SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4634-15T2

AMIR SHAKED, EFRAT SHAKED, KATARZYNA KRICKOVIC, NENAD KRICKOVIC and GURJEET TANEJA,

Plaintiffs-Appellants,

v.

BOARD OF ADJUSTMENT OF THE TOWNSHIP OF NORTH BERGEN and CHR PARTNERS, LLC,

Defendants-Respondents.

Argued December 14, 2017 – Decided May 23, 2018

Before Judges Simonelli, Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2484-15.

Malcolm J. McPherson, Jr., argued the cause for appellants.

John R. Dineen argued the cause for respondent Board of Adjustment of the Township of North Bergen (Netchert, Dineen & Hillmann, attorneys; Christine S. Diana, on the brief).

Joseph L. Basralian argued the cause for respondent CHR Partners, LLC (Winne, Banta,

Basralian & Kahn, PC, attorneys; Joseph L. Basralian, of counsel and on the brief; R.N. Tendai Richards, on the brief).

PER CURIAM

In this action in lieu of prerogative writs, plaintiffs Amir Shaked, Efrat Shaked, Katarzyna Krickovic, Nenad Krickovic, and Gurjeet Taneja appeal from the May 23, 2016 Law Division order, which affirmed the decision of defendant Board of Adjustment, Township of North Bergen (Board) to approve the amended application of defendant CHR Partners, LLC (CHR) to construct a seventy-unit high-rise building in North Bergen. We affirm.

I.

The subject property is known as 8701 and 8703-8719 Church Hill Road, and designated on the Township of North Bergen (Township) tax map as Block 435, Lots 39 and 40 (previously Lots 30 to 40). The property is located in the R-1 Low Density Residential/Townhouse District, which permits one- and two-family attached dwelling units and includes a townhouse overlay (the R-1 District).

In 2006, CHR applied for preliminary and final site plan approval to develop a fifty-four unit multi-family high-rise building with nine floors of residences above four floors of parking comprised of nine one-bedroom units, thirty-six two-bedroom units, and nine three-bedroom townhouse units on a 1.67

acre site (the 2006 application). CHR applied for a use variance because a high-rise apartment building was not a permitted use in the R-1 District.

CHR also applied for a density variance for 41.6 units per acre, whereas twenty-five units per acre was allowed in the R-1 District; a height variance for 114.17 feet, whereas forty-five feet was allowed; a rear yard setback variance of eleven feet, whereas thirty feet was required; a lot coverage variance for ninety-three percent, whereas ninety percent was allowed; a front yard setback variance for twenty-one feet and eight feet, whereas ten feet was allowed; and a side yard setback variance for nineteen feet and eight feet, whereas fifteen feet and fifty feet was allowed. On July 20, 2006, the Board issued a resolution approving the site plan and granting all variances CHR requested (the Original Approval).

CHR subsequently applied for an amendment to the site plan approved in the Original Approval to permit it to subdivide the townhouses on Lots 39 and 40 from the high-rise building on Lots 30 to 38, and install an interior electronic elevator parking system in the high-rise building to eliminate two levels of parking. Under the amended plan, CHR would proceed with the project in two phases, with the townhouses constructed in phase one and the high-rise building constructed in phase two. On July

11, 2007, the Board issued a resolution approving the application (the 2007 Approval).

In 2009, CHR constructed the nine townhouses. CHR also rebuilt Church Hill Road to the Township's road standards, and installed underground utilities along the entire length of the property and beyond to neighboring properties, thirteen on-street parking spaces on Church Hill Road, and a conforming intersection of Church Hill Road with River Road. By August 24, 2010, CHR sold all nine townhouses and conveyed title by separate deeds.

Prior to the sale of the first townhouse, the Township's tax assessor combined Lots 39 and 40, on which the townhouses were located, into a new tax Lot 40 with a numerical designation for each townhouse of one through nine. The tax assessor also combined Lots 30 to 38, on which CHR would construct the high-rise apartment building, into a new tax Lot 39. However, the subdivision of the townhouse Lots 39 and 40 from high-rise building Lots 30 to 38 never occurred because CHR withdrew its application for a subdivision.

On April 11, 2011, CHR applied for an amendment to the site plan approved in the Original Approval to permit construction of eighty units in the high-rise building and four floors of parking containing 138 parking spaces (the 2011 application). The eighty

units would comprise thirty one-bedroom units, forty two-bedroom units, and ten three-bedroom units.

On November 21, 2011, the North Bergen Fire Department advised the North Bergen Director of Public Safety that the building plan posed possible fire hazards, as "[t]here [was] no designated area for emergency vehicles to exit Church Hill Road" and "[t]here [was] no access to the rear of the structure for firefighter operations and rescue if needed." Prior thereto, on November 16, 2012, CHR withdrew the 2011 application and decided to proceed with the fifty-four-unit project approved in the Original Approval.

On June 26, 2014, CHR applied for an amendment to the site plan approval in the Original Approval to increase the number of units from fifty-four to eighty (the 2014 application). The units would be smaller in size and would comprise thirty one-bedroom units, forty two-bedroom units, and ten three-bedroom units. The building would have the same number of stories, footprint, and height as the originally approved fifty-four unit building.

CHR incorporated into its application and relied on the use, height, and other variances granted in the Original Approval, and requested a further density variance to increase the number of units per acre. Although the proposed building would be in the same location as the previously approved building, CHR requested

a front yard variance of 2.78 feet because of the deduction of a right-of-way granted to the Township for the improvements to Church Hill Road, and for 0.3 feet because of the high-rise windows beginning at the fourth floor. CHR also requested a waiver to permit parking spaces of eight feet, six inches by eighteen feet instead of the nine feet by eighteen feet required by the State Residential Site Improvement Standards.

The Board held hearings on October 16, 2014, December 16, 2014, and March 12, 2015. During the December 16, 2014 hearing, CHR amended the 2014 application to reduce the number of units from eighty to seventy with ten floors of residences above four floors of parking.

CHR's engineer, Calisto Bertin, testified about the modifications to the site plan relating to the exterior of the proposed building. He also testified about the reconstruction of River Road, and the building's location and height.

CHR's architect, Conrad Roncati, testified about the building's height, the distance between the building and the curb, changed market conditions creating a need for a building with smaller units, and the residential square footage added to the proposed building between the 2006 Resolution and the 2014 application.

CHR's licensed traffic engineer, Charles Olivio, testified that the amended plan provided parking in excess of the required amount of spaces, the seventy-unit project would not significantly impact the traffic volume on the River Road intersection, and the proposal of a seventy-unit building would reduce any increased traffic volume arising from the project. He also testified that the installation of the sidewalk and increase in road width during phase one of the project would improve traffic flow in the area.

CHR's planner, Gabriel Bailer, testified as to the positive and negative criteria with respect to the requested variances. He testified as to both the enhanced criteria under Medici v. BPR Co., 107 N.J. 551 (1988), justifying the use variance to increase the overall number of units, and with respect to the density variance to justify the increase in the number of units from fifty-four to seventy set forth in the relaxed standards under Coventry Square, Inc. v. Westwood Zoning Board of Adjustment, 138 N.J. 285 (1994).

On April 16, 2015, the Board issued a resolution approving the 2014 application (the 2015 Resolution), which stated:

> on December 16, 2014, [CHR] . . . reduced the requested number of residential apartment units to [seventy] units from [eighty] units; and
>
> . . . the Board . . . previously granted Site Plan Approval, a use variance, a height

> variance and other related variances to construct a [fifty-four]-unit multifamily complex and to construct nine (9) townhouses . . . to . . . [CHR] pursuant to its Resolution memorialized on July 20, 2006 as amended[.]

The 2015 Resolution specified the evidence the Board considered, and noted the following:

> The subject site is located in the R-1 Low Density Residential/Townhouse District of the Township. The subject site, which is approximately 26,200 square feet of vacant land, is part of Block 435, Lots 39 and 40 and aggregates 1.68 acres. This Application is for Amended Preliminary and Final Site Plan of the previously approved site plan pursuant to the Original Approval, use variance, height variance, density variance, and other incidental variances related to the site plan.
>
> [] The allowable height in the R-1 Zone is a maximum height of [thirty] feet and [forty-five] feet in the Townhouse Overlay. [CHR's] . . . proposed height is 114.17 feet for which a d(6) height variance was previously granted to . . . [CHR] pursuant to the Original Approval. The height of 114.17 feet is the same as proposed in the [2014] Application and Amended and Preliminary and Final Site Plan. The permitted maximum building coverage is [thirty-five] percent. [CHR's] . . . proposed building coverage is 29.3 percent. The maximum impervious surface coverage is [sixty-five] percent. [CHR's] . . . proposed impervious surface coverage is 41.33 percent.
>
> The front yard setback required is [ten] feet. [CHR] . . . proposed a front yard setback of 0.3 feet, and therefore, requires a variance, but it is acknowledged that the proposed building is in the same location as approved in the Original Approval; however, due to onsite engineering changes when Church Hill

> Road was constructed, the road was moved closer to the proposed building thereby necessitating the setback variance for a portion of the building even though the building was not moved from its location as approved by the Board in the Original Approval. The rear yard setback required is [thirty] feet and [CHR] proposed . . . a rear yard setback of 10.38 feet versus the [eleven] feet provided for in the Original Approval, and therefore, requires a variance. The side yard setback required is [fifteen] feet and [fifteen] feet and [CHR] . . . proposed [fifteen] feet and 4.9 feet; the side yard measuring 4.9 feet requires a variance.
>
> A total of [ninety-two] parking spaces are required and [CHR] . . . provided 109 parking spaces. The parking spaces measure [nine] feet in width and [eighteen] feet in length.
>
> Regarding use, a d(1) use variance is required because high rise apartments are not a permitted use in the R-1 district but such variance was heretofore granted pursuant to the Original Approval. Regarding density, a d(5) density variance is required because [CHR] has proposed 41.6 units per acre.

The 2015 Resolution stated the Board was fully satisfied that CHR demonstrated the proof required by the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -112, Medici, and the Township's Master Plan, and the record amply showed the proposed seventy-unit high-rise building was not an inconsistent use within the R-1 District. The Board made the following findings:

> 1. There is no detriment to the surrounding area by allowing for the construction of the [seventy]-unit residence;

2. There is no harm to the master plan or zoning ordinance because the proposed [seventy]-unit residence is permitted and consistent with the surrounding uses of the area;

3. [CHR] . . . has sustained [its] burden of establishing the enhanced proofs and further finds that there will be no detrimental impact to the master plan and the surrounding area;

4. The front yard setback of 0.3 feet is a result of field conduction at the time of the construction of [Church Hill] Road and that the building itself is located in the same place as was approved by the Board in the Original Approval;

5. The height of the building is the same as approved by the Board in the Original Approval;

6. The slight difference in the one side yard and the rear side yard from the Original Approval is de minimis and resulted from a miniscule shift of the building;

7. The infrastructure improvements heretofore made to [Church Hill] Road will eliminate any road construction during the construction of the building;

8. The proposed [seventy]-unit apartment building will have a de minimis impact on [Church Hill] Road and surrounding roadways and intersections;

9. The proposed density variance to permit 41.6 units per acre can be accommodated by the subject property; and
[10.] There is adequate turnaround for the delivery and refuse vehicles.

On June 8, 2015, plaintiffs filed a complaint in lieu of prerogative writs, seeking to overturn the Board's decision. Plaintiffs contended the 2015 Resolution was void ab initio because the Board was illegally constituted with municipal elected or appointed officials in violation of N.J.S.A. 40:55D-69, and therefore, incapable of granting approval of the 2014 application. Plaintiffs argued that Board Chairman Anthony Vainieri was appointed as the Mayor's Chief of Staff with the official title of confidential aide and appointed as a Commissioner for the North Bergen Housing Authority. Vanieri was also elected as a Hudson County Freeholder, a Committeeperson for his District in North Bergen, and Chairman of the Hudson County Democratic Organization (HCDO).

Plaintiffs argued that Board Vice-Chairman Frank Pestana was the Executive Director of the North Bergen Municipal Utilities Authority (MUA). Plaintiffs posited under N.J.S.A. 40:14B-4, the MUA is an instrumentality of the Township, the Township exercises complete control over the appointment of MUA members, the Township appoints five persons as members of the MUA board, and the MUA board elects the Executive Director. Plaintiffs also argued that Board member Emil Fuda was a supervisor in the Township's

Department of Public Works and appointed to a position with the North Bergen Parks Department.[1]

Plaintiffs contended the Board violated N.J.S.A. 40:55D-70.1, which required it to "at least once a year, review its decisions on applications and appeals for variances and prepare and adopt by resolution a report on its findings on zoning ordinance provisions which were the subject of variance requests and its recommendations for zoning ordinance amendment or revision, if any."

Plaintiffs contended the Board's decision to grant the use variance was arbitrary, capricious, and unreasonable because CHR did not support the 2014 application by substantial credible evidence. Plaintiffs argued that the reduction of the number of three-bedroom units and addition of more one- and two-bedroom units in response to the downturn in the economy and housing market and to increase CHR's financial return did not constitute "special reasons" to satisfy the positive criteria.

[1] Although plaintiffs also argued Board members Ann Barattin and John Bender were prohibited from serving on the Board, plaintiffs did not address these individuals in their merits brief on appeal. Thus, any issue relating to these individuals is deemed waived. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2018).

Plaintiffs also argued that "CHR failed to meet the required standard to address the general welfare or present a hardship," and failed to establish "special reasons" to satisfy the negative criteria and prove the benefit of the project outweighed the detriment.

Plaintiffs contended the Board's decision to grant the density variance was arbitrary, capricious and unreasonable because the 2014 application added 20,100 square feet of residential floor space, which was a substantial change to the project requiring notice to property owners within 200 feet of the property. Plaintiffs also argued that CHR improperly included in its density calculation the acreage of the land on which the townhouses were located, which CHR did not own at the time of the 2014 application. Plaintiffs posited the proper calculation excluding the townhouse acreage only permitted CHR to construct fifteen units in the building under the permissible density of twenty-five units per acre, and the difference between the fifteen units and the proposed eighty units was approximately 400% and resulted in a detriment to the surrounding properties.

Plaintiffs also argued the Board erred in relying on Bailer's analysis comparing the density of the proposed seventy-unit high-rise building to high-rise buildings in high-rise zones located outside the R-1 District and Township. Plaintiffs alleged the

Board refused to accept an exhibit reflecting the density calculations prepared by a professional engineer, Nenad Krickovic, and presented though the testimony of an objector, Katarzyna Krickovic, and the Township's planner. Plaintiffs averred that CHR provided no evidence that the density increase would not result in a detriment to the surrounding properties.

Plaintiffs contended the Board's decision to grant the front-yard setback variance was arbitrary, capricious and unreasonable because CHR only proposed 0.28 feet, whereas eight feet was required, and the Board erred in granting the variance based on the reconstruction of Church Hill Road. Plaintiffs also argued that CHR should have applied for a new height variance because the height of the building increased by 11.67 feet.

Plaintiffs further argued the Board failed to address the public safety issue raised by the North Bergen Fire Department, which plaintiffs alleged led to CHR withdrawing the 2011 application, and the Board failed to inquire or demand that CHR produce evidence to show the 2014 application complied with a zoning ordinance that required the Township to promote public safety by providing protection against fire.

Plaintiffs also contended that because there were substantial changes between the Original Approval and the 2014 application the

Board should have considered the 2014 application a new application requiring CHR to include proper height and density calculations.

Plaintiffs cited several reasons why the 2015 Resolution was inadequate. They alleged the Board only summarized testimony and failed to recite certain testimony, including ordinances, conditions in the 2007 Approval's subdivision approval and setback provisions, minor discrepancies between the applications, certain reports, and the absence of testimony on certain issues. Plaintiffs also argued the Board failed to accept submissions from the public, such as photographs of traffic congestion without a correlating traffic study and CHR's unit advertising prices, failed to require certain revised submissions from CHR's experts, and made legal conclusions contrary to plaintiffs' position.

Following a hearing, the trial judge held the Board was not illegally constituted pursuant to N.J.S.A. 40:55D-69 because Vainieri, Pestana, and Fudo did not hold any "elected office or position under the municipality." The judge also found there was no evidence of a conflict of interest, concluding as follows:

> The court cannot abrogate the Board's decision without more than speculation, suspicion, or nebulous accusations [of a conflict of interest]. The record before the court does not reveal that any Board member had "an interest not shared in common with the other members of the public." Wyzykowski [v. Rizas, 132 N.J. 509, 524 (1993)].

> There is conjecture without proof that the Board members had a direct interest in the decision. There is no indication that any Board member's relative or employer had a financial interest in [the] outcome of the decision; no indication that any Board member held a personal interest in the decision, i.e. an altruistic desire to see to it that a relative or friend succeed[ed] in getting an approval; or that any Board member's "judgment" may have been "affected because of membership in some organization and a desire to help that organization further its policies." Paruszewski [v. Twp. of Elsinboro, 154 N.J. 45, 59 (1998)].

The judge found that although the Board had not filed an annual report since 2006, as required by N.J.S.A. 40:55D-70.1, plaintiffs cited no authority that this violation voided the 2015 Resolution.

The judge found the record supported the Board's decision to reaffirm the use variance, and did not disclose the Board relied on CHR's desire to increase the marketability of the units to grant the variance. The judge determined that Bailer's testimony supported the Board's finding that CHR satisfied the requisite proofs for the positive criteria as required by the MLUL, Medici, and the Township's Master Plan. The judge noted that the Board specifically found Bailer demonstrated the proposed use would be compatible with surrounding residential and commercial uses along River Road; the downturn in the economy resulted in a demand for smaller units; the design of the project accounted for the natural

topography of the areas; and there was ample nearby public transportation.

The judge determined that Bailer's testimony also supported the Board's finding that CHR satisfied the negative criteria - that there would be no substantial detriment to the public good, and the building would not contravene, but would advance, the intent and purpose of the Township's Master Plan and zoning ordinances, and promote the purpose of the MLUL. The judge concluded that plaintiffs failed to show the Board's re-affirmance of the use variance was arbitrary, capricious or unreasonable.

Addressing the density variance, the judge found no new notice was required because "[t]he increased residential space [was] implicit in the request to exchange indoor parking levels for residential units and in the request to increase the number of residential units." The judge found the Board correctly determined that CHR fully demonstrated the requisite proofs required by the MLUL, Coventry Square, and Master Plan for the density variance, and made substantial findings of fact supporting the approval of that variance. The judge concluded as follows:

> There were substantial findings of facts supporting the Board's approval of the density variance. The Board expressly referenced Coventry Square. [Plaintiffs] . . . did not prove that a different calculation for density would mitigate any "detriment" to the public because there was no proven detriment to

> mitigate. Price [v. Himeji, LLC, 214 N.J. 263, 284 (2013)]. The court cannot conclude that the Board's determination was arbitrary, capricious, or unreasonable.

The judge determined a new height variance was not required because the approved height for the building in the 2015 Resolution was the 114.17 feet incorporated from the Original Approval. The judge found that any discrepancies in the testimony and CHR's proofs were immaterial because the approved 114.17 feet was the same as the proposed building in the 2014 application, and the record did not reveal that CHR planned to construct the building in excess of or below the approved height or otherwise deviate from the approved plans.

The judge found the evidence supported the Board's finding that CHR's proofs satisfied the required criteria for the bulk variances. The judge also determined that CHR's withdrawal of the 2011 application was based on its review of a prior hearing, and CHR did not specifically cite the fire official's letter as the reason for the withdrawal. The judge found the Board properly accepted Roncati's testimony that the 2014 application's plan did not require the previously proposed turnaround cited in the 2011 application, and the fire official did not object to the 2014 application.

Addressing the alleged inadequacy of the 2015 Resolution, the judge found the Board was not required to state its findings from each and every submission, accept cumulative submissions, or incorporate all testimony and evidence. Rather, the Board was only required to consider all the evidence, "but not cite every single finding from every single piece of evidence." The judge denied plaintiffs' application to invalidate and void the 2015 Resolution and dismissed their complaint with prejudice. This appeal followed.

On appeal, plaintiffs reiterate that the Board was illegally constituted, and thus, incapable of granting the approval; the Board's decision was arbitrary, capricious, and unreasonable because CHR's application was not supported by substantial credible evidence; the Board's decision was not supported by substantial credible evidence; and the 2015 Resolution was inadequate.

We review a planning board's decision using the same standard as the trial court. Cohen v. Bd. of Adjustment of the Borough of Rumson, 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). We give deference to a planning board's decision and will only reverse if

the decision was arbitrary, capricious, or unreasonable. Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 229 (2013). Where the issue on appeal involves a purely legal question, we afford no special deference to the trial court's or the planning board's decision, and must determine if the board understood and applied the law correctly. D. Lobi Enters., Inc. v. Planning/Zoning Bd. of the Borough of Sea Bright, 408 N.J. Super. 345, 351-52 (App. Div. 2009). Applying the above standards, we discern no reason to disturb the Board's decision.

II.

At common law, a "public official is disqualified from participating in judicial or quasi[-]judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body." Wyzykowski, 132 N.J. at 522 (citation omitted). N.J.S.A. 40:55D-69 codifies this prohibition by providing that "[n]o member [of a board of adjustment] may hold any elective office or position under the municipality. No member of the board of adjustment shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest."

"The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J.

477, 492 (2005). Thus, "[t]he plain language of the statute is our starting point." Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 418 (2009). In considering a statute's language, we are guided by the legislative directive that

> words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.
>
> [N.J.S.A. 1:1-1.]

Courts "will only resort to extrinsic aids, such as legislative history, if the plain language of the statute yields 'more than one plausible interpretation.'" State v. Williams, 218 N.J. 576, 586 (2014) (quoting DiProspero, 183 N.J. at 492). "If the plain language yields the meaning of the statute, then our task is complete." Ibid.

The plain language of N.J.S.A. 40:55D-69 specifies that Board members may not hold any "elective office or position under the municipality." (Emphasis added). The statute qualifies the words "office or position" with the words "elective" and "under the municipality," narrowing the prohibition to elected municipal officials. The statute does not, expressly or impliedly, prohibit Board members from holding positions or offices that are appointive, salaried, or under the municipality.

Further, courts must make a fact-sensitive inquiry in each case to determine whether a personal or financial interest warrants disqualification. Paruszewski, 154 N.J. at 58. "[T]hey must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials." Wyzykowski, 132 N.J. at 523-24 (citation omitted). The relevant inquiry is whether there is a potential for conflict, not whether there is an actual conflict of interest, and "where there do not exist, realistically, contradictory desires tugging the official in opposite directions," there is no potential for conflict. Paruszewski, 154 N.J. at 59 (quoting LaRue v. Twp. of E. Brunswick, 68 N.J. Super. 435, 435-448 (App. Div. 1961)). A conflict of interest occurs in the following four situations:

> (1) "Direct pecuniary interests," when an official votes on a matter benefitting the official's own property or affording a direct financial gain; (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance . . .; and (4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some

> organization and a desire to help that organization further its policies.
>
> [Wyzykowski, 132 N.J. at 525-26.]

N.J.S.A. 40:55D-69 does not bar Vainieri from serving on the Board, as he held no "elective office or position under the municipality" and plaintiffs provided no evidence his positions posed a potential conflict of interest. Vainieri was appointed, not elected, as the Mayor's Chief of Staff/Confidential Aide and as a Commissioner for the North Bergen Housing Authority. He was an elected Hudson County Freeholder and Committeeperson for his District in North Bergen, which also encompasses portions of Jersey City and Secaucus; however, these are elective offices or positions under Bergen County, not the Township.

Likewise, Vainieri's position as an elected Chairperson of the HCDO does not fall within the bar in N.J.S.A. 40:55D-69. According to the New Jersey Democratic State Committee By-Laws, "[t]he Council of County Chairpersons shall consist of all Democratic County Chairpersons, as elected at the organizational meetings of the County Committees." See New Jersey Democratic State Committee, By-Laws, The Democratic Party Of The State of New Jersey (June 13, 2013), http://d3n8a8pro7vhmx.cloudfront.net/themes/52408ad68d57d97596000002/attachments/original/1380300629/BYLawNJDSC2013.pdf?13803006

29. Thus, while it is an elected position, Vainieri was not elected as part of the Hudson County Democratic State Committee, a private political organization, by North Bergen citizens, but by members of the New Jersey Democratic State Committee.

N.J.S.A. 40:55D-69 also does not bar Pestana from serving on the Board, as he holds no elective office or position under the municipality. In addition, plaintiffs provided no evidence that holding the MUA Executive Director's position results in a potential conflict of interest. N.J.S.A. 40:14B-4 authorizes municipalities to create municipal utilities authority as a separate, legal entity. See N.J.S.A. 40:14B-4; Wanaque Borough Sewerage Auth. v. Twp. of W. Milford, 144 N.J. 564, 569 (1996). Thus, Pestana was appointed by the governing body of the municipality, not elected. N.J.S.A. 40:55D-69 expressly prohibits Board members from holding an elective office, not an appointive office, and as such, does not bar Pestana from serving on the Board.

N.J.S.A. 40:55D-69 does not bar Fuda serving on the Board. Although his positions with the North Bergen Parks Department and as a supervisor in the Township's Department of Public Works are under the Township, they are not elective positions or offices.

Moreover, plaintiffs provided no evidence of any real or potential conflict of interest arising from the elected or

appointed positions of these Board members or that these Board members or anyone closely related to them received a direct financial or property benefit, or a nonfinancial, but valuable benefit from approving the 2014 application. Plaintiffs also provided no evidence that the 2104 application affected their judgment because of their positions or desire to further the policies of those other organizations. While Vainieri occupied a position that required him to assist in implementing the Mayor's policies and received financial compensation for his services, plaintiffs did not specify how those policies or the financial compensation related to the 2014 application.

Further, with respect to the Board's alleged noncompliance with N.J.S.A. 40:55D-70.1, plaintiffs provided no authority that the Board's failure to file a report of its findings and recommendations based on a review of contested ordinance provisions warranted voiding the Board's approval of the 2014 application. Because the Board was not illegally constituted with municipal elected or appointed officials in violation of N.J.S.A. 40:55D-69, the 2015 Resolution is not void ab initio.

III.

The MLUL gives zoning boards the power to grant or deny use, density, and height variances. N.J.S.A. 40:55D-70(d). The MLUL provides, in pertinent part, that the Board may grant a variance

"[i]n particular cases for special reasons" for a use prohibited in the district, an increase in density permitted pursuant to N.J.S.A. 40:55D-4, and an increase in height of a building exceeding ten feet or ten percent of the maximum height allowed in the district. N.J.S.A. 40:55D-70(d). N.J.S.A. 40:55D-70 requires a finding of positive criteria or "special reasons," and negative criteria "showing that such 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. Sica v. Bd. of Adjustment, 127 N.J. 152, 156 (1992). To satisfy the "special reasons," or positive criteria, as a predicate to a grant of a use variance under (d)(1), an applicant must prove: (1) the use "inherently serves the public good"; (2) "the use promotes the general welfare because the proposed site is particularly suitable for the proposed use"; or (3) the applicant would experience "undue hardship," because "the property cannot reasonably be developed with a conforming use." Medici, 107 N.J. at 4; Grubbs v. Slothower, 389 N.J. Super. 377, 381, 386-87 (App. Div. 2007).

We conclude there was sufficient credible evidence supporting the Board's finding that CHR satisfied the positive criteria for the use variance, demonstrating that "the use promotes the general welfare because the proposed site is particularly suitable for the

proposed use." The Board specifically relied on Bailer's testimony in finding that CHR had demonstrated "special reasons" for the use variance. Bailer, in explaining the positive criteria, testified that the proposed building

> is consistent with the hi[gh]-rise character for residential uses along River Road and Boulevard East[,] . . . is more consistent with the zone patterns of the surrounding area [and] the footprint of the proposal building is smaller than the footprint of townhouses if they had been built on the site.

He noted that the "increase in the number of units is derived by the demand for smaller one- and two-bedroom units from commuters from New York City," and this site is suitable to meet that demand because "there are several commuter bus lines along River Road to provide transportation to New York City." He also testified that the building would "provide[] optimal views of the Hudson River" with minimal impact to the surrounding cliff face. Thus, the change in the housing market was only one of many reasons CHR advanced to support its request for a use variance.

There also was sufficient credible evidence supporting the Board's finding that CHR satisfied the negative criteria for the use variance, demonstrating that the variance could be granted without substantial detriment to public good and would not substantially impair the intent and purposes of the Master Plan and zoning ordinances. With respect to any possible detriment to

the public good, Olivio testified the seventy-unit project would not significantly impact the traffic volume on the River Road intersection and the reduced proposal of a seventy-unit building would reduce any increased traffic volume arising from the project. He testified that the motorists generated by the proposed building "would account for less than one percent of the total intersection volume at [Church Hill] Road and River Road," and "[t]hose vehicles and their ability to enter onto the roadway system and then also their ability to come from River Road into [Church Hill] Road would not be encumbered by the development project." He also testified that the installation of the sidewalk and increase in road width as a result of the project added significant infrastructure to the area.

Bailer testified that because "the footprint for the high-rise building will be smaller than the permitted townhouses use in the zone, [there] will [be] a reduction in impact[] to the surrounding environmental features." He explained that the increase from fifty-four units to seventy units would not create any new detriments because the proposed building fits in with the land use and densities of the surrounding areas, does not significantly impact traffic, provides for sufficient parking, and fulfills a market demand in the area for one- and two-bedroom residences.

Also, the Township's Master Plan sought to "encourage the further redevelopment of underutilized and outdated areas" and "encourage higher density development where it is permitted or complimentary to existing development patterns." Further, the Master Plan also noted that "Church Hill Road offers a particular planning challenge due to the site['s] topography and irregular road configuration" and "any prospective zoning changes [to that area] should be consistent with other development in the area in terms of height and density."

In explaining how the proposed building would not substantially impair the intent and purposes of the Master Plan, Bailer testified that the proposed building would provide a variety of housing types and densities, in conformance with goal four of the Master Plan based upon the surrounding area and its land use patterns. He also testified that the building would contribute to another goal of the Master Plan by creating appropriate population density to contribute to the welfare of the community and preservation of the environment. He explained that if CHR were to build only townhouses as permitted in the R-1 District, "it would encumber the whole site" leaving a "negative environmental impact," but "by building a hi[gh]-rise building that [is] consistent with the area it reduces the footprint and . . . helps the environment and the rock face of the Palisades."

Thus, there was sufficient credible evidence for the Board to find that CHR satisfied the positive and negative criteria for a use variance.

The Board's decision to grant a further density variance was not arbitrary, capricious or unreasonable. "Density," as defined by the MLUL, "means the permitted number of dwelling units per gross area of land that is the subject of an application for development, including noncontiguous land, if authorized by municipal ordinance or by a planned development." N.J.S.A. 40:55D-4; Grubbs, 389 N.J. Super. at 384. "The board of adjustment has sole jurisdiction over applications that seek a variance from a zone's density restrictions." Grubbs, 389 N.J. Super. at 384 (citing N.J.S.A. 40:55D-70). Density variances "are subject generally to the same weighing analysis that applies to other (d) variances. However, . . . if variances of this type are requested in connection with a permitted use, a lower threshold equivalent to the standard applicable to conditional use variances is appropriate." Price, 214 N.J. at 296 (citation omitted). A less demanding standard "reflect[s] the significant differences between prohibited uses, on the one hand," and permissible uses that deviate from an ordinance, on the other hand. Coventry Square, 138 N.J. at 297.

In Coventry Square, the Court explained the stringent special circumstances test of Medici does not apply because:

> [i]n the case of prohibited uses, the high standard of proof required to establish special reasons for a use variance is necessary to vindicate the municipality's determination that the use ordinarily should not be allowed in the zoning district. In the case of conditional uses, the underlying municipal decision is quite different. The municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied. As evidenced by this record, a conditional-use applicant's inability to comply with some of the ordinance's conditions need not materially affect the appropriateness of the site for the conditional use. . . . The use-variance proofs attempt to justify the board of adjustment's grant of permission for a use that the municipality has prohibited. Proofs to support a conditional-use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance.
>
> [Id. at 297-98.]

We have applied this reasoning to density variances under (d)(5), stating:

> Such requests need not demonstrate that the property is "particularly suitable to more intensive development" in order to prove "special reasons" under the MLUL. Rather, in considering such applications, zoning boards of adjustment should focus their attention on whether the applicant's proofs demonstrate "that the site will accommodate the problems associated with a proposed use with [a greater density] than permitted by the ordinance."

> For example, it might be shown that the project promoted a more desirable visual environment through development of otherwise underdeveloped or vacant property, or, a successful applicant might demonstrate that the project's construction with the requested density variance better promotes the character of the neighborhood or better preserves property values in the adjacent community.
>
> Likewise, in addressing the so-called negative criteria, the applicant would need to demonstrate that the increase in density would not have a more detrimental affect on the neighborhood than construction of the project in a manner consistent with the zone's restrictions. For example, the applicant might demonstrate that the increased proposed density was only minimally greater than the permitted density in the zone or in adjacent areas. The applicant might show that it was unlikely that a minimal increase in density would create a "substantial detriment" to nearby properties.
>
> [Grubbs, 389 N.J. Super. at 388-90 (alteration in original) (quoting Randolph Town Ctr. Assocs., LP v. Twp. of Randolph, 324 N.J. Super. 412, 416-17 (1999)).]

Thus, although the Board must consider the positive and negative criteria as set forth in Medici, because it had granted the 2006 application requesting a use variance to build a multi-family high-rise apartment building with one-, two-, and three-bedroom units, it was through the relaxed standard set forth in Coventry Square.

Further, there was no error in the density calculation. The zoning ordinance permits a density of twenty-five dwelling units

per acre in the R-1 District. CHR requested a density variance of 41.6 units per acre. Plaintiffs argue the Board erred in granting a density variance because it miscalculated the permissible density by incorporating acreage of the land where the townhouses were located, erroneously compared the proposed building's density to high-rise buildings outside of North Bergen, and provided no evidence that a density increase would not pose a detriment to the neighborhood and adjacent properties. We disagree.

N.J.S.A. 40:55D-70(d) vests the Board with the power to "grant a variance to allow departure from" the zoning ordinance which, in this case, permits only twenty-five dwelling units per acre. Based upon Bailer's and Olivo's testimony, the Board found that CHR satisfied the positive criteria, demonstrating "that the site will accommodate the problems associated with a proposed use with [a greater density] than permitted by the ordinance," and the negative criteria, demonstrating that the variance will not result in substantial detriment to public good or substantially impair the intent and purposes of the zone. Grubbs, 389 N.J. Super. at 389 (alteration in original). Bailer explained that the proposed building would not result in any detriments based upon a density analysis he conducted using buildings surrounding the property in North Bergen, as well as those in surrounding municipalities.

Based on that analysis, the density increase would be consistent with the Master Plan, which addressed a need for higher density near public transportation, and the surrounding area, in which eight buildings had a greater density than that of the proposed building.

Even if the densities with respect to the Master Plan related to within the Township's boundaries, Bailer provided other reasons as to why the site can reasonably accommodate the density increase, such as sufficient parking, minimal impact on traffic, and the market demand for this type of housing. We conclude there was substantial evidence supporting the Board's approval of the density variance and plaintiffs failed to show that a different calculation for density would mitigate any detriment to the public because there was no proven detriment to mitigate.

Although CHR sold the townhouses prior to the 2014 application, CHR did not erroneously include the land on which the townhouses were located in its density calculation. According to the New Jersey Association of County Tax Boards database, the representations of CHR's counsel, and Bertin's testimony, no subdivision of that land occurred, and the land is treated as one tract of land, even though different individuals own the townhouses on the land. The Board granted the density variance based on evidence that the tax map designated the land where the townhouses

are located as one property and on CHR's representation that it was seeking an amendment of the Original Approval, which took into consideration Lots 39 and 40 in granting a density variance.

Even if CHR erroneously included Lot 40 in its density calculation, the Board still properly approved a density variance, since CHR satisfied the relaxed Coventry standard. The Board found that CHR satisfied both the positive and negative criteria and recognized that "no matter . . . which way you count, it becomes more people and more density in the same footprint area." Moreover, the townhouse association provided CHR with an easement authorizing it to construct the tower for the building.

Without relying on Lot 40 or the townhouses specifically, the Board found the site where the building would be located could reasonably accommodate the increased density, the proposed building was in conformance with the Township's zoning ordinance, and no detriment would result from the project. For example, Olivio testified as to the minimal impact the building would have on traffic patterns, and Bailer testified as to the smaller environmental footprint the building would have compared to the townhouses, which are a permitted use in the R-1 District.

We are satisfied the Board did not need to require CHR to re-notice the affected property owners because, based upon the evidence presented at the hearings and CHR's counsel's

representation, the 2014 application did not constitute a new application. We disagree with plaintiffs' argument that because the 2014 application included an additional 20,100 residential square footage, it was a substantial change from the Original Approval that required CHR to give notice of that change to property owners within 200 feet of the site.

The MLUL requires notice to the public and affected property owners. N.J.S.A. 40:55D-12(a). "We have recognized the importance of the public notice requirements of the . . . [MLUL] and the fact that such notice is jurisdictional." Perlmart of Lacey, Inc. v. Lacey Twp. Planning Bd., 295 N.J. Super. 234, 237 (App. Div. 1996). The failure to provide notice "is fatal to . . . [a board's] approval[.]" Id. at 236. The purpose of notifying the public

> is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing or, at the least, look more closely at the plans and other documents on file.
>
> [Id. at 237-38.]

Once an approval has been granted, additional notice is only required if an application is amended to the point that it may be deemed "a substantially new application[.]" Lake Shore Estates, Inc. v. Denville Twp. Planning Bd., 255 N.J. Super. 580, 592 (App.

Div. 1991), aff'd o.b., 127 N.J. 394 (1992). Re-notice is not required so long as the "central focus" of the matter has not changed. Schmidhausler v. Planning Bd. of Lake Como, 408 N.J. Super. 1, 11, (App. Div. 2009).

Here, notice based on the additional 20,100 square footage was not required because it did not render the 2014 application a "substantially new application" and the "central focus" remained the same. The additional square footage did not render the 2014 application a new application because CHR "infilled [the] areas on the [ninth floor duplex units]," as it "had that volume[, and] . . . that height." CHR essentially split the originally proposed ninth floor in half and inserted a floor so that there was no longer "double height spaces and duplexes" but a "new residential floor out of those spaces that were already there."

Moreover, the central focus remained the density variance, or increase in units, and the setback variance, as the 2014 application noted no other changes from the Original Approval. Accordingly, no notice was required, given that the 2014 application, compared to the Original Approval, was an amended application and evidence revealed that the additional 20,100 residential square footage did not enlarge the proposed building itself.

We reject plaintiffs' argument that because the 2014 application contained other additional substantial changes, the Board should have treated it as a new application and required CHR to submit density calculations using only Lot 39. "Where an amended application is very substantially different from the original it may be treated by the board and any reviewing court as a new application." Id. at 11 (citation omitted). In Schmidhausler, we found that an application was not a "substantially new application" because the central focus of the case was the three-lot subdivision of a lot that did not change throughout the matter. Ibid.

Likewise, here, the Board correctly classified the 2014 application as an amendment to the Original Approval because the central focus throughout the matter remained the use of a multi-family high-rise apartment building. The fact that CHR added a tenth residential floor, the residential square footage increased, or the ownership of the townhouses changed, did not render the application substantially new. The evidence indicated that the building already had the height and volume for the additional floor and square footage, and that CHR simply turned the top floor of duplex units into single story units. The height of the building approved in the Original Approval and the height in the 2014 application has remained the same.

Further, change of ownership of the townhouses did not render the 2014 application a substantially new application because the focus of all of CHR's applications and all of the Board's resolutions had always been the multi-family high-rise apartment building and its use, density, and height. Contrary to plaintiffs' assertion, at the very outset of the first hearing, CHR's counsel specified that the 2014 application was "an amendment to a 2006 grant of approval, site plan approval and all requisite variances in connection with a [fifty-four]-unit high-rise building" in which CHR sought an increase in the previously granted density variance and a setback variance due to existing site conditions. The Board had sufficient credible evidence to consider the 2014 application as an amended, not a new application.

We find no merit in plaintiffs' argument that the Board erred in granting the setback variance because CHR's engineer altered the construction of the retaining wall, which resulted in reconstruction of the road and a gross four feet front yard setback variance. N.J.S.A. 40:55D-70(c)(1) permits a variance from a dimensional provision of a zoning ordinance, such as minimum front yard setback when, due to exceptional conditions of the property, strict application of a bulk or dimensional provision would present "peculiar and exceptional practical difficulties" or exceptional hardship to the applicant. Such exceptional conditions may include

the dimensions of the property, topographic conditions, or another extraordinary or exceptional feature unique to the property. Ibid. "Undue hardship refers solely to the particular physical condition of the property[.]" Jock v. Zoning Bd. of Adjustment of Wall, 184 N.J. 562, 590 (2005). The efforts made to bring the property into compliance with an ordinance, such as attempts to acquire additional land or reconfigure the improvements, are factors that must be considered. See Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 29-30 (2013).

In addition, an applicant for a (c)(1) variance must satisfy the negative criteria, proof that the variance will not result in substantial detriment to the public good or substantially impair the purpose of the zoning plan. Nash v. Bd. of Adjustment of Morris Twp., 96 N.J. 97, 102 (1984). The question of whether the variance will cause substantial detriment to the public good "focus[es] . . . on the impact of the variance on neighboring properties." D. Lobi Enters., Inc., 408 N.J. Super. at 358. With respect to the statutory requirement that the variance not substantially impair the intent and purpose of the zone plan and zoning ordinance, the inquiry "focuses on whether the grant of the variance can be reconciled with the zoning restriction from which the applicant intends to deviate." Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 57 (1999). This

reconciliation "depends on whether the grounds offered to support the variance . . . adequately justify the board's action in granting an exception from the ordinance's requirements." Id. at 57-58.

Here, the required front yard setback was ten feet, but CHR requested a front yard setback variance of 0.3 feet, which was properly granted based on Olivio's testimony. In addition, Bertin testified as to practical difficulties or exceptional circumstances when he explained, "[d]uring the construction or reconstruction of [Church Hill] Road there was some modifications to the retaining wall design, the radius on the road map got greater which forced the road to be pushed further away . . . and into the site." According to both Olivio and Roncati, the road moved closer to the building, but the building did not change location. As such, because the building did not move locations, there would be no impact on neighboring properties or substantial detriment as a result of the variance or proposed building, thereby satisfying the negative criteria. Plaintiffs failed to explain how the changed method of construction for the retaining wall leading to the expansion of the road created any substantial detriment or did not constitute a practical difficulty for the applicant. There was sufficient evidence supporting the Board's finding that CHR satisfied the requirements for a setback variance.

We are also satisfied there was no need for CHR to apply for a new height variance. The Original Approval granted a height variance of 114.63 feet and the evidence confirmed the height of the proposed building in the 2014 application was 114.17 feet.

Lastly, we reject plaintiffs' argument that the Board failed to consider public safety issues raised in the fire official's November 21, 2011 letter to the Director of Public Safety. The letter specified that the concerns were based on "the proposed plans for Church Hill Estates [for] a [fourteen-]story [high-rise building]" in 2011. The concerns were not based on the amended plan in the 2014 application, and the fire official did not object to the 2014 application.

Nevertheless, Bertin testified, "there is adequate area for a truck to back in or go front in to the driveway at the north side of the building." Roncati also testified that there is a driveway on the north side of the building "that will be used and designated for [a] loading area." Based on this testimony, the Board properly found there was "adequate turnaround for the delivery and refuse vehicles." Given that the Board's factual findings are not overturned absent a "clear abuse of discretion," we are satisfied the Board addressed any concerns regarding turnarounds and driveway space. Medici, 107 N.J. at 15.

In sum, we conclude CHR provided ample evidence supporting the 2014 application, and the Board's decision to approve it was supported by substantial, credible evidence and was not arbitrary, capricious, or unreasonable.

IV.

We have considered plaintiffs' contention that the 2015 Resolution was inadequate in light of the record and applicable legal principle and concluded it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). However, we make the following comments.

> In making factual findings, the board is obligated to consider all the evidence in the case rather than merely to accept as factual every statement made by its own planning consultant. Moreover, the board must explain how its findings support its ultimate legal conclusions.
>
> [Morris Cty. Fair Hous. Council v. Boonton Twp., 228 N.J. Super. 635, 647 (Law Div. 1988).]

There is no requirement that the Board list every single piece of evidence it reviewed and cite every single factual statement it found in its decision. Rather, the standard of review is whether there is sufficient credible evidence in the record to support the Board's findings, and this court will not disturb a Board's factual findings unless there is a clear abuse of discretion. Medici, 107

N.J. at 23; Fallone Props., LLC v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 560-61 (App. Div. 2004).

The 2015 Resolution was adequate. It stated that the Board reached its decision "after careful consideration of [the 2014] [a]pplication and the testimony and exhibits presented by all parties[.]" It specified that the Board considered all exhibits from both CHR and the objectors and considered the testimony of CHR's experts, the objectors, and the Board's planner and engineer. It also specified which portions of testimony the Board relied upon to make its factual findings, and set forth the factual findings in detail. The Board made factual findings after considering all the evidence presented, and explained how its findings supported its ultimate legal conclusion.

Affirmed.