SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1675-21

MAHWAH BP, LLC,

Plaintiff-Respondent,

v.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MAHWAH,

Defendant-Appellant.

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Argued June 7, 2023 – Decided October 4, 2023

Before Judges Accurso, Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4119-21.

Ronald P. Mondello argued the cause for appellant.

Jameson P. Van Eck argued the cause for respondent (Wells, Jaworski & Liebman, LLP, attorneys; Jameson P. Van Eck, of counsel and on the brief; Jennifer M. Berardo, on the brief).

PER CURIAM

Defendant Zoning Board of Adjustment of the Township of Mahwah appeals from an order reversing its denial of a conditional use variance under N.J.S.A. 40:55D-70(d)(3)[1] to plaintiff Mahwah BP, LLC, for outdoor storage of 300 new cars on a former landfill zoned for industrial use adjacent to a residential zone.[2] The Board concedes, as it did in the trial court, that the resolution memorializing its denial of plaintiff's application "is defective, contains net conclusions and failed to make proper findings of fact and conclusions of law in violation of N.J.S.A. 40:55D-10(g)." It, nevertheless, argues its decision is entitled to a presumption of validity and requests we reverse the trial court and affirm its conditional use variance.

In the alternative, the Board contends it's entitled to a remand to permit it to reopen the record because it "relied upon the mistaken evidence" presented by plaintiff that the Township had previously approved its storage of

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[1] A conditional use is defined in N.J.S.A. 40:55D-3 as:

> a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use as contained in the zoning ordinance, and upon the issuance of an authorization therefor by the planning board.

[2] Plaintiff also required a design waiver for the slope of the landscaped area designed to screen the cars from view.

cars elsewhere on its property. The Board contends a remand is necessary because "plaintiff must present evidence that the landfill [storage] does not require the adjoining storage lot to operate successfully."

The trial court rejected the Board's arguments, finding the Board's denial of plaintiff's application arbitrary and capricious because the Board ignored the unrefuted evidence in the record and the testimony of its own planner that plaintiff had established both the positive and negative criteria for the grant of the conditional use variance, and the plan could be approved without a substantial detriment to the public good.

The trial court rejected the Board's request for a remand, finding "no useful purpose" would be served in light of the complete and thorough record before the Board and its misapplication of the Coventry Square[3] standard. See Price v. Himeji, LLC, 214 N.J. 263, 295 (2013) (explaining the circumstances allowing a court reviewing a land use decision to exercise its original jurisdiction to bring the matter to a close instead of remanding to the board). We agree in both respects, and thus we affirm the decision of the trial court.

[3] Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994).

We review a trial court's decision on appeal from a local board of adjustment using the same standard the trial court applies. CBS Outdoor, Inc. v. Borough of Lebanon Plan. Bd./Bd. of Adjustment, 414 N.J. Super. 563, 577 (App. Div. 2010). The board's decision is presumed valid and will only be overturned if "arbitrary and capricious or unreasonable." Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin, 233 N.J. 546, 558 (2018) (quoting Grabowsky v. Twp. of Montclair, 221 N.J. 536, 551 (2015)). It is axiomatic that "[b]oards of adjustment, 'because of their peculiar knowledge of local conditions, must be allowed wide latitude in the exercise of the delegated discretion.'" Burbridge v. Mine Hill, 117 N.J. 376, 385 (1990) (quoting Medici v. BPR Co., 107 N.J. 1, 23 (1987)). Nevertheless, the Board's decision cannot be sustained if it lacks adequate support in the record created before the board. CBS Outdoor, 414 N.J. Super. at 578.

And because we accord more deference to a denial of a variance than to the grant of one in recognition that "variances tend to impair sound zoning," Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 199 (App. Div. 2001), "an applicant bears a heavy burden in overcoming a denial," Nynex Mobile Commc'ns Co. v. Hazlet Twp. Zoning Bd. of Adjustment, 276 N.J. Super. 598, 609 (App. Div. 1994). "[A] party

seeking to overturn the denial of a variance . . . must prove that the evidence before the local board was 'overwhelmingly in favor of the applicant.'" CBS Outdoor, 414 N.J. Super. at 579 (App. Div. 2010) (quoting Scully-Bozarth Post 1817 of the VFW v. Planning Bd., 362 N.J. Super. 296, 314-315 (App. Div. 2003)). We agree with the trial court that plaintiff carried that burden here.

The testimony before the Board established plaintiff owns a nearly forty-acre parcel in Mahwah's IP-120 industrial park zone on which it operates an industrial complex that includes ten buildings and surface parking. Plaintiff proposed to beneficially reutilize an undeveloped former landfill in the southwest corner of the site for the outdoor inventory storage of 300 new cars to be sold by a nearby dealership.

The landfill, essentially a grassy hill, has a pyramidal shape with a four-acre base that rises twenty to thirty feet to a one-and-a-half-acre flat top. Plaintiff proposed to construct its new car parking lot on the flat area at the top. Outdoor storage was permitted in the zone when plaintiff filed its application, conditioned on it "not abut[ting] existing residential development,

a residential street, or any R district."[4] Plaintiff's parcel is bordered by a General Business Zone to the east, a Neighborhood Business Zone to the north, and a One-Family Residential Zone to the south and west. It thus needed a conditional use variance for the project.

Over the course of five meetings spanning nine months, plaintiff presented unrebutted testimony of a licensed engineer and a licensed site remediation professional, based on Department of Environmental Protection documents in evidence as well as their own investigations, that the landfill consisted of foundry waste, largely silica sand and both natural and chemical binders, which the DEP had classified as "non-chemical and nonhazardous industrial solid waste"; that it was closed and capped in the 1980's, as approved by the DEP; that the approved closure plan noted the grading of the site was "designed to allow development of the site for automobile parking at some future date"; that the DEP had discontinued any requirement for groundwater or methane monitoring after several years of testing revealed, as expected, no threat to groundwater or any concerning amounts of methane; that

[4] Mahwah revised its ordinance in December 2020, while this application was pending before the Board, to eliminate outdoor storage in the zone. It concedes the ordinance in effect when plaintiff applied for the conditional use variance controls under the time of application rule. See N.J.S.A. 40:55D-10.5.

the topography of the landfill had not changed over more than thirty years, establishing there'd been no settling; that the DEP had ceased monitoring the site after thirty years, satisfied it was operating as intended; that plaintiff had presented a slope stability analysis establishing the landfill is stable and more than capable of supporting the anticipated loads and a structural and rutting analysis demonstrating the design will support the heaviest fire truck in use by the fire department without leaving ruts or causing damage to the surface; that construction of the parking lot will require approval by DEP of an amendment to the landfill's closure plan; that no construction could be undertaken without that approval; and that following construction, an engineer would have to certify to the DEP that the improvements were built in accordance with the amended plan, which will initiate another thirty-year monitoring period by DEP, including annual monitoring, maintenance and the posting of a bond in an amount satisfactory to the DEP for anticipated costs for the entire thirty-year period.

Those experts also testified the DEP had already approved plaintiff's construction of a culvert and a paved driveway to access the parking area, and that its Bureau of Solid Waste Permitting had advised, in writing, "[b]ased on the Department's historical data as well as the current condition of the

landfill," that it "can be developed as a parking lot assuming that the proposed design will not compromise the integrity of the landfill's final cover or other environmental controls at the site."

Although advised by its own engineer the construction of parking lots on capped sites "is commonplace in New Jersey"; that plaintiff had already received "Bergen County soil approval" signing off on plaintiff's plan "from a soil erosion standpoint; that the existing cap has "been in place for over thirty years" and "appears to be working as intended"; and that protection and maintenance of the cap is "under the jurisdiction of the DEP" and "not under the Town's jurisdiction,"[5] the Board focused most of its attention on the potential for erosion of the cap by construction of the car storage lot. The

[5] At one point, the Board's engineer addressed the Chairman, saying:

> I think we need to keep in mind that this is a use variance application. We know that there is a landfill there. There was a reason why it had to be properly capped. It's always been along the stream. I think we need to just keep in mind what the applicant's proposing. You know, it's not going to change what's in the landfill. We just need to take into consideration the testimony that was provided with respect to the adverse effects potentially of what's being proposed on top of the landfill. The landfill's always been there. You know, it's been capped. It's been monitored by DEP. And I think we need to — this is just my opinion — move forward on this.

Board was especially concerned with the possibility of the grass dying under the cars, resulting in hazardous chemicals leaching out of the landfill into groundwater and the Masonicus Brook.

Plaintiff's engineer and site remediation expert thus spent a great deal of time testifying to the importance of preventing erosion on top of the cap, explaining it was an aspect of the plan closure amendment that would receive close scrutiny by the DEP. The experts also explained the steps they'd taken in designing the project to prevent erosion, including grading to avoid any concentrated flow of stormwater, and the installation of grass pavers, consisting of geotextile material laid over the existing grass to protect the ground from eroding, topped with a four-inch layer of sand in which a cellular grid consisting of two inch by two inch grass paver cells would be sunk. Each individual paver cell would then be filled with topsoil, seeded with grass and fertilized.

The site remediation expert testified the cellular grid, and not the grass, would be supporting the weight of the cars. He also explained the grid would slow the velocity of water across the surface, because the grid "is essentially an erosion barrier in and of itself." In response to specific questions from Board members about erosion after the grass dies, the expert agreed grass is

important to prevent erosion. He testified, however, that even if there was no grass, it would be "very hard for soil to erode out of [the cellular grid] to any great depth, and even if it does, you still have the geotextile material underneath to stop the erosion."

Plaintiff's engineer also testified to the landscape buffer to be planted at the top of the landfill to shield the neighbors from a view of the cars. He explained he'd worked with DEP's Bureau of Solid Waste Management, which would have to approve any planting plan to ensure the landscaping wouldn't affect the cap, two feet below the surface, to devise a plan that would both screen the site and be acceptable to the Bureau. The engineer explained plaintiff proposed to fence the top of the landfill and tightly plant three types of shallow-rooted evergreens, including a fast-growing weeping Colorado spruce, outside the fence on the perimeter of the sloped area on the west and south sides to provide continuous screening along the residential zone.

Because of the Bureau of Solid Waste Management's concern about roots penetrating the cap, the plan was to tie into the existing grade and add fill to accommodate the root ball of the planned six-foot evergreens, necessitating the design waivers for the slopes. The engineer testified that "underneath the

root ball [would be] another [impervious] root barrier to prevent the roots from actually getting down and impacting the cap."

The engineer testified that he'd compared the elevations at the top of the landfill with that of the nearest neighbors, a little over 300 feet away, and determined the landfill was, on average, about twenty feet higher. He testified that based on those calculations, the neighbors would be looking up to the parking area. Thus, all they could see would be the slope and the trees planted on top; they would "not see the vehicles over the top of the trees from that location." Using Google Earth, the engineer demonstrated to the Board in real time that it was not until one was 750 feet distant that the elevation rose to a point where the storage area could be visible with trees of six feet. He noted the trees, of course, would grow much higher, and the view of the storage area of even those neighbors 750 feet away would be obstructed by trees, power lines and the like.

Plaintiff's planner addressed the requirements for a (d)(3) variance under the Coventry Square standard. She began by noting the proofs required for a (d)(3) variance are not as stringent as those for a use variance because the use is "essentially permitted," in the zone albeit "with certain conditions, the only one of which plaintiff did not meet, being that it cannot be located next to a

residential zone or residences." She noted, however, that the proposed use — outdoor new car storage — is less intense than many permitted uses in the industrial zone, including research laboratories, assembly or packaging of products, manufacture, assembly and/or packaging of electronics, instruments, precision tools, public utility buildings, printing plants and light manufacturing operations.

The planner testified that in her experience representing boards in various municipalities, towns limiting outdoor storage in industrial zones were usually targeting "contracting equipment" or building materials, as she suspected Mahwah's ordinance intended, as opposed to the storage of cars outdoors. Supporting her premise, the planner pointed out that parking lots are a permitted accessory use in the zone.

Plaintiff's planner contended plaintiff was essentially "just creating a parking lot," which "is a permitted accessory use." The planner acknowledged that unlike most parking lots, the cars would be there overnight, although the lot would likely be difficult to see, as there will be no lighting anywhere on the landfill. She maintained, however, that "essentially, it would still look and function as a parking lot." Indeed, she maintained that had plaintiff designated

the lot for parking to serve the many buildings on the site, instead of storage of the dealership's cars, it would not need a variance at all.

The planner noted that plaintiff was complying with the condition of a 100-foot buffer between the landfill and the existing residential developments to the south and west of its property, with the neighbors on the south being further separated by North Railroad Avenue and those to the west by the Masonicus Brook that runs through plaintiff's property and the high-tension wires that extend over it. She also stressed plaintiff's planned "fencing and significant landscaping" along the top of the slope to shield any view of the cars from the residential areas.

The planner opined plaintiff's proposed car storage lot was appropriate for the site notwithstanding the residential areas located to the south and west because the project is in an existing industrial zone and provides the neighbors "light, air, and open space," which is one of the purposes of the Municipal Land Use Law, N.J.S.A. 40:55D-(2)(c), thus meeting the positive criteria.

As to the negative criteria, the planner opined there would be no "detrimental effects on the surrounding properties" given the 100-foot buffer and the landscape screening plaintiff would provide. She also testified to her opinion the use will not impair the zone plan and actually promotes several

goals of the Town's master plan, including encouraging "buffer zones to separate incompatible land uses"; encouraging redevelopment to take the esthetic character of the community into account and to enhance the esthetic appearance of the Town; preserving and enhancing the Township's commercial areas; and ensuring future development that is sensitive to flood plains and their adjacent lands, noting plaintiff's care not to disturb the Masonicus Brook or its surrounding area.

Plaintiff's planner concluded her testimony by noting the industrial zone and plaintiff's industrial park already exist, and that plaintiff "would be able to put additional [accessory] parking [on top of the landfill] as of right with a hundred-foot buffer." Compared "to other types of outdoor storage or the actual uses that are permitted onsite," the planner opined that "this [new car storage] would be a much more benign use in every impactful way."

The Board chairman asked the Board's own planner her opinion as to how to view this "extremely unique" site that is on a "fifty or seventy foot high" mound "as opposed to something that's flat." The planner responded that "you really have to address the existing conditions when you look at any site. And I think that's what they did here. They have the road going up the slope,"

presumably at the correct angle and grade, and "the site on the top would be addressed by the cover that they're proposing."

The planner agreed "[t]he site is unique," but concluded "it's certainly developable." She also opined that plaintiff met "the proofs required as part of the conditional use variance and the positive and negative criteria" through the testimony of its planner. Asked specifically by the chairman whether she was of the opinion the Board could "grant this application without a substantial detriment to the public good," the planner answered in the affirmative. Noting she'd not been at the prior hearing, the planner stated that "[g]iven the testimony that [she] heard and the planning testimony" . . . it appears that would be the case."

Neither the Board's engineer nor its licensed site remediation professional had any unanswered questions about the application and neither expressed any reservation about the proofs, nor suggested the variance should be denied.

The Board denied the application in a unanimous vote. The memorializing resolution incorrectly noted plaintiff proposed storage of 400

cars, instead of the 300 finally requested.[6] In addition to reciting basic facts about the application, the resolution also noted "[e]nvironmental constraints, including flood hazard areas, riparian corridors, and a water feature are close to the landfill area," notwithstanding that plaintiff already had DEP approvals for flood hazard area, stormwater activity construction, riparian corridors, and construction in the stormwater area.

The resolution states plaintiff failed to satisfy the proofs necessary for a (d)(3) variance, and "that the proposed project located at the subject site would be inappropriate adjacent to a Residential Zone." Specifically, the resolution provides:

> [t]he proposal would create substantial negative impacts that could not be substantially ameliorated; the uncertainty of materials to be used on the landfill to stabilize the surface for parking on a regular rather than an intermittent basis; and uncertainty that the proposed operation and use would allow the vegetation on the landfill to remain in good condition to prevent erosion due to lack of sufficient sunlight and vehicle impact.

The resolution further provides:

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[6] Plaintiff initially sought approval to store 400 cars on the site but reduced it to 366 and ultimately to 300 to accommodate the Board's engineer's comments concerning width of aisles, spacing of cars and providing a sufficient turn radius for fire apparatus.

> that the deviation [from the condition that the use not abut existing residential development] will impose substantial detriment to the public good, especially to the adjoining neighborhood. Further, conditions could not be imposed to ensure that the deviations will not cause substantial impairment to the intent and purpose of the Master Plan and Zoning Ordinance. These findings were based on the same reasons cited above, including negative viewshed impact that could not be resolved with fencing and vegetation due to the elevations, and potential negative impacts to the health, safety, and welfare of the community pertaining to the disturbance of a landfill adjacent to a Residential Zone.

Although the resolution specifically alludes to "negative viewshed impact that could not be resolved with fencing and vegetation due to the elevations" that was "cited above," there is no other reference in the resolution to "negative viewshed impact."

Having reviewed the resolution, we agree with the Board about the resolution's failings, that is it "states its conclusion in a summary fashion, no summary of the testimony exists, [it] lacks any reference to specific findings of fact as to any testimony, [and there are] no specific findings of credibility as to any of the witnesses." But having reviewed the record before the Board, we agree with the trial court that remand would be inappropriate as it is clear the denial of this conditional use variance was arbitrary and capricious because it

lacks "substantial evidence to support it." Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965).

To establish entitlement to a conditional use variance under N.J.S.A. 40:55D-70(d)(3), an applicant must establish "that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems," and "that the variance can be granted 'without substantial detriment to the public good,'" and "will not 'substantially impair the intent and purpose of the zone plan and zoning ordinance.'" Coventry Square, 138 N.J. at 299 (quoting N.J.S.A. 40:55D-70(d)). The Court has instructed the focus here "is on the effect on surrounding properties of the grant of the variance for the specific deviations from the conditions imposed by ordinance." Ibid.

A review of this record establishes beyond any doubt the chief focus of the Board and members of the public was the risk that construction of the storage lot on top of the landfill would result in the release of hazardous substances into the air[7] and groundwater, a question clearly outside the Board's

[7] Several members of the public as well as at least one member of the Board insisted the landfill contained asbestos, as does the Board in its brief to this court, because the foundry apparently made castings as part of American Brake Shoe & Foundry Co., Abex's predecessor, although there is no evidence

jurisdiction. See Chester v. Dep't of Env't Prot., 181 N.J. Super. 445, 453 (App. Div. 1981) (holding state law is exclusive in the regulation of sanitary landfills); Dowel Assocs. v. Harmony Twp., 403 N.J. Super. 1 (App. Div. 2008) (affirming the trial court's reversal of a planning board's denial of major subdivision approval based on its determination of the safety of a sewage disposal bed, an issue beyond the board's jurisdiction, instead of conditioning approval on the DEP's issuance of a NJPDES (New Jersey Pollutant Discharge Elimination System) permit); see also N.J.S.A. 40:55D-22(b).

Thus, the Board's findings of "substantial negative impacts that could not be substantially ameliorated," all of which went to the stabilization and potential erosion, that is, the safety of the landfill, besides lacking support in the record, arrogated to the board a decision properly belonging to the Division of Solid and Hazardous Waste within the DEP. Dowell, 403 N.J. Super. at 27-29. The same is true of the Board's conclusion that plaintiff's outdoor storage of new cars atop a capped landfill adjacent to a residential zone "will impose

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establishing it in the record. Plaintiff's site remediation expert testified he "didn't see any evidence of [asbestos being deposited or buried in this landfill] or even the word asbestos in the record." He conceded it was "certainly possible" the landfill contained asbestos because "a common way to handle asbestos after it's been mitigated is to take it to a landfill." He opined, however, that "if there is asbestos in the landfill, it's properly disposed of," because it's "not a hazard if [it's] buried and maintained under a cap."

substantial detriment to the public good, especially to the adjoining neighborhood" because of the "potential negative impacts to the health, safety, and welfare of the community pertaining to the disturbance of a landfill adjacent to a Residential Zone."

The Board, of course, was well within its rights to consider whether the storage lot could be effectively buffered and screened from the neighboring residences in deciding whether to grant plaintiff's conditional use application. That's the focus of the Coventry Square inquiry, whether "the site will accommodate the problems associated with the use," that is, unsightly outdoor storage, "even though the proposal does not comply with the conditions the ordinance established to address those problems." 138 N.J. at 299.

The only testimony in the record, however, was that the fence and landscape screening plaintiff proposed would make it impossible for plaintiff's nearest neighbors to view the stored cars because the top of the landfill was, on average, nearly twenty feet higher than the elevation of their homes. Moreover, plaintiff's engineer testified it was not until one was 750 feet away, more than the length of two football fields, that the elevations made it possible for neighbors to see the cars behind the trees at their installed six-foot height.

"It is well-settled that hearings conducted before a zoning board of adjustment to decide an application for a land use approval are quasi-judicial proceedings." Cent. 25, LLC v. Zoning Bd. of Union City, 460 N.J. Super. 446, 464 (App. Div. 2019). "A board's function is to make factual determinations based on the record and decide whether the applicant has satisfied the statutory criteria for a variance." Baghdikian v. Bd. of Adjustment of Borough of Ramsey, 247 N.J. Super. 45, 49 (App. Div. 1991).

Although a Board, like a court, is free to reject the testimony of an expert, Klug v. Bridgewater Twp. Plan. Bd., 407 N.J. Super. 1, 13 (App. Div. 2009), "its determination must be made on a rational and reasonable basis," Reich v. Borough of Fort Lee Zoning Bd. of Adjustment, 414 N.J. Super. 483, 504-505 (App. Div. 2010). Here, the testimony of plaintiff's engineer, planner and site remediation expert was comprehensive, informative and consistent. Plaintiff's planner stressed the outdoor storage of new cars was not, in essence, any different than a parking lot for plaintiff's tenants, which plaintiff could construct on top of the landfill as of right as an accessory use.

The testimony by plaintiff's experts was in no wise contradicted by the Board's own experts, with the Board's planner expressly testifying plaintiff had established both the positive and negative criteria necessary to establish

entitlement to a (d)(3) variance, and the conditional use variance could be granted without substantial detriment to the public good. As the Board made no finding that the testimony of plaintiff's experts was not competent or believable, we find no basis in the record for its rejection of their well-supported opinions and that of its own planner that plaintiff had established entitlement to the conditional use variance. See Sprint Spectrum, L.P. v. Borough of Upper Saddle River Zoning Bd. of Adjustment, 352 N.J. Super. 575, 612 (App. Div. 2002) (finding the board's rejection of the opinion of its own expert, supporting that of the applicant based on the evidence in the record, was unreasonable). We agree with the trial court that plaintiff's proofs in support of the variance were overwhelming. See CBS Outdoor, 414 N.J. Super. at 579.

Finally, we agree with the trial judge that there is no point to a remand here given "the Board's reluctance to properly consider the evidence in the record." Sprint Spectrum, 352 N.J. Super. at 616. The Board's arguments to the contrary are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

We affirm the trial court's decision reversing the denial of the conditional use variance and remand to the Board to grant the conditional use

variance subject to the conditions previously accepted by plaintiff, including approval of the amendment to the landfill's closure plan by the Division of Solid and Hazardous Waste within the DEP. We do not retain jurisdiction.

Affirmed 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