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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0594-21**

**DONNA LYNN CONOVER,**

Plaintiff-Appellant,

v.

**BRICK TOWNSHIP ZONING  
BOARD OF ADJUSTMENT  
and BRIAN DREHER,**

Defendants-Respondents.

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Argued October 6, 2022 – Decided October 26, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey,  
Law Division, Ocean County, Docket No. L-0749-20.

Edward F. Liston, Jr., argued the cause for appellant.

Anne Marie Rizzuto argued the cause for respondents  
(Weiner Law Group, LLP, attorneys for respondent  
Brick Township Zoning Board of Adjustment;  
William B. Morris, attorney for respondent Brian  
Dreher; Ronald David Cucchiaro and William B.  
Morris, of counsel and on the joint brief; Richard  
Brigliadoro, on the joint brief).

The opinion of the court was delivered by  
ACCURSO, P.J.A.D.

This prerogative writs appeal arises out of a neighborhood dispute over a fence in a conservation easement. Brian and Marissa Dreher purchased a home on Brushy Neck Court in Brick in 2016. The property is a through lot with ninety-five feet of frontage on both Brushy Neck Court and Davids Road. It is encumbered by a conservation easement, located along the Davids Road frontage, in favor of Brick Township, required as a condition of the Township planning board's 1997 major subdivision approval creating Timberland Estates, of which the Dreher's lot is a part.

The conservation easement provides in pertinent part that the grantee, its successors and all subsequent owners are "required to maintain in perpetuity" the conservation easements on the "final subdivision plat in their natural state and shall be further prohibited from clearing . . . and/or from making any improvements on this space, including but not limited to, construction of buildings, sheds, swimming pools, tennis courts and/or other such uses." The conservation easement is recorded in the Ocean County Clerk's Office, both on the filed map of the subdivision and in an instrument entitled "Declaration of Dedications, Easements and Restrictions Pertaining to Block 870.22 . . . on the

Municipal Tax Map . . . ." It extends across nine lots in the subdivision, all with rear yards fronting on Davids Road.

In 1998, the Dreher's predecessor in title received a zoning permit to erect a four-foot-high chain link fence in the conservation easement based on a letter from the planning board's attorney at the time, opining the fence was permissible so long as it did not require removal of any living vegetation, thereby preserving the covenant in the conservation easement that the lands remain in their natural state.

Three years after purchasing the property, the Dreher's<sup>1</sup> applied to the Zoning Board to replace the four-foot chain link fence located four-feet from Davids Road with a six-foot stockade fence. Because the Township's land use ordinance limits fences in the thirty-five-foot front yard<sup>2</sup> setback<sup>3</sup> to a height of

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<sup>1</sup> The application lists Brian Dreher's name only.

<sup>2</sup> Brick Township Ordinance § 245-21 provides that "[a]ll yard areas facing on a public street shall be considered as front yards and shall conform to the minimum front yard requirements for the particular zone."

<sup>3</sup> Brick Township Ordinance Chapter 245 Attachment 5 Schedule of Area, Yard and Building Requirements establishes a thirty-five-foot front yard setback for the R-15 zone.

four feet in the Drehers' R-15 residential zone, and forbids stockade fences,<sup>4</sup> the Drehers required a (c)(2) variance.<sup>5</sup> N.J.S.A. 40:55D-70(c)(2).

The Drehers were the only witnesses for the applicant. Mrs. Dreher testified she and her husband wanted to erect the six-foot stockade fence for privacy. She claimed Davids Road was "really not patrolled at all. And we've had instances with ATVs on that road driving loops around in front of our house or behind our house. We have two small girls. We've had cars linger." She also pointed to the "contentious relationship" with the neighbor behind them on Davids Road, saying "it's just we need that peace of mind." She also

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<sup>4</sup> Brick Township Ordinance § 245-33B states:

No fence which shall be constructed under this section within the front yard setback area of any lot shall exceed four feet in height. Any such fence constructed within the front yard setback shall be of a design such as chain link, post and rail or pickets. All pickets shall be spaced at least two inches apart, and each picket shall be no more than 3 1/2 inches in width.

<sup>5</sup> Brick Township Ordinance § 245-33E provides "[no] fence to be constructed under this section shall be located less than ten feet from the pavement or cartway of any street, whether public or private." The Drehers' existing chain link fence is only four feet from the street. They proposed to erect the new stockade fence in the same place. They did not seek relief from that requirement.

claimed that with Summerfest<sup>6</sup> taking place nearby in Windward Beach Park, "a four-foot fence isn't going to deter anybody if they wanted to get into our yard. It's wide open."

When the Board Chairman returned later to the topic of Summerfest, and that "the people from SummerFest come on your property," Mrs. Dreher testified "I'm saying they could. It's a concern." When the Chairman sought to clarify the Dreher's were "saying the people from Windward Beach come up your road, come up Davids Road," Mrs. Dreher replied:

We obviously can't see people. There's no lights back there. They could. That's the concern is that they could. As our girls get older, it becomes a concern. I mean, there's ATVs, there's golf carts, there's all sorts of things on Davids Road. We don't know where it could escalate to, where it can end. We're just trying to be good neighbors and want to be good neighbors and just leave it alone.

When Mr. Dreher was asked what benefit the neighbors would derive from the required variances, he testified "[i]t would increase the appearance of the neighborhood. It would increase the privacy, the security and . . . the

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<sup>6</sup> According to the Township's website, Summerfest is a free Thursday night concert series followed by fireworks held at Windward Beach during July. Township of Brick, <https://www.bricktownship.net/events/summerfest-concert-featuring-jessies-girl-back-to-the-80s-show/> (last visited Oct 17, 2023) [<https://perma.cc/9D8B-A86F>].

neighborhood feel of kind of almost a comradery of the neighborhood, because they do kind of, they are all interested . . . [in] what we're seeking to do."

Asked by a board member about her view of the positive or negative impacts on the neighbors located both adjacent to and behind her home, Mrs. Dreher testified that a six-foot high stockade fence would be "far more attractive than what's there now."

Mrs. Dreher claimed "[t]he chain link on [the] Davids Road side is covered with briars," and that "there's probably some trash in there that we haven't seen." She testified a wood fence in her "opinion is nice to look at and I'd like to see it cleared back there. It is messy and you don't like to see on the side of the road all the briars and the vines choking out everything."

According to Mrs. Dreher, her neighbors had "not been able to maintain the conservation easement for fear of touching anything and having zoning or whomever called" and being harassed by "an inspector in the engineering department."

Mrs. Dreher also testified she and her husband "just feel as though we should be able to have the privacy that people on Princeton [Avenue] have. They have that double frontage on Princeton and they have the six-foot

stockade. We'd like to do the same."<sup>7</sup> When it was pointed out that all the neighbors on Brushy Neck Court had chain link and not stockade fences, Mrs. Dreher replied that was the only thing "they were permitted at the time." She stated "[w]e have the easement. We pay taxes for the easement. We should be able to be in the easement and [not] have to put a fence up 35 feet in and lose all that space and then be expected to maintain it on top of that."

Two members of the public testified. One neighbor of the Drehers on Brushy Neck Court spoke in favor of the application, saying he saw "no downside." He explained the Drehers' fence "is an older fence that needs repair anyway," and agreed the homes on Brushy Neck Court "could use some privacy behind us."

Donna Conover, plaintiff in this action, identified herself as "the nasty neighbor" the Drehers were referring to in their testimony. She testified she and several members of her family, including two elderly aunts, live along Davids Road, which she claimed was named for her grandfather, and that "our front yards face their backyards. All of the backyards." Ms. Conover testified

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<sup>7</sup> There appear to be four different zones along Princeton Avenue. Mrs. Dreher did not reference the zone she was referring to that has "that double frontage" and "the six-foot stockade." No party has identified any residential zone within the Township in which six-foot stockade fences are permitted.

she didn't "care if [the Drehers] put up a stockade fence," so long as it was not within the thirty-foot conservation easement along Davids Road. She claimed the Drehers cut down trees and cleared out vegetation in the conservation easement before receiving a permit from the Township, a charge the Drehers deny.<sup>8</sup>

Addressing the easement, the Board's attorney explained for the Board that

the easement has two purposes. The first is to preserve the natural green area by prohibiting the removal of any vegetation thereon other than dying or dead vegetation. Secondly, there is a prohibition against the clearing of free space for the making of any improvement, including, but not limited to, the construction of buildings, sheds, swimming pools, tennis courts and other such uses. [Prior board counsel] came to the conclusion that the fence did not fall within that. Those are the two purposes that this Board has identified as the purpose of the conservation easement.

The Board voted to grant the variances by unanimous vote of the members present and voting. In its memorializing resolution, the Board stated

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<sup>8</sup> Mrs. Dreher responded to the "clearing bit," by saying her "background is environmental," that she was "a consultant and while [she] underst[ood] that it may look drastic to clear out vegetation, in order to have a healthy canopy you can't have invasive briars and other vines choking out the trees. It will defeat the purpose."



the Drehers sought to replace a dilapidated four-foot open chain link fence with a closed six-foot stockade fence for "additional privacy and security," noting Mr. Dreher testified "that persons have regularly trespassed on the subject Property with all-terrain vehicles" and "trespassing often occurs in the summer, especially during 'Summer Fest.'"<sup>9</sup> The board also noted plaintiff Conover's testimony that a six-foot stockade fence was incompatible with both the existing fencing and the conservation easement, and that she [and her neighbors whose front yards face the back yards of the Drehers' and their neighbors on Brushy Neck Court] "should be given the opportunity to look at a yard and not a solid fence."

The board found the Drehers satisfied the positive criteria required for a (c)(2) variance because "the bulk variance relief required to install the fencing results in a diversified housing stock and an aesthetic improvement which promotes the goals of planning as enumerated in N.J.S.A. 40:55D-2," and "reiterate[d] that the purpose of the conservation easement," as explained by both its current and former counsel, "is to preserve the trees and vegetation easement and . . . that the Applicant's proposed fencing would not undermine that purpose."

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<sup>9</sup> That is an obviously inaccurate summary of the testimony on this point.

As to the negative criteria, the board found the proposed six-foot stockade fencing four feet off a paved street "is a commonly permitted improvement to a single-family residential use such as those in the surrounding neighborhood." It found the new fence "will not create a substantial detriment to the public good because the proposed fencing would be located in the exact location of the existing fencing." The Board also found "persuasive" the 1998 opinion of its former counsel that "a four-foot high, see-through chain link fence" was "permissible" within the conservation easement "so long as it did not require any clearing of vegetation."

Accepting the Dreher's testimony "that the proposed fencing would not disturb vegetation and trees," the Board concluded the proposed fencing "complies with [its counsel's 1998] letter" and "therefore the nature of the encroachment into the rear yard setback is unlikely to detrimentally affect the adjacent property owners" nor "harm the vegetation and trees in the conservation easement because the proposed fencing would be installed in the exact same location as the existing fencing." The Board rejected plaintiff Conover's claim "that the proposed fencing could be viewed from her property" as having "little merit" as she "lives two doors away" from the Dreher's.

The Board concluded the proposed fence will not have a substantial detrimental effect on neighboring properties and that the improvement will actually benefit surrounding properties through the improved aesthetics. It found the purpose and intent of the ordinance establishing the thirty-five foot setback for rear yards fronting a public street was "to avoid any substantial detriment to the residential character of the neighborhood," and that the variances requested did not pose a "substantial detriment to this purpose," satisfying the negative criteria.

The Law Division dismissed Conover's appeal of the grant of the variances. Finding "the Township has an interest in the preservation of the conservation easement," the trial court held the Board "had the right to interpret [the] conservation easement to make sure" any relief it provided "wouldn't violate" its provisions.

As to the variances requested, the court found the Drehers required relief from the minimum rear yard setback of thirty-five feet, where four feet was proposed; from the maximum fence height of four feet, where six feet was proposed; and from the requirement that the fence be open, where a closed stockade fence was proposed. The court noted "[a] stockade fence, however, does provide enhanced privacy and security" and the Drehers "testified that it

would clean up the property along Davids Road in order to maintain the visually attractive environment."

Applying the criteria for the "flexible (c) variance" sought, the court, stated it "weigh[ed] heavily" that the property was created as a through lot with "roadways both in the front and rear yard[s]" and "for security purposes as well as privacy, there is a benefit to not only the property itself but the surrounding neighborhood to allow for enhanced security and privacy." The court further found there was also "an aesthetic issue that enhances the neighboring scheme to allow for a fence to be placed in such a location."

The court reviewed the findings of fact the Board made, agreeing with its conclusions, and "specifically find[ing] that the bulk variance required to install the fence results in a diversified housing stock and an aesthetic improvement, which promotes the goals of planning as enumerated under the Municipal Land Use Act." The court further found the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163 allowed "the court and the zoning board" to review the neighborhood scheme, the purposes of the Municipal Land Use Law, and the improved "aesthetics . . . [and] security of the property owners and any enhancements that would come from a solid fence." The court concluded the Board's decision that "the conservation easement does not

prohibit fences" and that the Drehers had established their entitlement to a (c)(2) variance was neither arbitrary nor capricious and it was thus "compelled to consent under these circumstances to uphold [its] decision and not disturb the resolution as adopted by the Board."

Conover appeals, arguing the Board lacked the authority to interpret a recorded easement required as a condition of subdivision approval by the planning board, and that both the Board and the Law Division erred in finding the Drehers established their entitlement to a (c)(2) variance to build a six-foot stockade fence four feet off Davids Road. We agree on both points and reverse.

We review the decision of the Law Division from a zoning board's grant of a variance "bound by the same standards as was the trial court." Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). "Thus, while we give substantial deference to findings of fact, it is essential that the board's actions be grounded in evidence in the record." Ibid. As our Supreme Court has explained, "[t]he proper scope of judicial review is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Jock v. Zoning Bd. of Adjustment, 184

N.J. 562, 597 (2013). We consider questions of law, however, de novo without deference to interpretive conclusions we believe mistaken. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin, 233 N.J. 546, 559 (2018).

Of course, municipal decisions enjoy a presumption of validity, and will only be overturned if arbitrary and capricious or unreasonable. Id. at 558. Zoning boards, in particular, "because of their peculiar knowledge of local conditions[,] must be allowed wide latitude in the exercise of delegated discretion." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)). Nevertheless, because the Municipal Land Use Law "exhibits a preference for municipal land use planning by ordinance rather than by variance," ibid., a reviewing court accords less deference to the grant of a variance than it does to a denial. Scully-Bozarth Post # 1817 of Veterans of Foreign Wars of U.S. v. Plan. Bd. of City of Burlington, 362 N.J. Super. 296, 314 (App. Div. 2003 ).

We disagree with the trial court that the Board "had a right to interpret" the conservation easement, if only to ensure the relief it granted did not run afoul of the easement's terms. The law is well-settled a municipal board lacks the power to relieve an applicant from a deed restriction imposed as a

condition of a prior subdivision approval, Am. Dream at Marlboro, L.L.C. v. Plan. Bd. of the Tp. of Marlboro, 209 N.J. 161, 168 (2012); Soussa v. Denville Plan. Bd., 238 N.J. Super. 66, 69 (App. Div.1990). When a board "interprets" a deed restriction imposed as a condition of a prior approval, even if only to ensure the relief it grants does not violate the restriction, it obviously runs the risk of relieving the applicant of the restriction — as prior Board counsel arguably did by approving erection of the chain link fence in the conservation easement.

The prohibition against the Board interpreting the deed restriction, however, did not prevent it from considering the Drehers' request for bulk variances. As Judge King, sitting as a trial judge, explained in Tobin v. Paparone Constr. Co., 137 N.J. Super. 518, 527 (Law Div. 1975), a landowner has "a right to pursue [a] zoning variance irrespective of the restrictive covenants running with [his] land," because his obligations vis a vis the deed restriction "are not to be determined by reference to the zoning restrictions applicable to the land." "The grant of the variance in no way affects the validity of the covenant nor the covenant the validity of the grant." William M. Cox & Stuart R. Koenig, N.J. Zoning and Land Use Admin. § 19-3.4 (2023).

Thus, we consider whether the trial court was correct to affirm the grant of the (c)(2) variances without regard to the deed restriction imposed as a condition of subdivision approval, as the question of the extent of that restriction is not properly before us.

N.J.S.A. 40:55D-70(c)(2) provides in pertinent part that

where in an application or appeal relating to a specific piece of property the purposes of this act . . . would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, [the zoning board may] grant a variance to allow departure from regulations pursuant to article 8 [N.J.S.A. 40:55D-62 to -68.6] of this act . . . .

Thus, to establish entitlement to a (c)(2) variance, an applicant must demonstrate "that the purposes of the MLUL would be advanced, the variance can be granted without substantial detriment to the public good, the benefits of the variance will outweigh any detriment, and that the variance will not substantially impair the intent and purpose of the zoning plan and ordinance." Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 471 (App. Div. 2015). It is thus axiomatic that "no (c)(2) variance should be granted when merely the purposes of the owner will be advanced." Kaufmann v. Plan. Bd. for Warren, 110 N.J. 551, 563 (1988). "The grant of



approval must actually benefit the community in that it represents a better zoning alternative for the property." Ibid. The Board's focus then must be "on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community." Ibid.

Applying those standards here, we are convinced the trial court erred in affirming the Board's grant of a (c)(2) variance to the Drehers. There was no evidence before the Board sufficient to find the requested variances advanced the purposes of the Municipal Land Use Law. The only reasons the Drehers advanced were their own personal privacy and security. To the extent Mr. Dreher's testimony implied the grant of the easement would benefit their neighbors on Brushy Neck Court, who would also be interested in erecting stockade fences in their rear yard setbacks, the Board is prohibited from rewriting the zoning ordinance to amend the rear yard setback requirements for through lots in the R-15 zone. See Kaufmann, 110 N.J. at 564 (noting boards "cannot rewrite ordinances to suit the owner or their own idea of what municipal development regulations should be"). Any relief in that regard must come from the Township Council's amendment of the zoning ordinance.

The board also failed to identify specifically which purposes of the MLUL the variances advanced, finding only that the proposed "fencing results

in a diversified housing stock and an aesthetic improvement which promotes the goals of planning as enumerated in N.J.S.A. 40:55D-2." We fail to see any connection between a six-foot stockade fence and "a diversified housing stock," which the Board does not locate within the purposes listed in N.J.S.A. 40:55D-2(a) through (q) in any event. And although the promotion of "a desirable visual environment," N.J.S.A. 40:55D-2(i) is certainly included among the purposes of zoning, the Board does not explain why a six-foot stockade fence, which does not appear to be permitted within the front yard setback in any residential zone in the Township, see Brick Township Ordinance § 245-33B, "effectuate[s] the goals of the community as expressed through its zoning and planning ordinances." See Kaufmann, 110 N.J. at 564.

As for the negative criteria, the Board offers no evidence supporting its finding that a six-foot stockade fence located four feet from the street within a thirty-five-foot setback "is a commonly permitted improvement to a single-family residential use such as those in the surrounding neighborhood." The record supports the opposite, that is that none of the neighbors had stockade fencing and the only fences in the neighborhood were open chain link fences. In addition, Brick Township Ordinance § 245-33E prohibits any fence of whatever type to be "located less than 10 feet from the pavement or cartway of

any street, whether public or private," and the proposed fence will be only four feet from the street.

The Board's finding that the proposed fence on this through lot would "not create a substantial detriment to the public good because the proposed fencing would be located in the exact location of the existing fencing," fails to take into account that the existing fence is an open chain link fence four feet high and the fence proposed will be a six-foot-high closed stockade fence, which is apparently not permitted in any residential zone in the Township.

It is readily apparent that the Township's purpose of allowing only open fences of no more than four feet high in the front yard setback is to provide a "desirable visual environment" from the street, with no exceptions for through lots, which front on two streets. Indeed, the Board found "the purpose and intent" of the ordinance establishing "the rear setback is to avoid any substantial detriment to the residential character of the neighborhood."

It is not possible to square that finding with the Board's conclusion that the Dreher's proposed six-foot stockade fence located four feet from Davids Road, which as plaintiff Conover explained, is what the neighbors living on that road face and anyone traveling along it sees, "will not have a substantial detrimental effect on neighboring properties and that the [fence] will actually

benefit surrounding properties through the improved aesthetics."<sup>10</sup> Erecting a six-foot stockade fence four feet from the road unavoidably creates a "substantial detriment to the residential character of the neighborhood," with no offsetting benefit. See Bressman v. Gash, 131 N.J. 517, 528-30 (1993) (finding the benefits of the bulk variance, resulting in a smaller back yard, outweighed any detriment and were "not purely private" because it allowed the applicant to construct an attractive home more in keeping with the character of the neighborhood and a landscape berm mitigated the adverse impact on the neighbors). The Board nowhere explains how a six-foot stockade fence four feet off David's Road "actually benefits the community," representing "a better zoning alternative" for the Drehers' property in this small residential neighborhood. Kaufmann, 110 N.J. at 563.

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<sup>10</sup> Our conclusion is buttressed by the Township's noted preference for naturally wooded areas included in a proposed subdivision site to remain in their natural state, see Brick Township Ordinance § 245-365; and that the preservation of naturally wooded tracts is preferred over the clearing and replanting of buffer areas, see Brick Township Ordinance § 245-409 B and D. The Township's aesthetic sensibilities in preferring the appearance of naturally wooded areas in residential neighborhoods appear at odds with those of the Drehers, who consider a six-foot stockade fence "nice to look at" and would prefer "to see it cleared back there. It is messy and you don't like to see on the side of the road all the briars and the vines choking out everything."

Because we are satisfied the Board's finding that the Drehers established both the positive and negative criteria for a (c)(2) variance was arbitrary and capricious and without support in the record, we reverse the judgment of the Law Division and remand for entry of an order reversing the Board's grant of the variances. We do not retain jurisdiction.

Reversed and remanded.

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



CLERK OF THE APPELLATE DIVISION