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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5003-15T2

PAMELA COLLINS, CATHERINE OSBORNE,
JOSEPHINE FEDAK, LORI OLIVIERI,
ANDREA HUNTSINGER, BARBARA DUNCSAK,
SALIM BESSAIH, and FRANK SICOLI,

Plaintiffs,

and

JEFFREY J. CARR,

Plaintiff-Appellant,

v.

PRESBYTERIAN CHURCH OF TOMS RIVER
and TOWNSHIP OF TOMS RIVER ZONING
BOARD OF ADJUSTMENT,

Defendants-Respondents.

Argued November 14, 2017 – Decided January 17, 2018

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. L-2990-
15.

Jeffrey J. Carr, appellant, argued the cause
pro se.

Michael B. York argued the cause for respondent Presbyterian Church of Toms River (Novins, York & Jacobus, attorneys; Michael B. York, on the brief).

Thomas G. Gannon argued the cause for respondent Township of Toms River Zoning Board of Adjustment (Hiering, Gannon & McKenna, attorneys; Thomas G. Gannon, on the brief).

PER CURIAM

Presbyterian Church of Toms River (the Church) submitted an application for a use variance to the Township of Toms River Zoning Board of Adjustment (Board), so that it could lease a portion of its parking lot to an off-site automobile dealership for the storage or parking of its automobiles. The Board granted the Church's application.

Thereafter, plaintiffs filed an action in lieu of prerogative writs in the Law Division challenging the Board's action on various grounds. The trial court entered an order dated June 6, 2016, which affirmed the Board's action and dismissed the complaint. Plaintiff Jeffrey J. Carr appeals from the trial court's order. For the reasons that follow, we affirm.

I.

The Church's property is located at Hooper Avenue and Chestnut Street in Toms River Township (Township). The property is within the Township's O-15 zone, and houses of worship are a conditional use in the zone. On the property, the Church maintains a house of

worship, nursery school, pre-kindergarten school, and a facility called the "House of Hope." The property has a lot with 474 parking spaces, although the Township's Code only requires 268 spaces.

On July 1, 2015, the Church submitted an application to the Board for a use variance that would allow the Church to lease an unused portion of its parking lot to an off-site car dealership for parking and storage of its vehicles. The Church sought permission to lease 127 of the 474 parking spaces in its lot.

The Church indicated that it intends to use the funds derived from the lease to subsidize the Church's activities. According to the application, the parking spaces to be leased are located in the "least utilized" area of the lot.

On July 2, 2015, the Board's planner drafted and presented the Board with a memorandum regarding the Church's variance request. The planner provided an analysis of the neighborhood and detailed the requirements for the variance. The planner noted that a use variance was required because auto storage is not a permitted use in the O-15 zoning district.

On August 13, 2015, the Board conducted a hearing on the application. The Board consists of seven members. Six of the Board's seven members were present for the hearing. The Church

presented two witnesses in support of the application: Gary Lotano and David Shipman.

Lotano told the Board he has served in various leadership positions with the Church and he is familiar with its activities. He testified that about twenty years earlier, the Board had granted the Church permission to expand the parking lot because church attendance had grown. He stated that the Church no longer required the extra parking spaces due to a gradual decline in attendance.

Lotano noted that under the proposed lease, the auto dealership would be restricted to the use of certain entrances. Lotano said that based on the Church's previous experience, the proposed use would not have a significant impact upon traffic in the neighborhood. He stated that the Church would not allow the dealership to move cars into the lot by truck, and it would only be allowed to move vehicles into the lot, one at a time.

Shipman stated that he has also held various leadership positions with the Church. He said that during the previous twenty years, the Church's membership had been declining. He noted that the income generated from the lease would contribute to the Church's budget.

Members of the public were permitted to comment, and they voiced concerns about the effect the proposed use would have on the neighborhood where the Church is located. Carr, who is a

resident of the Township and President of the Township's Council, opposed the application. He noted that the Township's zoning ordinance did not allow the storage of bulk motor vehicles in the O-15 zone.

Carr said if the Board granted the application, the Church would be "running what is tantamount to a business." He added that the Church had not presented any engineering or planning testimony in support of the application. He said the Church was required to present proof of "special reasons, proof of hardship or something [of] the planning nature" in order to obtain the variance.

After some Board members indicated that any approval would be subject to certain conditions, the members called for a vote. Before the vote, the Church's attorney indicated he understood only six members would be voting on the application. The Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, provides that a use variance may be granted only if approved by five members of a seven-member board. N.J.S.A. 40:55D-70(d).

After four members of the Board voted in favor of the application, and one member voted against, the sixth member abstained. The member who abstained explained that she was doing so because of Carr's participation in the hearing, which she had not anticipated since he often attends the Board's meetings.

The member noted that she and Carr are members of the Township's Land Use Committee, and during the hearing, Carr had been asked about the Committee's discussions. The member stated that if she had known Carr would be asked about those discussions, she would have recused herself at the very beginning of the hearing. She believed it would be unethical and improper for her to vote on the application.

The Church's attorney told the Board that if he had been asked if he wanted to proceed to a vote with only five voting members, he would have said "No." The Board's attorney noted that the Board member's abstention is considered a vote against approving the application.

The Church's attorney asked the Board to cancel the vote, and have another member listen to a tape recording of the hearing and vote on the application. The Board continued the matter to its next meeting. That meeting took place on September 10, 2015.

The Board determined that the Church was entitled to a vote by the full Board with seven eligible Board members. The Board member who had been absent from the August 13, 2015 meeting was present. He indicated that he had listened twice to a taped recording of the August 13, 2015 hearing. He voted in favor of the application.

The Board recorded the vote as five in favor, one opposed, and one abstention. The Board determined that the Church's application had received the required number of affirmative votes and was approved. The Board memorialized its decision in a resolution dated September 24, 2015.

Thereafter, plaintiffs filed this action seeking to invalidate the Board's action. The Law Division judge considered the appeal on April 20, 2016, and filed a written opinion dated May 23, 2016, finding that there was sufficient credible evidence in the record to support the Board's decision to grant the Church the use variance and that the Board's action was not arbitrary, capricious, or unreasonable.

The judge also found that the Board did not abuse its discretion by continuing the matter so that six eligible Board members could vote on the application. The judge entered an order dated June 6, 2016, affirming the Board's action and dismissing the complaint. Carr's appeal followed.

On appeal, Carr argues that: (1) the Board's approval of the Church's application was invalid because the application failed to receive five affirmative votes on August 13, 2015, as required by the MLUL; (2) the Board's action in adjourning the matter and continuing the vote at the September 10, 2015 meeting was not authorized by the MLUL, and it was arbitrary, capricious, and

unreasonable; (3) the Board's action in granting the use variance was arbitrary, capricious, unreasonable, and unsupported by the record; and (4) the Board's determination that the proposed lease of the Church's property was for an inherently beneficial use was arbitrary, capricious, unreasonable, and contrary to the record.

II.

We begin our consideration of the appeal by noting several well-established principles. "[M]unicipalities are authorized to impose conditions on the use of property through zoning by a 'delegation of the police power' that must 'be exercised in strict conformity with the delegating enactment – the MLUL.'" Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (quoting Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95, 101 (2011)). "The MLUL exhibits a preference for municipal land use planning by ordinance rather than by variance, which is accomplished through the statute's requirements that use variances be supported by special reasons, and by proof of the negative criteria." Ibid. (citations omitted).

Generally, zoning boards "must be allowed wide latitude in the exercise of delegated discretion" in these matters "because of their peculiar knowledge of local conditions." Ibid. (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)). 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." Ibid. (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, 45 N.J. at 296). Although the court's standard of review is deferential, the board "may not, in the guise of a variance proceeding, usurp 'the legislative power reserved to the governing body of the municipality to amend or revise the [zoning] plan.'" Id. at 285 (quoting Feiler v. Fort Lee Bd. of Adjustment, 240 N.J. Super. 250, 255 (App. Div. 1990)).

III.

We turn first to Carr's contention that the Church's application was denied on August 13, 2015, when the application failed to receive five affirmative votes, as required by N.J.S.A. 40:55D-70(d). Carr contends the Board did not have authority under the MLUL to adjourn the matter and continue the vote at the September 10, 2015 meeting, so that another eligible member could vote on the application. He argues that the Board's action is arbitrary, capricious, and unreasonable. We disagree.

"Municipal boards of adjustment created under N.J.S.A. 40:55D-69 have seven members, and they may have up to four alternates." D. Lobi Enters., Inc. v. Planning/Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 352 (App. Div. 2009). As noted, the MLUL provides that a use variance under N.J.S.A. 40:55D-70(d) may be granted "only by affirmative vote of at least five members" of the seven-member board. "Thus, for a seven member municipal board of adjustment, five out of seven votes is necessary to approve a [N.J.S.A. 40:55D-70(d)] variance." D. Lobi Enters., 408 N.J. Super. at 353.

N.J.S.A. 40:55D-10.2 also provides that a board member "who was absent for one or more of the meetings at which a hearing was held or was not a member of the municipal agency at that time, shall be eligible to vote on the matter upon which the hearing was conducted." The member may vote provided "the transcript or recording of all of the hearing from which [the member] was absent or was not a member" has been made available, and the member has "certifie[d] in writing to the board that he [or she] has read such transcript or listened to such recording." Ibid.

We reject Carr's contention that the Board acted arbitrarily, capriciously, and unreasonably in adjourning the matter and continuing the vote on September 10, 2015, with the participation by the Board member who was not present at the August 13, 2015

meeting. As we have explained, at the August 13, 2015 meeting, six Board members were present, and the Church's attorney agreed to a vote on the application, with the expectation that all six members present would be voting.

However, after five of those six members voted, the sixth member unexpectedly abstained from voting due to a perceived conflict of interest. The Church's application only garnered four affirmative votes, which was one short of the five votes required by N.J.S.A. 40:55D-70(d) for a use variance.

On appeal, Carr asserts that the Board member who abstained from voting had sixteen years of experience on the Board, and she has been the Chairperson for six years. He asserts that the member presided at the August 13, 2015 meeting, and called for a vote before she abstained. He contends that the vote taken at the August 13, 2015 meeting should have been considered final.

The fact remains, however, that the Board member abstained from voting on the application after five other members voted, and before the vote, the member did not indicate she would do so. As the Law Division judge noted in her opinion, it is unnecessary to decide whether the member's recusal was required. The member abstained and her vote was not an affirmative vote on the application. Mann v. Housing Authority of Paterson, 20 N.J. Super. 276, 279 (App. Div. 1952).

In her opinion, the judge noted that no provision in the MLUL directly addresses this situation. The judge found that the Board acted properly in carrying the matter to the next meeting and allowing another Board member to participate in the vote. The judge explained:

This is not a case where the Board or its members sought to unfairly manipulate a vote. The Board sought a fair and impartial method to resolve this unusual development and at the same time to give the applicant what it originally represented it would have: [t]he benefit of a vote by [six] eligible members of the Board. Under the unique circumstances of this case, the [c]ourt cannot conclude that the procedure adopted by the Board in extending the vote to another date was the product of any illegal and illicit manipulation of the process[,] which would have certainly rendered the ultimate decision of the Board to be arbitrary, capricious or unreasonable.

The judge found that the Board acted in good faith to preserve the integrity of the hearing process and that such action was "clearly within" the Board's discretion. The judge noted that if the Board had not granted the continuance, there was a risk the Church would have been deprived of a fair hearing and the procedural protections afforded to it under the MLUL. The judge found the Board's solution "preserved the rights of all interested parties to a fair and complete hearing, as well as a vote on the

application in a manner anticipated by the public as well as the applicant."

The judge commented that the better practice would be for a Board member who is compelled to abstain to make an "early announcement" of the abstention. However, when a conflict arises during the hearing, which the Board has not reasonably anticipated, the Board has "the right to take steps to ensure the integrity of its decision while affording appropriate notice to the applicant."

The judge found that the Board's decision to adjourn the matter and continue the vote at the next meeting with the addition of another eligible member was appropriate under the circumstances. We agree with the judge's analysis.

We likewise conclude that the Board did not abuse its discretion by adjourning the vote and allowing a seven-person Board to vote on the application. No provision of the MLUL precluded the Board from handling the application in this manner. The Board's action was not arbitrary, capricious, or unreasonable.

IV.

Next, Carr argues that the Board's action in granting the use variance to the Church was arbitrary, capricious, unreasonable, and unsupported by the record. Carr contends the Church failed to establish special reasons for the grant of the variance and the trial court erred by affirming the Board's action.

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). N.J.S.A. 40:55D-70(d)(1) 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).

The courts, however, have recognized three categories in which "special reasons" may be found. Nuckel, 208 N.J. at 102 (citing Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 76 (App. Div. 2006)). These categories are: (1) where the proposed use inherently serves a public good; (2) where the owner of the property would suffer an "undue hardship" if required to use the property in the manner permitted by the zoning ordinance; and (3) where the use would serve the general welfare because the site is particularly suitable for the proposed use. Ibid (citing Saddle Brook Realty, 388 N.J. Super. at 76).

In addition, N.J.S.A. 40:55D-70 provides that no variance or other relief can be granted under this section of the MLUL "without a 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." The applicant for a use variance must establish this 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)).

The applicant must focus "on the effect that granting the variance would have on the surrounding properties." Price, 214 N.J. at 286 (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).

On appeal, Carr argues that the Board erred by finding that the proposed use of the Church's property is for an inherently beneficial use. We agree. The proposed use of a portion of the Church's parking lot does not meet the generally accepted view of an inherently beneficial use. Parking and storage of automobiles by an off-site auto dealership is not an inherently beneficial use. Moreover, such use is not ancillary to the Church's use of the property for church-related purposes.

We recognize that the lease of the underutilized section of the parking lot will generate funds that will be applied to subsidize the Church's operations. This does not convert the

commercial use of the property to one that is inherently beneficial. Indeed, under that theory, almost any use of the Church's property would be considered an inherently beneficial use. We conclude that the variance cannot be justified on the ground that the proposed use is for an inherently beneficial purpose.

Nevertheless, we are convinced that the Church established "special reasons" for the variance by showing that the underutilized section of its parking lot is "particularly suitable for the proposed use." Nuckel, 208 N.J. at 102 (citations omitted) (quoting Saddle Brook Realty, 288 N.J. Super. at 76). As the trial court found, the proposed use is indistinguishable from the present, permitted use of the lot for parking.

Moreover, the Board imposed conditions in its resolution, which are intended to ensure that the proposed use has a minimal impact upon the surrounding properties. Those conditions are: (1) the applicant must design a barrier to designate the area of the property where the leased parking spaces are located; (2) no more than six vehicles per hour may be transported to the property; (3) there can be no bulk movement of vehicles or any car carriers or other delivery of numerous vehicles to the site at one time; (4) the parking spaces will be numbered and the applicant may not use beepers or alarms on the vehicles; and (5) members of the public

will not be permitted to inspect the vehicles at the site, nor will any sales activity be permitted on the property.

Carr argues that the Church failed to meet its burden of proof of showing that it would be a hardship for the Church to comply with the zoning ordinance, but the Church did not seek to establish "special reasons" on the basis of a hardship. Carr further argues that the Church did not present sufficient evidence to show that the proposed use is inherently beneficial; however, as the trial court found, the variance is justified because the site is particularly suited to the proposed use.

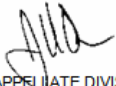
In addition, Carr contends that the Church failed to show that the variance would advance one of the purposes of the MLUL and did not show that the benefits from granting the variance would outweigh any detrimental impact. Carr argues that the Church failed to present any experts in the field of planning to support its variance application.

The judge correctly found, however, that because the proposed use is not substantially different from the present allowed use of the property, no expert testimony was required. The proposed use is indistinguishable from its present use, and the record shows that the variance could be granted without any substantial

detriment to the zoning ordinance or the zone plan.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION