson opined this configuration would not cause traffic congestion because "the tenants here have worked something out . . . [that] seems to work very well from what [he has] seen[.]" A Board member noted that the proposed parking configuration did not provide enough room for vehicles to turn. As a result, plaintiff would need to widen the parking area.

Land use consultant Lisa Phillips testified next. She opined that plaintiff's plan complied with the municipality's zoning ordinance because it allows two-family structures on 6000 square feet lots. Phillips testified that plaintiff's property is "nearly 18,000 square feet[.]" In her opinion, plaintiff's lot can accommodate fourteen dwelling units under a "dwelling per acre" analysis. Plaintiff's proposal only asked the Board to approve twelve and one-half dwelling units. Phillips also noted that the neighborhood consisted of both two-family and three-family houses. Thus, plaintiff's plan was consistent with the character of the neighborhood and would not negatively impact the surrounding area.

Phillips opined that plaintiff's plan qualifies for a use variance under N.J.S.A. 40:55D-70(d)(2) because it has a preexisting nonconforming four-family structure and seeks only to

expand that nonconformity by one residential unit. Phillips emphasized that this would not require any physical expansion of the property. With respect to parking, Phillips testified that this would not pose a problem from a land use perspective.

A Board member pointed out to Phillips that plaintiffs' property is located in a zone that is "based on families per dwelling[,]" not "[dwellings] per acre." The member expressed concern that accepting Phillips's dwellings per acre approach may lead to an increase in the number of applications seeking similar relief. Phillips testified that in her opinion, plaintiff's plan did not set a "precedent" in this regard because there were no other properties in the neighborhood that would be able to accommodate additional residential units in terms of size of the lot and the availability of onsite parking.

With respect to the positive criteria, Philips testified that granting a use variance under these circumstances (1) would be responsive to the municipality's need for more rental units; (2) would be consistent with the State's smart growth initiative because the rental unit would be near to mass transit; (3) increases the "variety of housing" and provides "a middle range rent;" and (4) conserves a unique architectural style.

The Board denied plaintiff's application. In its memorializing resolution explaining the basis for its decision,

the Board found that granting the application would frustrate "the intent and purpose of the zone plan and ordinance[.]" The plan "would further degrade compliance with the ordinance standard and allow intensification in direct contravention of the governing body's intent for the zone." The Board found the size of plaintiff's property was not a relevant factor because "[t]he ordinance limits density in this area according to the number of units in a structure, not the number of dwelling units per acre." Finally, the Board found the plan presented a risk of substantial impairment. It concluded plaintiff failed to present sufficient evidence to address the negative criteria and did not qualify for a use variance under N.J.S.A. 40:55D-70(d)(2).

We begin our analysis by reaffirming the legal principles that inform the judiciary's standard of review. A court reviews a municipal zoning board's decision to grant or deny a variance mindful that the Legislature vested the municipality with the discretion to make such decisions under the MLUL. Booth v. Bd. of Adjustment, 50 N.J. 302, 306 (1967). Furthermore, as noted by our Supreme Court: "A Board of Adjustment's decision is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable." In re Convery, 166 N.J. 298, 306 (2001) (citing New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 160 N.J. 1, 13 (1999)).

The reviewing court may not substitute its judgment for that of the municipal body unless the body acted in an arbitrary, capricious, or unreasonable manner. Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268, 296-97 (1965). As Justice Long emphasized in Jock v. Zoning Bd. of Adjustment:

> In the final analysis . . . public bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion. The 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.
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> [184 N.J. 562, 597 (2004) (citations omitted).]

Consistent with this jurisprudential policy of deference to local board's peculiar knowledge of local conditions, a reviewing court must afford "greater deference . . . to [a] denial of a variance[.]" Ne. Towers v. Zoning Bd. of Adjustment of Borough of W. Paterson, 327 N.J. Super. 476, 493-94 (App. Div. 2000) (citing Funeral Home Mgmt. v. Basralian, 319 N.J. Super. 200, 208 (App. Div. 1999)). This "heavier burden requires the proponent of the denied variance to prove that the evidence before the board was 'overwhelmingly in favor of the applicant.'" Nextel of N.Y. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 38 (App. Div. 2003) (quoting Ne. Towers, 327 N.J. Super. at

494). Appellate courts apply the same standard of review as trial courts when reviewing grants or denials of variances. Advance at Branchburg II, LLC v. Twp. of Branchburg Bd. of Adjustment, 433 N.J. Super. 247, 252 (App. Div. 2013). Appellate courts are bond by these same standards of review. Booth, 50 N.J. at 306.

Here, the record shows the Board's decision to deny a proposed expansion of a nonconforming use was not arbitrary, capricious, or unreasonable. Although the applicant's structure was a preexisting nonconforming use within the meaning of N.J.S.A. 40:55D-5, the public policy underpinning the MLUL disfavors its expansion because such nonconformities are inherently incompatible with the municipality's master zoning plans. See Belleville v. Parrillo's, 83 N.J. 309, 315 (1980). Notwithstanding this settled public policy, the MLUL permits the Board to grant variances for: "(1) a use . . . in a district restricted against such use or principal structure, (2) an expansion of a nonconforming use, . . . [and] (5) an increase in the permitted density[.]" N.J.S.A. 40:55D-70d. See Medici v. BPR Co., 107 N.J. 1, 19 (1987).

The "MLUL 'requires an applicant to prove both positive and negative criteria to obtain a use variance'" under N.J.S.A. 40:55D-70d. Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (quoting Smart SMR of N.Y., Inc., v. Fair Lawn Bd. of Adjustment, 152 N.J.

309, 323 (1998)). An applicant must prove the positive criteria by showing:

> (1) [] the proposed use inherently serves the public good, such as a school, hospital or public housing facility . . . ;
>
> (2) [] the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone . . . ; [or]
>
> (3) [] the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use."
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> [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) (internal citations omitted)).]

To satisfy the negative criteria, 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." N.J.S.A. 40:55D-70(d) (emphasis added). Here, the record shows Betz failed to present sufficient competent evidence to satisfy his burden of proof under the "positive/negative criteria" paradigm. With respect to the positive criteria, Betz did not present any evidence showing the proposed expansion of the property's nonconforming use promoted an inherently beneficial use or served the general

welfare. There is also no basis to find Betz would suffer an "undue hardship" from the denial of the application.

With respect to the negative criteria, the Board found Betz's proposal would undermine the municipality's master plan:

> The Board was concerned . . . with [the] detriment to the intent and purpose of the zone plan and ordinance. The ordinance limits density in this area according to the number of units in a structure, not the number of dwelling units per acre. By allowing expansion of this already non-conforming use[,] [Betz's] application would further degrade compliance with the ordinance standard and allow intensification in direct contravention of the governing body's intent for the zone. The Board concludes that such impairment is substantial and should not be allowed. Whether analyzed as a d(1) or d(2) variance[,] [Betz] has not proven the negative criteria.

Based on this record and mindful of the prevailing standards of review, the trial court's decision to overturn the Board's denial of Betz's application cannot stand.

Reversed.