SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2275-21

JOSEPH PULEO, RITA PULEO, and JOEL RUSSELL,

Plaintiffs-Appellants,

v.

ZONING BOARD OF ADJUSTMENT OF THE BOROUGH OF BELMAR, and DOWN TO EARTH CONSTRUCTION, LLC,

Defendants-Respondents.

Argued September 13, 2023 – Decided October 6, 2023

Before Judges Haas, Gooden Brown and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3682-19.

Thomas F. Carroll, III, argued the cause for appellants (Hill Wallack LLP, attorneys; Thomas F. Carroll, III, of counsel and on the briefs).

Kevin E. Kennedy argued the cause for respondent Zoning Board of Adjustment of the Borough of Belmar

(Law Offices of Kevin E. Kennedy, LLC, attorney; Kevin E. Kennedy, on the brief).

Donna Jennings argued the cause for respondent Down to Earth Construction, LLC (Wilentz, Goldman & Spitzer, PA, and Shamy, Shipers & Lonski, PC, attorneys; William J. Shipers and Darren M. Pfeil, on the brief).

PER CURIAM

Plaintiffs Joseph Puleo, Rita Puleo, and Joel Russell appeal from the Law Division's February 18, 2022 order denying their appeal and affirming the decision of the Zoning Board of Adjustment of the Borough Belmar, which granted Down to Earth Construction, LLC's applications for preliminary and final site plan approval, and use and other variances. After reviewing the record in light of the contentions advanced on appeal, we affirm substantially for the reasons set forth in Judge Linda Grasso Jones's comprehensive written decision.

The parties are fully familiar with the underlying procedural history and facts of this case and, therefore, only a brief summary is necessary here. The subject property is located at Block 10, Lot 1, zoned R-75, which permits only single-family residential homes. A vacant, non-functioning thirty-four-room boarding house is currently on the property, as a pre-existing non-conforming use. The boarding house is also described as a rooming house or hotel. Down to Earth, a potential purchaser of the property, applied to the Board for approval

to demolish the existing structure and build a two-building, six-unit townhome project. The application sought approval for the preliminary and final site plan, height and other bulk ("c") variances, and use and floor area ratio ("d") variances.

The Puleos and Russell, who own the two properties adjacent to the subject property, formally objected to the application. Over the course of seven months, the Board held five public hearings on the applications, during which it considered testimony from both sides. On August 22, 2019, the Board voted to adopt a 108-page resolution approving Down to Earth's preliminary and final site plans, and "c" and "d" variances.

Plaintiffs filed an action in lieu of prerogative writs seeking to reverse the Board's decision, contending Down to Earth's application failed to accurately provide notice of the matters to be considered during the hearing; the Board's decision amounted to "spot zoning," which is impermissible; and the Board improperly granted the variances because Down to Earth failed to meet the "positive" criteria required by N.J.S.A. 40:55D-70d(1) and the "negative" criteria pursuant to Medici v. BPR Co., 107 N.J. 1, 4 (1987). After reviewing the trial briefs and hearing arguments of counsel, Judge Grasso Jones issued a

written opinion and order denying the relief requested by plaintiffs and affirming the Board's approval of the application.

With regard to the notice, N.J.S.A. 40:55D-11 requires the notice to provide the date, time and place of the hearing; state the nature of the matter to be considered; identify the property by street address or lot and block number; and give the location and times the pertinent maps and documents are available. Plaintiffs claimed the notice regarding the "nature of the matter to be considered" was inadequate because it indicated the application was to raze the existing structure "and build six fee simple townhomes." Plaintiffs contended this description was inaccurate because Down to Earth was not seeking to subdivide the property into six lots but rather intended to build two buildings containing three townhomes each. According to Down to Earth, the description was accurate because each townhome owner would have a fee simple interest in the townhome along with an undivided interest in the common facilities as a tenant in common with the other owners.

Judge Grasso Jones found the notice to be adequate because the term "fee simple townhomes" accurately described the nature of the matters to be considered. She noted the "critical element" of notice is an accurate description in layperson's plain language, not technical zoning terms, so the general public

understands what the property is to be used for. The notice stated Down to Earth sought variances to permit the construction of six residential townhomes, which the court found accurately described the application to be considered by the Board.

Plaintiffs also alleged the Board's decision was impermissible "spot zoning," which is re-zoning for the benefit of the owner that is incompatible with surrounding uses and contrary to the zoning plan. Cresskill v. Borough of Dumont, 15 N.J. 238, 250 (1954). The Board addressed this issue in its resolution, which found the townhomes were not incompatible with the surrounding residential uses, the demolition of the existing structure and abandonment of its use promoted the purpose of the zoning plan, and the townhomes were a better zoning alternative than the pre-existing, non-conforming rooming house.

As the judge noted, granting a use variance necessarily involves approving an application to develop a property for a use other than is permitted in its zone. The Board's resolution stated that within a few blocks' radius, there were many condominium projects and apartment complexes with much higher densities than Down to Earth's proposed project. Thus, the Board determined the project was compatible with surrounding uses, particularly more so than the existing

rooming house. In rejecting plaintiff's contention, the judge found the Board's decision to be within its discretion and not "spot-zoning."

Plaintiffs also challenged the Board's granting "c" and "'d" variances, contending Down to Earth failed to provide enough evidence to meet the positive and negative criteria. In addressing this issue, the judge found the Board's 108-page resolution contained an "exhaustive analysis of the evidence presented" and not a "conclusory" decision as alleged by plaintiffs. The judge further reasoned:

> As set forth in the resolution the [Board] determined that the hotel (or "rooming house") use was a pre-existing, non-conforming use on the property. Hotel or "rooming house" use is not a permitted use, and it is thus a prohibited use under the Borough's zoning regulations. While the hotel is not currently open for business, the preexisting non-conforming hotel use has not been abandoned by the owner of the property. The [Board] determined that the proposed [six] townhouse condo units proposed for the site were "significantly more suitable / more compatible for the site than the existing [thirty-four]-[u]nit [r]ooming [h]ouse."
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> Approval of Down to Earth's proposed [six] unit condo project and the associated demolition of the hotel would result in abandonment of the preexisting non-conforming use. No one would in the future be able to operate a hotel/rooming house on the site, unless a new use variance were to be granted. The [thirty-four] unit hotel, if rented at or near occupancy, would result in more people staying at the site during the summer season than would be staying on the property in the six

> condo units proposed. The application provided for [twelve] on-site parking spaces, where [fourteen] would be required under Belmar's zoning regulations, a [two] parking space deficiency. The current hotel should provide [thirty-four] parking spaces under Belmar zoning regulations, but in fact the property provides no on-site parking, thus resulting in a [thirty-four] parking space deficiency. The proposed six unit condo project will provide a lower number of dwelling units on the site than the preexisting hotel use, and thus results in a lower density than the preexisting hotel use and will result in a lower impact on emergency services providers in the Borough.

Plaintiffs contended the Board should not have considered the application compared to what is currently on the property; rather, it should have considered the application in light of its intended conforming use, which is a single-family residence. Thus, plaintiffs argued, the Board was required to conclude the property could not be developed as a single-family residence before it could consider granting the variances. Plaintiffs asserted the Board further erred by improperly considering the financial aspects of the project, including its $2.3 million purchase price, as the basis for finding the property was particularly suited for the townhome project.

The judge's opinion thoroughly analyzed these issues consistent with controlling case law. In addressing the appropriate comparator, the judge found the Board did not err by considering the application for non-conforming

townhomes in comparison to the existing non-conforming rooming house. Our Supreme Court has rejected the argument that a board must demonstrate a property cannot be developed as a conforming use before it can approve variances. Kramer v. Bd. of Adjustment, 45 N.J. 268, 291 (1965). In Kramer, the board approved variances to build a modern hotel in a residential zone, where a "deteriorating old hotel" stood. Id. at 293. As here, plaintiffs argued the board improperly considered "only the relative benefits and detriments of the proposed structure vis a vis the present structure, arbitrarily ignor[ing] a third alternative," which was a return to a conforming use. Consistent with Kramer, Judge Grasso Jones rejected plaintiffs' argument that the Board erred in comparing the proposed townhome project to the existing rooming house instead of a single-family residence on the property.

The judge further determined the Board's decision established the "positive" and "negative" criteria, noting the resolution "provided a substantial basis" for its determination that the site is particularly suitable for the townhome project and the variances will not be a substantial detriment to the public good nor will they substantially impair the intent and purpose of the zoning plan. Because "the resolution contained a more than ample factual basis for the

[Board's] decision," the judge found it was not arbitrary, capricious or unreasonable.

Although plaintiffs did not raise the issue before the trial court, Judge Grasso Jones noted that during the Board hearings, counsel for Down to Earth elicited testimony from witnesses regarding "Section 8 people"[1] residing in the rooming house. The clear intent of the testimony and argument was to suggest that if the townhome project was not approved, the rooming house may reopen in the future and lead to a less desirable clientele residing on the property. Although the judge recognized the comments were "clearly inappropriate," she found the Board did not reference or rely on them in its decision.

On appeal, plaintiffs raise the same arguments they unsuccessfully contended before the trial court. They claim the notice was insufficient, the variances amounted to "spot zoning," and the Board's decision failed to adequately address the "positive" and "negative" criteria. Although plaintiffs did not raise the issue before the trial court, on appeal they argue the Board based its decision on the inappropriate "Section 8" commentary. We disagree.

[1] "Section 8" refers to a federal program that provides low-income housing assistance. See 42 U.S.C. § 1437f.

"[W]hen reviewing the decision of a trial court that has reviewed municipal action, we are 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, our review of the Board's action is limited. See Bressman v. Gash, 131 N.J. 517, 529 (1993) (holding that appellate courts are bound by the same scope of review as the Law Division and should defer to the local land-use agency's broad discretion).

It is well-established that "a decision of a zoning board may be set aside only when it is 'arbitrary, capricious or unreasonable.'" Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002) (quoting Medici, 107 N.J. at 15). "[P]ublic bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. of Adjustment of Wall, 184 N.J. 562, 597 (2005). Therefore, "[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." Ibid.

Applying the above standards, we discern no reason to disturb the trial court's or the Board's decision and affirm substantially for the reasons expressed in Judge Grasso Jones's opinion. We add the following comments.

When an applicant seeks a use variance, it must demonstrate special reasons for granting the variance under the Municipal Land Use Law (MLUL). N.J.S.A. 40:55D-70(d)(1). These special reasons are referred to as the "positive" criteria. The Supreme Court has identified three categories of circumstances where special reasons may be found:

> (1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility; (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use."
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> [Nuckel v. Little Ferry Planning Bd., 208 N.J. 95, 102 (2011).]

Here, the use does not inherently serve the public good and there is no claim of undue hardship from the owner; therefore, the Board's decision rested on whether the use would serve the general welfare because the site is particularly suitable for the proposed use. Meeting any of the MLUL purposes listed in N.J.S.A 40:55D-2 has consistently been construed as "serving the general welfare." Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 386 (1990). The Board's resolution found the proposed use would serve the general welfare

because it furthered many of the intents and purposes listed in the MLUL, specifically those identified in sections (a), (b), (c), (e), (g), (h), (i) and (m).

The Board must also determine "whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone." Price v. Himeji, LLC, 214 N.J. 263, 293 (2013). In the section entitled "Particular Suitability" and throughout the resolution, the Board's decision reflects that it engaged in a "fact-specific and site-sensitive" inquiry and analysis. Id. at 294. For instance, the Board noted the property's unusual triangular shape which limits street access and impacts the feasibility of property line setbacks, its proximity to the ocean in a resort town and lack of parking spaces both on the existing property and on the street. In comparison to the existing non-conforming use, the townhome project would increase the property line setback from the neighboring properties and decrease the parking deficit from thirty-four spaces to two spaces. Thus, the Board considered these site-specific characteristics and concluded the property is particularly suited to the townhome project.

An applicant must also demonstrate "negative criteria" by showing the variance "can be granted without substantial detriment to the public good and

will not substantially impair the intent and the purpose of the zone planning and zoning ordinance." N.J.S.A. 40:55D-70(d). An applicant has the additional "enhanced quality of proof" to secure "clear and specific findings of the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance." Medici, 107 N.J. at 21.

After detailed discussions of each issue, the Board summarized:

> The law certainly envisions that any approval for development will certainly lead to, or otherwise contribute to, some type of detriment—be it a use issue, a setback issue, a parking issue, a garbage issue, a traffic issue, a combination of the aforesaid issues, and the like. Quite frankly, the within approval is no different—as there certainly are some potential detriments associated with the subject proposal.

Based on these considerations, the Board determined that approval of the application would not cause a substantial detriment to the public good. Particularly in contrast with the pre-existing, non-conforming rooming house, the Board found the townhome project to "be beneficial for the site, the neighborhood, and the community as a whole."

As the judge found, the Board's resolution provided "a more than ample factual basis" for the decision. We, too, are satisfied that the Board's decision was not arbitrary, capricious or unreasonable and was amply supported by the record.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION