SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3906-15T1

JOHN FAUCHER and AMY FAUCHER,

Plaintiffs-Appellants,
Cross-Respondents,

v.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF HOBOKEN and B&B PROPERTIES OF HOBOKEN, LLC,

Defendants-Respondents,
Cross-Appellants.

Argued December 5, 2017 – Decided January 25, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3564-15.

Ira E. Weiner argued the cause for appellants/cross-respondents (Beattie Padovano, LLC, attorneys; Ira E. Weiner, of counsel and on the briefs; Mariya Gonor, on the brief).

Dennis M. Galvin argued the cause for respondent/cross-appellant Zoning Board of Adjustment of the City of Hoboken (The Galvin

Law Firm, attorneys; Dennis M. Galvin and Andrew T. Leimbach, on the briefs).

Robert C. Matule argued the cause for respondent/cross-appellant B&B Properties of Hoboken, LLC.

PER CURIAM

B&B Properties of Hoboken, LLC (B&B) submitted an application to the City of Hoboken Zoning Board of Adjustment (Board) for several variances so that B&B could construct an accessory apartment above an existing garage on its property. After the Board granted the application, plaintiffs John and Amy Faucher, the owners of adjacent property, filed an action in lieu of prerogative writs in the Law Division challenging the Board's action.

The trial court affirmed the Board's decision to grant the variances, but remanded the matter to the Board to make additional findings of fact and conclusions of law on the existing record with regard to the density issues raised by the application. Plaintiffs appeal and the Board cross-appeals from the trial court's judgment dated April 15, 2016.

For the reasons that follow, we modify the trial court's judgment order to allow the Board to determine, in the exercise of its discretion, whether the existing record is sufficient for the Board to make the additional findings and conclusions or

whether the parties should be permitted to present additional evidence and testimony on density. As so modified, we affirm the trial court's judgment.

I.

B&B is the owner of property on Hudson Street in the City's R-1 (CS) zone, a subdistrict of the larger R-1 zone. The property is an undersized, through-lot that extends from Hudson Street in the front to Court Street in the rear. B&B's lot is improved with a two-unit, four-story residential dwelling and a one-story accessory garage. A yard is located to the rear of the principal residential dwelling. The yard is ten-feet deep and extends the entire width of the lot.

To the south of B&B's property is a large lot occupied by a seven-story, multi-unit residential structure, known as the Union Club. Plaintiffs' property is located to the north of B&B's property. Plaintiffs' property has a four-story residential principal structure at the front of the lot and a one-story accessory garage at the rear. The campus of Stevens Institute of Technology is located on the other side of Hudson Street.

On May 31, 2013, B&B submitted an application to the Board seeking several variances, which are required for the construction of an accessory apartment over the existing garage. In support of

the application, B&B provided the Board with a report by professional planner Kenneth Ochab, which stated in part that

> [t]he apartment will add two stories to the existing one-story garage. The two additional floors on the accessory building will cover [thirty-five percent] of the property and be separated from the principal building by [twenty] feet. The existing garage will be modified to allow three cars to be parked (currently two spaces are available).

After the Board's professionals expressed concerns about the proposal, B&B submitted a revised application to the Board, which reduced the height of the proposed structure to thirty feet, the permitted height under the City's zoning ordinance, thereby eliminating the need for a height variance. B&B also changed its application to request a use variance pursuant to N.J.S.A. 40:55D-70(d)(1) to allow two principal structures on the lot.

In addition, B&B sought variances pursuant to N.J.S.A. 40:55D-70(c)(2) and (d)(6) in order to allow accessory coverage of thirty-five percent, where twenty percent or 400 square feet is permitted under the ordinance; accessory height of three stories, when one story over the existing garage is allowed; lot size of 1910 square feet, when 2000 square feet is required; four stories for the existing principal building, when three stories are permitted; and pre-existing lot coverage of forty-five percent of the accessory building, when twenty percent is permitted.

On February 17, 2015, the Board conducted a hearing on the application. B&B submitted an affidavit to the Board indicating that it had provided affected property owners notice of the hearing by certified mail, as required by the Municipal Land Use Law (MLUL), N.J.S.A. 40:55A-1 to -163, specifically, N.J.S.A. 40:55D-12. Plaintiffs did not attend the hearing. It appears that the certified mail addressed to plaintiffs was returned "unclaimed."

At the hearing, B&B presented testimony from architect James McNeight and Ochab. The Board voted to approve the application and memorialized its decision in a resolution dated February 18, 2015. In the resolution, the Board determined that B&B's "proposal is an efficient use of the property in light of existing conditions affecting this property."

The Board found that "the use of this garage is substantially consistent with the [z]oning [o]rdinance's provision regarding accessory garages along Court Street," as well as the City's master plan. The Board therefore approved the proposal with conditions, including conditions concerning the appearance of the garage, apartment, and surrounding area.

Thereafter, plaintiffs commenced this action in the Law Division seeking a judgment invalidating the Board's action. On February 19, 2016, the trial court heard oral argument on the complaint. On April 15, 2016, the judge filed a written opinion,

finding that the Board had followed the applicable statutory guidelines, and there was sufficient credible evidence in the record to support the grant of the variances.

The judge noted, however, that plaintiffs had argued that B&B required a density variance because three dwelling units on the subject property exceeds the maximum density permitted in the R-1 (CS) subdistrict. In response, the Board had argued that a density variance was not required because the related bulk and density variances are subsumed in the Board's decision to grant the use variance.

The judge determined that in granting the use variance, the Board had not specifically addressed density. Therefore, the judge remanded the matter to the Board for "findings of fact and conclusions of law, on the record below, as to density, that is, whether density was implicitly considered in [the Board's] decision to grant the use variance."

The judge entered an order dated April 15, 2016, which dismissed plaintiff's complaint with prejudice and remanded the matter to the Board "to provide findings of fact and conclusions of law solely as to density" in conformity with the court's opinion. The court did not retain jurisdiction.

Plaintiffs appeal and argue: (1) B&B failed to prove the positive criteria required for a use variance; (2) B&B did not

present any evidence showing an "enhanced quality of proof" which is required for a use variance; (3) B&B failed to prove the negative criteria for the use variance; and (4) the trial court correctly found that a density variance was needed but erred in limiting the remand to the making of new findings of fact and conclusions of law based on the existing record. In its cross-appeal, the Board argues that the trial court erred by remanding the matter to the Board for findings of fact and conclusions of law on density.

II.

We turn first to plaintiffs' challenge to the Board's decision to grant B&B the use variance pursuant to N.J.S.A. 40:55D-70(d)(1). As noted, plaintiffs argue that B&B failed to present sufficient evidence establishing the positive and negative criteria for the variance. Plaintiffs further argue that B&B failed to present the "enhanced quality of proof" required for the variance.

A zoning board's decision is entitled to "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, LLC, 214 N.J. 263, 284 (2013) (citing Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002)). Therefore, a party challenging that grant or denial of a variance must "show that the zoning board's decision was 'arbitrary,

capricious, or unreasonable.'" Ibid. (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)).

An applicant seeking a use variance has the burden to "prove both positive and negative criteria" to a zoning board. Smart SMR of N.Y., Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998). The positive criteria are set forth in N.J.S.A. 40:55D-70(d)(1), which authorizes a zoning board, "[i]n particular cases for special reasons, [to] grant a variance to allow departure from regulations pursuant to . . . [the MLUL] to permit . . . a use or principal structure in a district restricted against such use or principal structure."

The term "special reasons" is not defined in N.J.S.A. 40:55D-70(d)(1). However, special reasons may be found where: (1) the proposed use inherently serves a public good; (2) the owner of the property would suffer an "undue hardship" if required to use the property in the manner permitted by the zoning ordinance; or (3) the use would serve the general welfare because the site is particularly suitable for the proposed use. Nuckel v. Little Ferry Planning Bd., 208 N.J. 95, 102 (2011) (citing Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 76 (App. Div. 2006)).

The negative criteria are set forth in N.J.S.A. 40:55D-70, which states that the applicant must show the "variance or other

relief 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." The applicant must establish the negative criteria with an enhanced quality of proof. Price, 214 N.J. at 286 (citing Medici v. BPR Co., 107 N.J. 1, 21 (1987)).

To do so, the applicant must focus "on the effect that granting the variance would have on the surrounding properties." Ibid. (quoting Medici, 107 N.J. at 22 n.12). The applicant "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).

Here, the Board found that B&B satisfied the requirements for a use variance because it advanced several purposes of the MLUL. The Board noted that the proposal promotes "a desirable visual environment through creative development techniques and good civic design and arrangement," N.J.S.A. 40:55D-2(i), and "the conservation of historic sites and districts," N.J.S.A. 40:55D-2(j).

The Board determined that the proposal was particularly suited for the location. The Board also found that "the accessory garage is consistent with the Court Street streetscape and the

proposed renovation will [complement] the look of this historic street." The Board decided that the benefits of granting B&B's application outweighed any detriments.

A. Positive Criteria

Plaintiffs argue that B&B failed to present sufficient evidence to show that its proposal was particularly suitable to the site. Plaintiffs contend B&B did not demonstrate that the proposed three-story, accessory structure would be of greater benefit to the general welfare than a structure that complies with the City's zoning restrictions.

In her opinion, the Law Division judge noted that the Board found that the proposal is "particularly fitted to the subject property." The judge stated that

> the Board [had] conducted a site-specific analysis of the subject property, the surrounding properties, and the [R-1 (CS)] subdistrict. Although [plaintiffs] argue that a conforming accessory apartment would likewise serve the general welfare, B&B presented evidence, and the Board found, that the subject property is unusual and unique and, as such, it was particularly suitable for the proposed use.
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> Specifically, . . . the Board considered B&B's expert testimony that the proposed project would not substantially impact [plaintiffs'] property vis-à-vis air, space and shade, but that an extension of the existing principal building would [have an] impact [upon] B&B's neighbor to the south, that is, the Union Club.

The judge rejected plaintiffs' contention that a conforming structure also would serve the general welfare because such a structure would have an adverse impact upon the Union Club's building.

On appeal, plaintiffs argue there is no benefit to the general welfare in constructing a large home rather than a small apartment in the manner specified in the ordinance. Plaintiffs further argue that the site is not unique "in the sense that development of the second principal structure will provide a general welfare benefit that would not occur if this same development were constructed on any other lot."

The Board found, however, that the proposed accessory apartment is particularly suited to the site. In its resolution, the Board noted that the proposed structure is consistent with the Court Street area and the proposed renovation "will [complement] the look of this historic street." The Board also found that the proposed improvements to the garage will appear "undistinguishable from the requirements of accessory garages" in the zone and are reconcilable with the zoning ordinance and the master plan.

As the Law Division judge found, there is sufficient credible evidence in the record to support the Board's findings. Therefore, we reject plaintiffs' contention that B&B failed to establish the

positive criteria in N.J.S.A. 40:55D-70(d)(1) for the grant of the use variance.

B. Negative Criteria

Plaintiffs argue that B&B failed to present sufficient evidence to establish the negative criteria by an enhanced quality of proof. Plaintiffs contend that Ochab offered no testimony to show that a second principal structure on B&B's property could be reconciled with the prohibition of such structures throughout the City.

Plaintiffs further argue that the Board's resolution is deficient because it does not mention the enhanced quality of proof required for a use variance. Plaintiffs also contend the trial court's opinion is flawed. Plaintiffs maintain the judge erroneously stated that an enhanced quality of proof might not be required in this case.

In her opinion, the judge pointed out that the Board's planner had suggested that B&B seek a use variance out of an abundance of caution. The judge noted that B&B was not seeking to vary the use of the accessory building, which will remain a single-family residential structure. This is consistent with the provisions of the City's zoning ordinance pertaining to the R-1 (CS) subdistrict.

In any event, the judge found that B&B had established the negative criteria with an enhanced quality of proof. The judge

noted the uniqueness of the lot, the existence of nonconforming principal and accessory structures, the use of a design that will utilize the lots without having a substantial impact upon its adjacent neighbors, and the fulfillment of the goal of providing family-sized housing options. The judge stated that

> The Board found that, due to the unique site conditions, the proposed project would not change the scale of the residential character of Court Street or be detrimental to the zoning plan. The second principal structure is consistent with the height permitted by the ordinance and the number of stories of other buildings on Court Street. The zoning ordinance provides for accessory apartments over garages on Court Street. Thus, the Board found that, despite the additional building depth, the project is consistent with the master plan and the zoning ordinance.
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> Moreover, B&B demonstrated that the project would not [have a negative] impact [upon] the character of the neighborhood or of the [C]ity. The Board did not disregard the potential impact of B&B's proposal on the surrounding properties. Rather the Board considered that, based on the size and location of the surrounding buildings, specifically the Union Club, any potential negative impact would be insubstantial.

The judge added that the proposed building would continue the "unique, historic character" of the R-1 (CS) subdistrict. It would promote the desirable visual environment and conserve a historic district, purposes that are consistent with the zoning ordinances and master plan.

The record supports the judge's determination that B&B satisfied the negative criteria by an enhanced quality of proof. As the judge found, the Board considered the effect the proposed structure would have on surrounding properties and reconciled the proposal with the City's zoning restrictions.

We have considered plaintiffs' other arguments regarding the grant of the use variance, including plaintiffs' contention that McNeight and Ochab offered net opinions with regard to the shadows the new structure will cast on neighboring properties. We are convinced these arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Therefore, we conclude the trial court correctly determined that the Board's decision to grant B&B's application for the use variance is supported by sufficient credible evidence in the record and the Board's decision is not arbitrary, capricious, or unreasonable.

III.

As noted, in its cross-appeal, the Board argues that the judge erred by remanding the matter to the Board for further findings of fact and conclusions of law on density. In their brief, plaintiffs argue that the judge correctly found that a density variance is required. Plaintiffs also argue that if the matter is remanded to the Board, the findings of fact and conclusions of law

should not be made on the existing record and the parties should be permitted to present additional evidence and testimony.

In her opinion, the judge stated that the Board had taken the position that a density variance was not required because all variances based on the applicable bulk and density standards are subsumed within the use variance. The judge observed that may be the case because B&B met its burden of establishing the positive and negative criteria for that variance.

The judge determined, however, that the Board should have made specific findings indicating "that density was considered explicitly and found to be subsumed in the use variance." The judge remanded the matter to the Board for findings of fact and conclusions of law "on the record below" regarding density, "that is, whether density was implicitly considered in its decision to grant the use variance."

Thus, the judge did not determine, as plaintiffs contend, that B&B was required to obtain a density variance pursuant to N.J.S.A. 40:55D-70(d)(5). Rather, the judge found that the density issues may have been subsumed in the Board's decision to grant the use variance and, if so, the Board should make explicit findings of fact and conclusions of law on density. The trial court's decision on this issue was consistent with Price, 214 N.J. at 296-300.

In Price, the Court noted that "when a zoning board considers an application for a (d)(1) use variance, it tests the associated requests for density and height variances against a more relaxed standard." Id. at 296. Thus, the applicant must show the site will accommodate the proposed use with greater density than that permitted by the ordinance. Id. at 296-97 (citing Grubbs v. Slothower, 389 N.J. Super. 377, 389 (App. Div. 2007)).

The Court made the following observations, which are relevant to this case:

> There is little doubt about the fact that 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. Indeed, [the Court] observed long ago that, in reviewing a use variance, "it is obvious that the height and front-yard restrictions are intended to apply to single-family residences" which was the only permitted use in the zone, rather than to the proposed use. [Kramer, 45 N.J. at 295]. That does not mean that a zoning board can ignore the ordinarily applicable limits on height, for example, when evaluating an application for a use variance. It does mean that the board can, as part of granting a use variance, consider the other requested variances as ancillary to the principal relief being sought.
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> Indeed, this Board treated the application in just such a fashion. As part of the analysis of the use variance, the Board did not focus simply on the use, but on the overall project design, including its height and density. Although both were inconsistent with the ordinarily applicable limitations in

> the zone, the Board addressed each as part of deciding to grant the use variance. Nor did the Board simply authorize the height and density that [the applicant] requested. On the contrary, the Board required that the building be lowered in height and reduced in regard to the number of living units, thus limiting the extent to which the project varied from the zone and bringing it into conformity with nearby existing buildings to retain consistency with the overall zone plan.
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> [Id. at 299-300.]

Therefore, as part of considering a use variance, the Board may consider "other requested variances" as ancillary to the primary relief being requested. Id. at 300. The Board must, however, focus on each requested variance and address each as part of its decision on the use variance. Ibid.

Here, B&B did not expressly seek a density variance, but the need for such relief was implicit in the application because, if granted, three dwelling units will be constructed on the property, with a greater density than permitted by the ordinance. The trial judge correctly determined that the Board could consider the need for relief from the density requirements as ancillary to its decision on the use variance; however, there was no indication that the Board had done so. The judge found that additional findings of fact and conclusions of law on density are required. Therefore, the judge did not err by remanding the matter to the Board.

Plaintiffs argue, however, that the judge erred by ordering the Board to make those findings and conclusions based on the existing record. Plaintiffs argue that if the matter is remanded, the record should be reopened and all parties permitted the opportunity to present additional testimony and evidence.

We leave it to the Board to determine, in the exercise of its discretion, whether the existing record is adequate for the Board to make the required findings of fact and conclusions of law, and if not, whether the record should be re-opened to allow the parties to present additional evidence and testimony on density.

As so modified, the trial court's order of April 15, 2016 is affirmed on the appeal and the cross-appeal.