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SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE
LAW DIVISION - CIVIL PART

DOCKET NO. ESX-L-4015-23

DENARRA SIMMONS; MICHAEL ADAMES,

Plaintiffs,

v.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF NEWARK; AGLORITHM REAL ESTATE HOLDINGS, LLC,

Defendants.

OPINION

Decided: September 17, 2024

Hanlon Niemann & Wright, P.C., attorney for Plaintiffs (Richard C. Sciria, Esq. on the brief)

Murphy, Schiller & Wilkes LLP, attorney for Defendant Algorithm Real Estate Holdings, LLC (Lisa E. Lomelo, Esq. on the brief)

Plata Law Group LLC, attorney for Defendant Zoning Board of Adjustment of the City of Newark (Michael Jay Plata, Esq. on the brief)

SANTOMAURO, D., J.S.C.

The matter before the court involves an action brought by plaintiffs Denarra Simmons and Michael Adams in lieu of prerogative writs challenging Defendant Zoning Board of Adjustment of the City of Newark's ("Board's") grant of Defendant Algorithm Real Estate Holdings, LLC's ("Algorithm's") Application No. ZBA-22-54 ("Application") for a use variance, bulk variances, and preliminary and final site plan approval to construct a new two-family dwelling on an existing vacant lot located at 99 Osborne Terrace, Newark, New Jersey 07102 ("Property"). Plaintiffs seek a judgment invalidating and reversing the Board's grant of Algorithm's Application as memorialized in the Board's April 27, 2023 Resolution of Memorialization ("Resolution"). The issue disputed by the parties is whether the Board's decision was arbitrary, capricious, or unreasonable pursuant to the Municipal Land Use Law ("MLUL"), N.J.S.A. §§ 40:55D-1 to -163. However, as set forth below in further detail, the court cannot reach that issue on the record before it because the Resolution does not state the Board's findings of fact and conclusions based thereon in the detail required by the MLUL.

I. FACTUAL BACKGROUND

Algorithm entered into an agreement with the City of Newark ("City") in 2022 to acquire and redevelop the Property. As part of the agreement with the City, Algorithm was required to obtain approval to build a two-family house on the

Property. Certification of Lisa Lomelo, Esq. ("Lomelo Cert.") at Ex. C (Tr. 32:2-32).

Thereafter, Algorithm submitted its May 25, 2022 Application to the Board. Id. at Ex. G (p. 1). The Application states that the Property is zoned R1 (one family residential), reflects that the Property is currently a vacant lot of 2,210 square feet, and identifies the proposed use as "new 2-family residential" with a building area of 3,780 square feet. Id. (p. 1, 3). The Application includes the following summary of the project for which Algorithm sought approval:

> IN AN R1 ONE FAMILY RESIDENTIAL DISTRICT CONSTRUCTION OF A NEW 3-STORY 2-FAMILY DWELLING SEEKING VARIANCE APPROVAL FOR USE, INSUFFICIENT LOT SIZE, INSUFFICIENT FRONT AND READ YARD SETBACKS, INSUFFICIENT LOT AREA PER DWELLING UNIT. EXCEEDING MAX LOT COVERAGE AND ANY AND ALL REQUIRED VARIANCES AND OR WAIVERS THAT MAY BE NECESSARY[.]

Id. (p. 3).

On January 5, 2023, the Board conducted a public hearing in connection with the Application. See Lomelo Cert. at Ex. C. The following individuals testified on behalf of Algorithm: (1) a representative of Artek Studio, LLC ("Artek"), Algorithm's architect; (2) Van Robinson ("Robinson"), identified as the builder and owner of the Property; and (3) John McDonough, a licensed professional planner. Id. at Ex C, Ex. E (p. 2). The Board's planner, Gerald Haizel, PP, AICP ("Haizel"), who issued a memo to the Board regarding the Application, id. at Ex. B, also briefly

testified at the hearing. Id. at Ex. C (Tr. 83:7-85:7). Plaintiffs also testified in opposition to the Application.[1] Id. at Ex C (Tr. 69:3-70:24; 75:23-78:10). At the conclusion of the hearing, the Board held a vote on a motion to approve the Application with conditions. The vote was in favor of approval. Id. (Tr. 90:22-92:7).

The Board subsequently issued its April 27, 2023 Resolution. The Resolution describes the project as follows:

> In the R-1 Zone, the application proposes to construct a new two-family dwelling on an existing vacant lot. Applicant is seeking a D1 (Use) Variance and 4 C Variances for insufficient lot area, insufficient lot area/dwelling unit, insufficient rear yard setback and excessive lot coverage by building.

Id. at Ex. D (p. 1). The Resolution includes 11 factual findings that largely describe physical characteristics and dimensions of the proposed project. Id. (pp. 2-4).

In addition, the Resolution includes the following Board determination:

> WHEREAS the Board has determined that the relief requested by Applicant can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the Zone Plan and Zoning Ordinance of the City of Newark for the following reasons:
>
> 1. Applicant has presented testimony of its experts, as listed above, regarding the application, including the variances requested.
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> 2. Applicant has provided adequate proof in support of granting approvals for the application. Specifically, the testimony and exhibits, incorporated herein by reference, indicate that the grant of the variances

[1] In addition to plaintiffs, a number of other individuals from the community asked questions and testified at the hearing. See, e.g., Lomelo Cert. at Ex. C (Tr. 41:19 to 52:17; 66:25 to 80:12).

and waivers advances the purposes of the Municipal Land use Law ("MLUL") and the benefits of granting the deviation and approvals substantially outweigh any detriments.

3. The application will result in a public benefit because the investment in an otherwise vacant lot to construct a new two-family dwelling on an existing vacant lot, which is needed in the area, meets the intent of the Zone Plan and will guide the appropriate use and development of this site in a manner that will promote the general welfare. The proposed use will provide a facility that supports the community and will improve the flow of traffic by eliminating congestion.

4. The application will benefit the community while promoting the intent and purpose of the MLUL because the proposed project to construct a new two-family dwelling on an existing vacant lot is a productive and efficient use of the site. Further the project promotes the general welfare of the community and provides a desirable visual, so overall it meets the purposes of the MLUL "a," "g," "h," "i," and "m"[.]

3. The conditions will also serve to integrate the project into the surrounding area and lessen any negative impact.

4. The request for the subject approvals, including the variances and waivers, will not result in substantial detriment to the public good. The benefits of granting the request variances and waivers substantially outweigh any detriments relative to deviations from the Zoning Ordinance criteria.

Id. (pp. 4-5) (offset indentation and misnumbering in original). Finally, the Resolution documents the Board's approval of the resolution subject to three conditions: (1) Algorithm's compliance with conditions of the Department of Water & Sewer Utilities; (2) Algorithm's compliance with conditions of the Office of Planning; and (3) a deed restriction that the Property remain a two-family dwelling. Id. at p. 5.

II. PROCEDURAL HISTORY

Plaintiffs filed a Complaint in lieu of a Prerogative Writ pursuant to Rule 4:69-1 on June 22, 2023. Following answers filed by Algorithm and the City, the court entered a briefing schedule via a case management order. No discovery was conducted. After receipt of the parties' briefs, the court conducted a hearing on June 28, 2024.

The parties' initial briefing focused on the merits of the Board's ultimate decision to grant the requested variances. However, having reviewed the Resolution, the court raised an issue concerning its adequacy and requested the parties submit supplemental briefing on this issue. After receiving the supplemental briefing, the court continued the hearing on August 29, 2024.

III. ANALYSIS

A. Standard of Review of Board Decisions

In considering challenges to decisions of municipal land use boards, a court's review "ordinarily is limited. A board's decision 'is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable.'" Smart Smr v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998) (quoting Sica v. Bd. of Adjustment, 127 N.J. 152, 166-67 (1992)). As the parties challenging the Board's decision here, plaintiffs bear "the burden of overcoming the presumption of validity and demonstrating the unreasonableness of the board's action." Toll Bros., Inc, v.

Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 256 (2008). Significantly, "public 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 Twp. 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 of adjustment or planning board, but to determine whether the board could reasonably have reached its decision." Davis Enterprises v. Karpf, 105 N.J. 476, 485 (1987). However, "'[b]ecause variances should be granted sparingly and with great caution, courts must give greater deference to a variance denial than to a grant.'" Kinderkamack Rd. Assocs., LLC v. Mayor & Council of the Borough of Oradell, 421 N.J. Super. 8, 21 (App. Div. 2011) (quoting N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004)). See also D. Lobi Enters., Inc. v. Planning/Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009) ("In this case, since the Board denied the variance, we must accord its decision with even greater deference."). Thus, the deference due the Board here, where it granted Algorithm's Application requesting the subject variances, is less than if the Board had denied the Application.

B. Algorithm's Variance Requests

Algorithm's proposed project requires two different variances – a use variance (also referred to as a "d(1)" variance because it is based upon the requirements set forth in N.J.S.A. § 40:55D-70(d)) and "bulk variances" (also referred to as "c(2)" variances because they are premised on the requirements set forth in N.J.S.A. § 40:55D-70(c)(2))). See Price v. Himeji, LLC, 214 N.J. 263, 297 (2013) (discussing requirements for "(c)(2) variances, also referred to as bulk variances" and a "(d)(1) use variance"). Haizel's December 21, 2022 memorandum to the Board outlines the reasons the proposed project requires a d(1) use variance and bulk variances. Specifically, Haizel's memorandum states:

> Use – Pursuant to Newark Zoning & Land Use Regulations §40:4-1 two-family dwellings are not permitted in the R-1 Zone and the applicant proposes to construct a two-family dwelling. **A D(1) variance is required to permit this use in this R-1 zone.**
>
> Lot Size – Pursuant to Newark Zoning & Land Use Regulations §40:53 a minimum lot size of 2,500-SF is required, and the applicant proposes a lot size of 2,210-SF. **A C-Variance is required to permit a smaller lot size than required.**
>
> Front Yard Setback – Pursuant to Newark Zoning & Land Use Regulations §40:5-3, a prevailing front yard setback is required, and the applicant propose front yard setbacks of 6-feet. **A C-variances** [sic] **is required to permit a lesser front yard setback than required.**

Rear Yard Setback – Pursuant to Newark Zoning & Land Use Regulations §40:5-3, a rear yard setback of 30-feet is required, and the applicant proposes a rear yard setback of 20-feet. **A C-variance is required to permit lesser rear yard setback than required.**

Density – Pursuant to Newark Zoning & Land Use Regulations §40:53, a minimum lot area per dwelling unit of 1,250-SF is required and the applicant proposes 1,105-SF per dwelling unit. **A C-variances** [sic] **is required to permit a lesser lot area per dwelling unit than required.**

Lot Coverage – Pursuant to Newark Zoning & Land Use Regulations §40:5-3 a maximum lot coverage of 50% is required and the applicant proposes a lot coverage of 56%. **A C-Variance is required to allow a greater lot coverage than permitted.**

Lomelo Cert. at Ex. B (p. 2) (emphasis in original).

A municipal board's power to grant the variances at issue here is governed by N.J.S.A. § 40:55D-70, which states in relevant part:

> The board of adjustment shall have the power to: . . .
>
> c. (1) Where: (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 pursuant to article 8 [C.40:55D-62 et seq.] of this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship; (2) where in an application or appeal relating

to a specific piece of property the purposes of this act or the purposes of the "Educational Facilities Construction and Financing Act," P.L.2000, c.72 (C.18A:7G-1 et al.), would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow departure from regulations pursuant to article 8 of this act; provided, however, that the fact that a proposed use is an inherently beneficial use shall not be dispositive of a decision on a variance under this subsection and provided that no variance from those departures enumerated in subsection d. of this section shall be granted under this subsection; and provided further that the proposed development does not require approval by the planning board of a subdivision, site plan or conditional use, in conjunction with which the planning board has power to review a request for a variance pursuant to subsection a. of section 47 [C.40:55D-60] of this act; and

d. In particular cases for special reasons, grant a variance to allow departure from regulations pursuant to article 8 [C.40:55D-62 et seq.] of this act to permit: (1) a use or principal structure in a district restricted against such use or principal structure, (2) an expansion of a nonconforming use, (3) deviation from a specification or standard pursuant to section 54 of P.L.1975, c.291 (C.40:55D-67) pertaining solely to a conditional use, (4) an increase in the permitted floor area ratio as defined in section 3.1 of P.L.1975, c.291 (C.40:55D-4), (5) an increase in the permitted density as defined in section 3.1 of P.L.1975, c.291 (C.40:55D-4), except as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings, which lot or lots are either an isolated undersized lot or lots resulting from a minor subdivision or (6) a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure. A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board, or two-thirds of the full authorized membership, in the case of a regional board, pursuant to article 10 [C.40:55D-77 et seq.] of this act."

If an application development requests one or more variances but not a variance for a purpose enumerated in subsection d. of this section, the decision on the requested variance or variances shall be rendered under subsection c. of this section.

> No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

N.J.S.A. § 40:55D-70 (emphasis added).

To obtain a "d(1)" use variance, the MLUL "requires an applicant to prove both positive and negative criteria" – requirements derived from the statutory language in N.J.S.A. § 40:55D-70. Smart SMR, 152 N.J. at 323. Specifically, "[t]he requirement that a use variance be based on proof of the positive criteria arises from the language of the MLUL, which limits the grant of a use variance to those cases in which there is a showing of 'special reasons.'" Price, 214 N.J. at (2013) (quoting N.J.S.A. § 40:55D-70). The "negative criteria requires the applicant to demonstrate, in accordance with the enhanced quality of proof, both that the variance 'can be granted without substantial detriment to the public good' and that it 'will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.'" Id. at 286 (quoting N.J.S.A. § 40:55D-70, internal citation omitted).

The positive criteria requirement reflects "[t]he legislative preference for land use planning by ordinance rather than by variance." Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95, 102 (2011). As the Supreme Court has noted, courts "must remain mindful that '[v]ariances to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound

zoning.'" Cerdel Constr. Co. v. Twp. Comm. of E. Hanover, 86 N.J. 303, 307 (1981) (quoting Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268, 275 (1967). See also Kinderkamack Rd., 421 N.J. Super. at 12 ("Because of the legislative preference for municipal land use planning by ordinance rather than variance, use variances may be granted only in exceptional circumstance."). Thus, an applicant seeking a "d(1)" variance must satisfy the "stringent standards" required by the MLUL by proving the existence of a "special reason." Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin, 233 N.J. 546, 552 (2018). In Saddle Brook Realty, LLC v. Township of Saddle Brook Zoning Board of Adjustment, the Appellate Division identified the three situations in which "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.

388 N.J. Super. 67, 76 (2006) (internal citations and quotation marks omitted). See also Dunbar Homes, 233 N.J. at 552 n. 3.

The negative criteria requirement embodies a two-part inquiry. "[T]he first inquiry under the negative criteria focuses on the potential effects of the variance on the surrounding properties." Advance at Branchburg II, LLC v. Branchburg Tp. Bd. of Adjustment, 433 N.J. Super. 247, 255 (App. Div. 2013). "The board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties

and determine whether or not it will cause such damage to the character of the neighborhood as to constitute 'substantial detriment to the public good.'" Medici v. BPR Co., 107 N.J. 1, 22 n.12 (1987) (quoting N.J.S.A. § 40:55D-70). In the second inquiry, an applicant must typically demonstrate through 'an enhanced quality of proof … that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance.'" Smart Smr, 152 N.J. at 323 (quoting Medici, 107 N.J. at 21). However, if there is an inherently beneficial use (in essence, the first special reason that will satisfy the positive criteria requirement), "satisfaction of the negative criteria does not depend on an enhanced quality of proof." Id. See also Kinderkamack Rd. Assocs., 421 N.J. Super. at 13 ("All use variance applicants must satisfy the first prong of the negative criteria, which requires proof that the variance can be granted without substantial detriment to the public good. In addition, any proponent of a use that is not inherently beneficial must satisfy an enhanced quality of proof that requires clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance." (internal citations and quotation marks omitted)).

Consideration of a "c" variance alone typically requires its own independent analysis. However, where, as is the case here, "c" variances are sought in

conjunction with a "d" variance, a different methodology is employed. As the Appellate Division noted in Puleio v. N. Brunswick Tp. Bd. of Adjustment:

> Generally application for a 'c' variance and a 'd' variance cannot coexist. If the application is for a use not permitted in the zone, the bulk regulations designed for that zone cannot be applicable to the intended use. For example, an application for a gasoline service station in a residential zone should not be held to the bulk requirements of the residential zone. Lot area requirements and front and side yard setbacks for a residence were not contemplated to be made applicable to a service station. A Zoning Board, in considering a 'use' variance, must then consider the overall site design. In essence, the 'c' variances are subsumed in the 'd' variance.

375 N.J. Super. 613, 621 (App. Div. 2005). See also Price, 214 N.J. at 301 (approvingly referencing the zoning board's reliance on Puleio "concerning the way in which (c)(2) variances are evaluated when they are requested as part of an application for a (d)(1) use variance").

C. Adequacy of Board's Resolution

While the parties' initial briefs focused on whether Algorithm's Application satisfied the positive and negative criteria requirements for the variances at issue, as well as the application of the standard of review to the Board's determination that the Application did so, the court raised a different issue at the initial June 28, 2024 hearing. Specifically, as noted above, the court expressed concern as to whether the Resolution sufficiently memorialized the Board's factual findings and conclusions, as well as its reasoning for same, in compliance with the MLUL. Upon review of

the parties' supplemental submissions on this issue, the court concludes that the Resolution does not.

The MLUL includes a requirement for a memorializing resolution in N.J.S.A. § 40:55D-10(g), which provides:

> g. The municipal agency shall include findings of fact and conclusions based thereon in each decision on any application for development and shall reduce the decision to writing. The municipal agency shall provide the findings and conclusions through:
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> (1) A resolution adopted at a meeting held within the time period provided in the act for action by the municipal agency on the application for development; or
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> (2) A memorializing resolution adopted at a meeting held not later than 45 days after the date of the meeting at which the municipal agency voted to grant or deny approval**.** Only the members of the municipal agency who voted for the action taken may vote on the memorializing resolution, and the vote of a majority of such members present at the meeting at which the resolution is presented for adoption shall be sufficient to adopt the resolution. If only one member who voted for the action attends the meeting at which the resolution is presented for adoption, the resolution may be adopted upon the vote of that member. An action pursuant to section 5 of the act (C. 40:55D-9) (resulting from the failure of a motion to approve an application) shall be memorialized by resolution as provided above, with those members voting against the motion for approval being the members eligible to vote on the memorializing resolution. The vote on any such resolution shall be deemed to be a memorialization of the action of the municipal agency and not to be an action of the municipal agency; however, the date of the adoption of the resolution shall constitute the date of the decision for purposes of the mailings, filings and publications required by subsections h. and i. of this section (C. 40:55D-10). If the municipal agency fails to adopt a resolution or memorializing resolution as hereinabove specified, any interested party may apply to the Superior Court in a summary manner for an order compelling the municipal agency to reduce its findings and conclusions to writing within a stated

> time, and the cost of the application, including attorney's fees, shall be assessed against the municipality.

Id. (emphasis added). See also N.Y. SMSA, 370 N.J. Super. at 332 ("The statute requires a municipal agency to reduce each decision on any application to writing in the form of a resolution that includes findings of fact and conclusions of law. The resolution may be adopted at the time of the decision, at a meeting held within forty-five days of the decision, or in compliance with a court order compelling action within a specified time.").

As the Appellate Division emphasized in N.Y. SMSA, the requirement for sufficiently detailed findings in a memorializing resolution is essential to a court's ability to perform its review function of a municipal board's determinations.

> The factual findings set forth in a resolution cannot consist of a mere recital of testimony or conclusory statements couched in statutory language. Rather, the resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the applicant's variance request in accordance with the statute and in light of the municipality's master plan and zoning ordinances. Without such findings of fact and conclusions of law, the reviewing court has no way of knowing the basis for the board's decision.
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> * * *
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> While remarks made by individual Board members during the course of hearings may be useful in interpreting ambiguous language in a resolution, they are not a substitute for the formality mandated by N.J.S.A. 40:55D-10(g). Such remarks at best reflect the beliefs of the speaker and cannot be assumed represent the findings of an entire Board. Moreover, because such remarks represent informal verbalizations of the speaker's transitory thoughts, they cannot be equated to deliberative findings of fact. It is the resolution, and not

> board members' deliberations, that provides the statutorily required findings of fact and conclusions.

370 N.J. Super. at 332-34 (emphasis added). See also CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 580-81 (App. Div. 2010) ("Because the memorializing resolution of the Board is the wellhead for the judiciary's consideration of the validity of municipal action, we begin our review there. The Supreme Court has noted that the key to sound municipal decision-making is a clear statement of reasons for the grant or denial of a variance. Local boards and their counsel should take pains to memorialize their decisions in resolutions that explain fully the basis on which the Board had acted, with ample reference to the record and the pertinent statutory standards." (internal citations and quotation marks omitted)).

Here, on a surface level the Resolution may appear appropriately detailed. Indeed, it is more than five pages long, includes 11 separately numbered paragraphs of purported factual findings, and six separately numbered conclusions. Lomelo Cert. at Ex. D. However, upon closer scrutiny the Resolution does not pass muster. As an initial matter, the factual findings appear largely unrelated to the positive and negative criteria, and instead, essentially constitute a physical description, as well as various dimensions, of the proposed project. See Lomelo Cert. at Ex. D (pp. 2-4). Moreover, the factual findings (except the finding that Algorithm has standing to bring the matter before the Board) appear to be simply cut and pasted from the

December 21, 2022 Haizel memorandum. Compare Lomelo Cert. at Ex B (Project Summary and Project Description) with Ex. D (pp. 2-4). That the Resolution simply mirrors the Project Summary and Project Description from the Board's Planner raises two issues. First, it highlights that the Board's "factual findings" are not really findings related to the analysis required to reach a determination on the requested use and bulk variances. See, e.g., Morris Cty. Fair Hous. Council v. Boonton Tp., 228 N.J. Super. 635, 646-47 (Law Div. 1988) ("The board's memorializing resolution in this case consists almost entirely of quotations from experts' reports, especially with respect to the planning and density issues. Such wholesale incorporation of the contents of expert reports does not fulfill the board's responsibility to make findings of fact and conclusions of law. In making factual findings, the board is obligated to consider all the evidence in the case rather than merely to accept as factual every statement made by its own planning consultant. Moreover, the board must explain how its findings support its ultimate legal conclusions."). Second, it raises concerns as to whether the Board made its factual findings before holding the January 5, 2023 hearing.[2] Further clarification and explanation on this point is required.

[2] The court notes that the Board's Resolution introduces the factual findings by stating that the Board made the factual findings "after consideration of all evidence." Lomelo Cert. at Ex. D (p. 2). It is unclear how the Board considered "all evidence" – which necessarily would have included testimony at the hearing – if its factual

Moreover, the six separately numbered conclusions are, with two exceptions, essentially bereft of any tie to any facts about the proposed project. The first two and last two paragraphs are utterly conclusory, devoid of anything about the proposed project at issue, and provide no mechanism for the court to conduct its required review. They are precisely the "conclusory statements couched in statutory language," N.Y. SMSA, 370 N.J. Super. at 332,[3] that do not satisfy the resolution memorialization requirement in N.J.S.A. § 40:55D-10(g).

Further, although the middle two paragraphs at least reference the proposed project at issue, they also are insufficient to satisfy N.J.S.A. § 40:55D-10(g). The court notes that the middle two paragraphs are indented differently than the other

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findings are simply a word-for-word reiteration of the Board's Planner's report prepared prior to the hearing.

[3] The court described the resolution at issue in N.Y. SMSA as follows:

> The Board's resolution in this case sets forth no factual findings. It merely identifies the applicant, describes the proposed site, summarizes, in a very cursory fashion, the testimony presented by Verizon's witnesses, and reiterates selected comments by Board members and the public. Its sole conclusory statement is couched in statutory language and lacks any reference to specific facts and circumstances surrounding the application. The Board itself admits candidly that the resolution states its conclusions in a "summary fashion." This is exactly the sort of resolution that has repeatedly been recognized as deficient by the courts.

370 N.J. Super. at 333 (App. Div. 2004). Much of this description applies to the Resolution here.

paragraphs while also bearing the same numbering (paragraphs "3." and "4.") as the last two paragraphs. This raises questions as to whether virtually all of the Board's "determinations" in this Resolution are specific to this proposed project or just form language. While the court does not question the use of some form language in a memorializing resolution, detailed findings and determinations about the specific project at issue – and why the Board is granting the requested variances for that specific project – must also be included in the resolution in order to meet the requirements of N.J.S.A. § 40:55D-10(g).

The court acknowledges that the Resolution states that the "application will result in a public benefit because the investment in an otherwise vacant lot to construct a new two-family dwelling on an existing vacant lot, which is needed in the area, meets the intent of the Zone Plan and will guide the appropriate use and development of this site in a manner that will promote the general welfare." Lomelo Cert. at Ex. D (p. 4). However, while this statement at least relates to the proposed project, it could equally apply to any proposed construction of a new two-family dwelling on an existing vacant lot. What is missing is any explanation of why this meets the intent of the Zone Plan and how this particular two-family dwelling will promote the general welfare. Similarly, the statement in the same paragraph that the "proposed use will provide a facility that supports the community and will improve the flow of traffic by eliminating congestion," id., appears substantive, but also may

not relate to the proposed project at issue. It is difficult to fathom how a two-family house – even one that requires no relief needed for parking and has the capacity to accommodate the parking needs of two families as was testified to be the case here, see id. at Ex. C (Tr. 51:9-19; 60:11-14) – improves the flow of traffic by eliminating congestion as opposed to, at best, maintaining the status quo. Stated differently, some explanation for this conclusion – which, although arguably the only conclusion that could be construed as specific to this particular project, appears untethered to any factual finding made by the Board in the Resolution[4] – is required.

The foregoing concerns are particularly critical in light of the requirement set forth in Medici for "an enhanced quality of proof, as well as clear and specific findings by the board of adjustment, that the grant of a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance." 107 N.J. at 4. There, the Supreme Court emphasized that:

> Our role is to give effect to these legislative policies. In the use-variance context, we believe this can best be achieved by requiring, in addition to proof of special reasons, an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance. The applicant's proofs and the board's findings that

[4] The court acknowledges that factual finding no. 4 states: "A garage is proposed at the front of the 1st floor. This garage will measure 36-feet by 10.6-feet and will accommodate two (2) parking spaces arranged in tandem with one space located directly behind the other. The garage will be accessible by way of a garage door on the front façade." Lomelo Cert. at Ex. D (p. 3). However, nothing included in this factual finding suggests that the project reduces traffic congestion and improves current traffic flow in the area.

the variance will not "substantially impair the intent and purpose of the zone plan and zoning ordinance," N.J.S.A. 40:55D-70(d), must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district. For example, proof that the character of a community has changed substantially since the adoption of the master plan and zoning ordinance may demonstrate that a variance for a use omitted from the ordinance is not incompatible with the intent and purpose of the governing body when the ordinance was passed. Reconciliation on this basis becomes increasingly difficult when the governing body has been made aware of prior applications for the same use variance but has declined to revise the zoning ordinance.

* * *

However, as is evident from the perfunctory proof and conclusory findings in this record, the negative criteria often do not function as the fixed and far reaching protective restriction envisioned by the Court. Typically, expert testimony designed to satisfy the negative criteria will, as in this case, be expressed as an incantation of the statutory phrase. The added requirement that boards of adjustment must reconcile a proposed use variance with the provisions of the master plan and zoning ordinance will reinforce the conviction . . . that the negative criteria constitute an essential 'safeguard' to prevent the improper exercise of the variance power. . . . Our purpose is simply to insure that the exercise of discretion by boards of adjustment faithfully reflects the statutory standards ordained by the legislature.

We also emphasize, for the guidance of boards of adjustment and their counsel, that in the event a use variance is challenged, a conclusory resolution that merely recites the statutory language will be vulnerable to the contention that the negative criteria have not been adequately established. The board's resolution should contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the master plan and zoning ordinance, and determined that the governing body's prohibition of the proposed use is not incompatible with a grant of the variance. If the board cannot reach such a conclusion, it should deny the variance. To the extent this requirement narrows the discretion of boards of adjustment to grant use variances for uses intentionally and persistently excluded from the zoning ordinance by the governing body, we believe it accurately

> reflects the strong legislative policy favoring zoning by ordinance rather than by variance.

Id. 107 N.J. at 21-23 (emphasis added). See also Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div. 1988).[5]

The court here has carefully reviewed the Resolution, as well as the record before it. Having done so the court is left with the inescapable conclusion that the Resolution does not contain clear and specific findings of the Board conclusions, analysis, and reasoning sufficient for the court to conduct the required review of the

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[5] In Loscalzo, the Appellate Division reversed the trial court's decision to sustain the board's approval of variances. In doing so, the court rejected the sufficiency of the board's resolution, stating:

> The only language in the resolution of the Board of Adjustment which addresses the negative criteria is as follows:
>
> > G) The Board determined that many buildings in the immediate area do not meet the zoning requirements of the Borough of Fairview which would include minimum lot dimensions, maximum lot coverage, lack of any side yard, and lack of any rear yard. The Board further determined that the existing structure is equal to the average set back within 100 feet either side of the subject property.
> >
> > H) The Board determined that there would be no substantial detriment to the public good if the variance was granted and further that the applicant would be subjected to undue hardship if they were forced to conform to the ordinance.
>
> These findings are inadequate.

228 N.J. Super. at 305.

Board's decision. Accordingly, the court remands the matter back to the Board to comply with N.J.S.A. § 40:55D-10(g) and make sufficiently detailed factual findings and conclusions, with supporting reasoning, relating to its approval of Algorithm's Application, including the requested use variance and bulk variances.

Finally, the court briefly addresses two arguments advanced by Algorithm's counsel at the August 29, 2024 hearing. First, Algorithm's counsel suggested that the court must give deference to the Board's Resolution. While, as noted above, the court agrees that a reviewing court must give deference to a board of adjustment's decision to grant or deny a variance request, that is a separate and distinct inquiry from whether a board has provided a sufficient resolution for the court to do so. The court does not agree that a board of adjustment's memorializing resolution is entitled to deference when assessing whether it comports with N.J.S.A. § 40:55D-10(g), and neither Algorithm nor the Board identified any authority supporting such a position. Second, Algorithm's counsel emphasized the potential consequences Algorithm faces from a remand because of the resulting delay to this currently approved project. While consequences from delay could potentially be inferred from some of the testimony at the January 5, 2023 hearing, the specific consequences from a remand are not really part of the record on this application. Nevertheless, the court recognizes that there are potential, real-world impacts on projects when they are delayed. However, such potential impacts are secondary to ensuring that a decision

by this court to defer to the Board's determination – that Algorithm properly demonstrated its project is an exceptional circumstance to justify the use variance sought here and that the bulk variances are appropriate – is premised on a determination actually made by the Board and properly memorialized in a resolution. The Resolution here does not effectively communicate the whys and wherefores of the Board's findings and conclusions necessary for the court to understand the Board's determination and assess whether it is arbitrary, capricious, or unreasonable. As such, a remand is required. See Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 123 (App. Div. 2000) ("In sum, the record before us does not adequately embody the necessary administrative findings. The vital importance of such findings has long been stressed by our courts. Justice will best be served by remanding the case to the Zoning Board for reconsideration and specific findings." (internal citations omitted)).

IV. CONCLUSION

For the reasons set forth above, the court remands the matter to the Board to provide it an opportunity, if it so chooses, to set forth more specific factual findings, conclusions, and reasoning in support of its decision to approve Algorithm's application. In the event the Board's elects to amplify its decision in a new resolution it must include specific factual findings and conclusions, a sufficiently detailed

relationship between those findings and conclusions, and the appropriate analysis of same demonstrating compliance with the MLUL.

The court leaves to the sound discretion of the Board the manner in which the Board exercises this opportunity on remand, and the court does not dictate any specific procedure or outcome other than that the Board must comply with any applicable legal requirements, including, without limitation, any statutory notice requirements, as it moves forward. Further, by ordering this remand the court takes no position on the ultimate merits of any decision by the Board on remand. The remand is solely for the purpose of providing the Board an opportunity to issue a resolution that complies with the requirements of N.J.S.A. § 40:55D-10(g).

The court will retain jurisdiction. Counsel for the parties shall apprise the court of any developments as this matter progresses on remand.