SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1630-21

EBURY RE, LLC,

Plaintiff-Respondent/
Cross-Appellant,

v.

TOWNSHIP OF MOUNT
OLIVE PLANNING BOARD,

Defendant-Appellant/
Cross-Respondent.

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Submitted November 16, 2022 – Decided August 4, 2023

Before Judges Accurso, Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-0464-20.

The Buzak Law Group, LLC, attorneys for appellant/cross-respondent (Edward J. Buzak and Susan L. Crawford, on the brief).

Respondent/cross-appellant has not filed a brief.

PER CURIAM

In March 2019, plaintiff Ebury Re, LLC applied to the Township of Mount Olive Planning Board for a hardship variance pursuant to N.J.S.A. 40:55D-70(c)(1) to build a two-story, four-bedroom single-family home on an undersized lot.[1] The Board denied the application. Ebury filed a prerogative writs action challenging the denial. The trial court reversed and remanded the matter to the Planning Board to reconsider the application anew. The Board appeals, claiming the trial court overstepped by reversing its denial of the variance.[2] We agree and reverse.

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[1] N.J.S.A. 40:55D-70(c)(1) allows for a variance

> (1) [w]here: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of any regulation . . . would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property [and] . . . (2) . . . the purposes of [the Municipal Land Use Act] . . . would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment.

[2] Although Ebury filed a cross-appeal objecting to the remand requesting "judgment in [its] favor," and collaborated with the Board on the filing of a joint appendix, it failed to file a brief. We granted its counsel's motion to be relieved and subsequently suppressed the brief it never filed. It is not participating in the appeal.

The record in this case is exceptionally meager. Ebury is a limited liability company based in Rye, New York. No one from the company testified at the Planning Board hearing. Instead, the company presented a real estate agent, an engineer and a planner. The real estate agent testified Ebury acquired this undersized property in a package of three lots in a tax sale. The agent explained the company had already sold one and was doing some engineering work on the other, but "this one happened to be undersized, so you know, sometimes when you buy a package you get some dogs and you get some good stuff."

The lot is Block 2302, Lot 5 on the Mount Olive tax map, on the southeast corner of Whippoorwill and Hudson Roads. It is in the R-4 Residential District, which calls for lot sizes of at least 10,000 square feet for a single-family home. Although the tax map lists the dimensions of the property as 75 feet by 100 feet, Ebury claimed the property was 86 or 88 feet by 97 feet,[3] still 1,664 short of the required 10,000 square feet. The real estate agent testified Ebury had offered to sell the lot for $69,900 to the only adjacent neighbor, or alternatively, to buy 2,500 square feet of that neighbor's over-sized lot to make Ebury's lot conforming.[4] The

[3] The engineer testified to both figures, neither of which multiplied by 97 yields the 8,336 square feet claimed.

[4] The neighbor's lot, which also has frontage on Whippoorwill and Hudson Roads, surrounds Ebury's undersized lot on two sides. Thus, if one were

neighbor rejected both offers but expressed a willingness to purchase Ebury's lot for $10,000, an offer Ebury rejected. The agent testified the lot was under contract for $50,000 to a local builder, contingent on a variance and without conditions that would make the lot "particularly constrained" for the construction of a single-family house. The contract purchaser was also not in attendance at the meeting.

Ebury's engineer presented a variance plan for a two-story, four-bedroom house he maintained could meet setbacks as well as building and lot coverage. He testified his proposed house had lot coverage of 29.9 percent where the town permitted 30 percent, and building coverage of 18.8 percent where the ordinance permitted 20 percent. Mount Olive's professionals advised the Board, however, the building proposed would likely not be compliant with setbacks and coverage because the engineer based his measurements on rights of way of thirty-three feet, whereas the ordinance requires a fifty-foot right of way from each paved street.[5]

Ebury's planner testified the application presented "a really classic, textbook (c)(1) hardship case whereby the relief relates to the land and not the structures per

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looking toward Whippoorwill the two lots together resemble an American flag with Ebury's lot representing the canton and the neighbor's lot representing the field.

[5] The plan was simply to illustrate the size house one might be able to build on the lot. Because the applicant was proposing only the construction of a single-family dwelling, no site plan was required. N.J.S.A. 40:55D-37(a). The application was strictly for variance relief for the undersized lot.

se." He claimed the Board could see from the engineering drawings "that a reasonably sized home that's comparable to the other homes in the neighborhood" could be built on the lot "and meet all the other zoning criteria," including the setbacks, "so no other variance is necessary." The planner testified from that "we can tell that it's not a matter of the home being too big, but of the land being too small."

The planner claimed the testimony demonstrated Ebury had tried, unsuccessfully, to acquire additional land and that every undersized lot satisfies the positive criteria for a (c)(1) variance "[i]f there's been some attempt to buy additional land." He also claimed a new house would "add value to the neighborhood" by ridding it of an undeveloped lot. The planner testified because the house was of "a reasonable scale" and would be similar "to all the other houses in the area. . . . relief can be granted without causing substantial impairment of the zone plan."

On questioning by the Board, however, the planner was forced to admit that while the proposed house would be similar to other houses in the neighborhood, it would not be similar to the other lots, as "most of the lots are 10,000 [square-foot, conforming lots] for sure." Asked by the Board to address self-created hardship, the planner responded by denying Ebury had anything to do with creating the hardship. He asserted "the town created the hardship when they allowed the

subdivision." He also asserted "it's essentially a grandfathered lot," although he was forced to admit there was no basis for that statement, because he did not know when the lot was created, when Mount Olive first adopted a zoning ordinance or whether the lot as configured predated the ordinance.

The engineer, who had already completed his testimony, chimed in to say he knew the lot's origins. He claimed "the lot" was created in 1936 pursuant to a filed map of Country Club Estates, which "lops up all the lots into a million different lots, but it's the creation of this subdivision." Asked by the Board's engineer whether the witness knew "anything from the title as to when it became the shape it's in" now, Ebury's engineer responded, "no," explaining all they had was the filed map. He testified the filed map "divided all of those lots in that area up into much smaller parcels," and "[a]t some point" of which he was unaware, "they were combined into larger tracts." Ebury's counsel interjected that he had "obviously" not done "a search back into the history," but would be happy "to go back and see when the lot changed." He claimed Ebury "could probably trace that by doing an appropriate title search."

A member of the public asked how the lot went from 7,500 square feet as shown on the tax map to the 8,336 Ebury claimed. The engineer responded they'd "looked up the deed, the mapping, and the survey." Although the filed map was

marked as an exhibit, no survey was presented to the Board, and the only deed for the property in the record does not contain a metes and bounds description.

After hearing that testimony, the Planning Board denied the variance on a vote of six to two. In its memorializing resolution, the Board noted Ebury acquired the property knowing it was undersized and a variance would be required, and further noted the deficiency "was not de minimis but was a substantial deviation from the minimum lot size in the zone." The resolution states "[t]he proofs provided through the planning testimony with regard to the positive criteria were inadequate in that the expert contended that a hardship was created by virtue of the fact that the lot was undersized." The Board claimed "every undersized lot would automatically satisfy the positive criteria" for a (c)(1) variance if it were to accept Ebury's position that the lot size alone constituted a hardship.

Further, the Board determined the testimony was also inadequate to carry the applicant's burden on the negative criteria to establish the variance could be granted without substantial detriment to the public good. The resolution notes the planner had not undertaken a survey of the homes in the neighborhood and "ignored the fact that the lots immediately to the north of the Property . . . were all conforming lots." Besides simply "speculat[ing]" that the proposed home "was consistent with the surrounding neighborhood," the Board noted Ebury's planner had "offered no explanation as to the maximization of the coverage on the lot to

eliminate any possibility of additional improvements such as a pool or other accessory structures without obtaining subsequent variances."

Ebury filed this action in lieu of prerogative writs in the Law Division, challenging the denial of the variance. The trial court's decision is, speaking plainly, difficult to decipher — largely because it intersperses and relies on cases examining use variances before a zoning board in its analysis of the law of hardship variances before a planning board, without appearing to appreciate they are different animals having nothing whatsoever to do with one another. Kaufmann v. Plan. Bd. for Warren Twp., 110 N.J. 551, 559-62 (1988) (explaining the historical development and distinguishing features of "C" and "D" variances). In addition, key factual findings are without support in the record.

Specifically, the court found as fact both that "[t]he Property was created in 1946 by subdivision" and that the planner "demonstrate[d] that the size of the lot was fixed at its current size when it was created by subdivision in 1936." Neither of those findings has support in the record. Ebury's position before the Board and the Law Division was that the property had its origin in a 1936 filed map approved and recorded under the 1898 Old Map Act, L. 1898, c. 232 (subsequently supplemented by R.S. 46:23-1 to -9 (repealed L. 1953, c. 358)), for Country Club Estates, which "divided all those lots in that area into much smaller parcels." Although counsel for Ebury speculated "without seeing that map of Country Club

Estates, that they were probably all divided into 5,000-square-foot lots as was typical way back in the '30s," there was no testimony as to the size of those original lots, although the engineer remarked it appeared the "map divides everything up to 25-foot sections." Moreover, the engineer testified unequivocally that Ebury could not advise the Board as to when the property assumed its current dimensions. And, as already noted, Ebury's counsel affirmatively represented to the Board it had not undertaken a title search to be able to advise the Board when the lot became the size it is today.[6]

Having determined the Board "erroneously found that plaintiff failed to establish the requisite positive criteria," the court went on to criticize the Board for its failure "to apply the Sica[7] factors or make particular findings" on the negative criteria in accordance with Price v. Himeji, LLC, 214 N.J. 263, 286 (2013), as to "whether the proposed use '[would] not substantially impair the intent and the purpose of the zone plan and zoning ordinance'" (alteration in original).

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[6] Although the engineer referred to the documents he was reading from about the filed map, which were marked as an exhibit, as "a full title search for . . . that whole property," a review of the documents makes clear it is not a title search, and that Ebury's counsel was correct when he advised the Board Ebury had not undertaken such a search.

[7] Sica v. Bd. of Adjustment, 127 N.J. 152 (1992) (holding the enhanced proofs necessary for a use variance for a commercial purpose under Medici v. BPR Co., 107 N.J. 1, 21 (1987), do not apply to an applicant seeking a variance for an inherently beneficial use).

Concluding the Board's findings on both the positive and the negative criteria were arbitrary, capricious and unreasonable, the court vacated the Board's denial of the variance and remanded the matter to the Board for reconsideration and application of the Sica factors.

The Board appeals, claiming the trial court erred by applying the use variance standards of N.J.S.A. 40:55D-70(d) under Price and Sica to a (c)(1) hardship variance and by reversing a variance decision that was supported by sufficient evidence in the record. We agree.

Ebury applied to the Planning Board for a hardship variance under N.J.S.A. 40:55D-70(c)(1) to permit it to build a single-family house on its undersized lot. It is axiomatic in such cases that relief will ordinarily be denied if the applicant's hardship was self-created, meaning the applicant or one of its predecessors in title undertook "an affirmative act that transform[ed] a conforming property into one that is non-conforming." Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 569, 591 (2005).

Thus, it is incumbent on an applicant for a (c)(1) hardship variance to establish how the hardship was created. See Dalton v. Ocean Twp. Zoning Bd. of Adjustment, 245 N.J. Super. 453, 463-64 (App. Div. 1991) (explaining "if a prior owner created the hardship, and would therefore not be entitled to a variance, the impediment is not removed by a purchase by a buyer who did not participate in

creating the problem"); Cox et al., New Jersey Zoning & Land Use Administration § 29-2.9(c), at 438 (2023) ("The availability of a hardship variance depends always on how the hardship was created, not on who suffers from it at the time of application for a variance.").[8]

Applying those standards, the Planning Board was correct to find Ebury failed utterly to carry its burden of demonstrating its entitlement to the variance. Because a self-created hardship exists when "an affirmative action by the landowner or a predecessor in title . . . brings an otherwise conforming property into non-conformity," Jock, 184 N.J. at 591, "it is necessary to know when . . . zoning ordinance limitations were adopted and the status of the property with respect to those limitations at that time" in order to evaluate whether a self-created hardship exists, ibid. (quoting Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 606 (1980)).

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[8] To the extent the Board's resolution could be read to suggest an applicant who purchases an undersized lot knowing it is undersized has "self-created" the hardship, it is in error. As we explained in Dalton, "[i]f an owner, who was entitled to a lot-size variance on hardship grounds, sells to a buyer who, like plaintiffs, knows that the lot does not conform, the right to a variance is not lost as a result of the buyer's knowledge." 245 N.J. Super. at 463. Of course, as we also noted in that case, "[a]n isolated undersized lot in a Map Act subdivision is a problem parcel. One can choose to buy it at a knock-down price, and take one's chances, or thoroughly investigate its history before the purchase." Id. at 465. What one cannot do is "take one's chances" before the Planning Board, seeking a hardship variance without having "thoroughly investigate[d] its history."

Not one of Ebury's witnesses, its planner, engineer or real estate agent, knew when Mount Olive adopted its zoning ordinance, and they could not offer the Board any information as to when the property assumed its current dimensions. Moreover, its counsel admitted to the Board "an appropriate title search" would likely provide when and how the lot came to be its current size, but that Ebury had not undertaken that search.

Just as with the trial court, Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004), our review of the decision of a planning board is limited, Smart SMR v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998). Because "planning boards are granted 'wide latitude in the exercise of the delegated discretion' due to their 'peculiar knowledge of local conditions,'" Fallone, 369 N.J. Super. at 561 (quoting Burbridge v. Mine Hill, 117 N.J. 376, 385 (1990)), our role is limited to ascertaining "whether the board could reasonably have reached its decision" on the competent evidence in the record, Davis Enters. v. Karpf, 105 N.J. 476, 485 (1987).

As well-settled law makes clear it was Ebury's burden to establish that the hardship it claimed entitled it to the variance was not self-created, and the record is clear it failed to do so, the Board did not abuse its considerable discretion in denying it a hardship variance under N.J.S.A. 40:55D-70(c)(1). The trial court erred in finding otherwise.

Ebury's failure to establish that neither it nor a predecessor in title created the hardship, relieved the Board of the necessity to consider Ebury's efforts to bring the property into conformity with the ordinance or whether the variance would advance the purposes of the Municipal Land Use Law and its benefits substantially outweigh any detriment. See N.J.S.A. 40:55D-70(c)(1). The Board was certainly under no obligation "to evaluate whether the proposed use '[would] not substantially impair the intent and the purpose of the zone plan and zoning ordinance,'" (alteration in original) (quoting Price, 214 N.J. at 286), or consider the "Sica factors," as the trial court held, and indeed would have erred had it done so, because Ebury was not seeking a use variance under N.J.S.A. 40:55D-70(d).

We reverse the trial court's decision to vacate the denial of the variance and to remand Ebury's (c)(1) variance application to the Board. We affirm the Board's denial of Ebury's requested hardship variance.

Reversed.