

MONARCH COMMUNITIES, LLC, a Limited
Liability Company of the State of Delaware,

Plaintiff,

v.

TOWNSHIP OF MONTVILLE; MAYOR AND
COUNCIL OF THE TOWNSHIP OF
MONTVILLE; and TOWNSHIP OF MONTVILLE
ZONING BOARD OF ADJUSTMENT,
Defendants-Appellant,

And

JMC INVESTMENTS, LLC, a New Jersey Limited
Liability Company,
Plaintiff-Respondent,

v.

TOWNSHIP OF MONTVILLE; MAYOR AND
COUNCIL OF THE TOWNSHIP OF
MONTVILLE; and TOWNSHIP OF MONTVILLE
ZONING BOARD OF ADJUSTMENT,
Defendants-Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
APPELLATE NO.: A-000929-23T4

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MORRIS COUNTY
DOCKET NO.: MRS-L-1986-21 AND
MRS-L-1995-21

Sat Below:
Hon. Stephan C. Hansbury

Civil Action

**DEFENDANT- APPELLANT- PETITIONER MONTVILLE ZONING
BOARD OF ADJUSTMENT BRIEF ON PETITON FOR CERTIFICATION**

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Preliminary Statement:

In a short period of time a significant amount of municipal resources were spent on the property at 205 & 207 Changebridge Road in Montville (“Property”). In 2018, the Montville Township Committee (“Committee”) considered the request from Allegro Developers to rezone the Property from R-20 single family zone to a senior mixed-use development with 150 units of independent living, assisted living and memory care. The Committee commissioned the Township Planner to provide a report on the request. Da18-55. The Committee fully considered the request but decided not to approve the request to rezone the site for the requested uses.

Then in 2019, the Montville Planning Board (“Planning Board”) undertook a master plan update of the land use element of the master plan in compliance with N.J.S.A. 40:55D-89. Da47. The Planning Board thoroughly considered the need for additional senior housing in the Township and recommended that a new overlay zone and medium density residential zone be created to accommodate such uses. The Planning Board considered many locations, including the subject Property, but ultimately rejected the Property for those uses and proposed the creation of an overlay zone and a new moderate density residential zone for those senior uses at other locations in the Township. The 2019 Land Use Plan Amendment to the Montville Master Plan update was duly adopted by the Planning Board on

December 12, 2019, (“2019 Master Plan”) in compliance with the Municipal Land Use Law (“MLUL”) N.J.S.A. 40:55D-28 and 89. Da71-113¹. Shortly thereafter, the Applicant filed this use variance request for the same mix of senior living uses, but with 165 units at the same Property that had been thoroughly reviewed and rejected for this use with 150 units by the Township Committee and the Planning Board.

The Montville Zoning Board (“Board”) heard the application of Monarch Communities, LLC (“Applicant”) for a d(1) use variance, d(3) density variance and “c” variances and waivers over the course of 7 nights of hearings. The Board carefully considered all of the witnesses and testimony provided by the Applicant and by its own professionals and decided to deny the application. The Board determined that the Applicant had not satisfied the negative criteria, based upon several grounds set forth in the resolution of the Board. Da118. One of the most compelling reasons was the Applicant’s failure to address the inconsistency of the request for this use with the recent actions by the Committee and the Planning

¹ The 2019 Master Plan update was fully adopted according to law on December 12, 2019 after a public hearing. The ordinance changes recommended in the 2019 Master Plan have not been enacted by the Township Committee, but they remain part of the planning guidance in the 2019 Master Plan. The Appellate Division Decision at page 15 incorrectly stated that the Master Plan “had not yet been adopted.” SCA18. The 2019 Master Plan update was fully adopted by the Planning Board per the statutory framework for the Planning Board to update a master plan, and no adoption by the governing body is required.

Board to reject this use at this Property, and rejecting the density requested in all senior living zones. The Board looked to the MLUL provision, which requires that:

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 the zoning ordinance**. N.J.S.A. 40:55D-70d. (emphasis added).

The Board, knowing the history of zoning at this Property and relying on the recently adopted 2019 Master Plan, recommending senior uses at alternate locations and at significantly lower densities, decided that granting the application would substantially impair the intent and purpose of the zone plan and zoning ordinance that had been fully examined by the Township very recently².

Neither the trial court nor the Appellate Division gave any weight to the Township's zoning and planning efforts regarding this Property or the establishment by the Planning Board of appropriate alternate zones in the Township and lower allowable unit densities for such senior living uses. The statutory language clearly requires that the Board consider the zone plan and zoning ordinance, and the Board did just that -- it considered the fact that the

² For a more detailed discussion of the 2018 rezoning request and the 2019 Master Plan Update please see Montville Zoning Board's Appellate Brief. Db 4-8.

ordinance was not amended to include this use at this Property and the zone plan as established in the Master Plan recommends this use in other locations and at a far lower density. The Board applied the statutory language and determined that the application must be denied.

If these clear actions by the Township Committee and Planning Board do not support a finding of substantial impairment that is not arbitrary, capricious or unreasonable, then municipal land use boards need more instruction on what standard applies in determining what substantially impairs the intent and purpose of the zone plan and zoning ordinance when evaluating a d(1) variance for an inherently beneficial use. And municipalities need more instruction on how to guide the development of their communities, if keeping the master plan updated and the rejection of a request to rezone the property by the governing body do not suffice to firmly establish the zone plan and zoning ordinance.

Statement of the Matter:

In 2020 the Montville Zoning Board (“Board”) heard the application of Monarch Communities, LLC³ (“Applicant”) for a d(1) use variance, d(3) bulk

³ Monarch Communities, LLC was the applicant before the Board and developer of the project, however Monarch’s contract with JMC Investments, Inc. has lapsed, and Monarch is no longer involved in this litigation. JMC Investments, Inc. as contract purchaser, of the Property is still pursuing this matter. For ease of reference, we refer to them collectively as “Applicant” in this brief.

variance, and assorted c variances, and waivers for a 170,000 square foot, 3 story senior care facility with 81 independent living units, 58 assisted living, and 26 memory care units for a total of 165 units and up to 221 resident beds at the Property. Da118-145. The Applicant needed the use variance because it chose a site in Montville Township's R-20 zone which primarily permits single family homes on half-acre sites, instead of one of the many zones that permitted senior living uses. The zoning plan in the Township already included assisted living and nursing homes as permitted uses in all office and industrial zones, and senior citizen housing in all affordable housing zones, totaling well over 1,225 acres or 10% of the Township, but the Property in question was not in one of those zones. Da401.

The Property is currently a farm with a single-family home. To the south and east are single family residences. To the west there are 144 townhomes on 44 acres, which is a density of 3 units per acre. To the north is a lot zoned for single family uses, with a former single-story residence currently used as an office for a school bus service.

The Applicant required a d(3) density variance, because the density in the zone was permitted at 2 units per acre and the Applicant was requesting 20.1 units per acre. In fact, the existing senior living zones in the Township permitted a maximum of 10 units per acre and the proposed senior overlay zone recommended

in the 2019 Master Plan permitted a maximum of 14.3 units per acre. Da30. The Applicant's project was significantly oversized for any of the applicable senior living zones in the Township and would not have fit as of right in any zone where the use was permitted. The Board's Professional Planner highlighted the substantial difference between the density requested by the Applicant and the density permitted in the zoning ordinance. Da30, 6T 127:4-14. Despite several requests to reduce the size of the facility, the Applicant did not do so, and its expert testified that the 165 units were required, or the project would not be "viable". 2T63:3-6.

The Board denied the application and adopted a well-reasoned resolution recognizing the use as inherently beneficial but concluding that the Applicant failed to satisfy the negative criteria under the test in Sica v. Bd. of Adjustment of Twp. of Wall, 127 N.J. 152, (1992). Da 118-185. The decision relied in part on the following testimony of the Board Planner:

I think this is one of the most important points probably that we need to reiterate is that, again, the almost identical project was proposed for a rezoning at the governing body level which was ultimately, uh, not passed along to the Planning Board for further consideration. And the Planning Board subsequently reviewed the project separately and concluded not to move any further. 6T 88:5-14...Ultimately all land use decisions are up to the governing body and the planning board and that, as you know, sovereign municipal entities functioning as the MLUL intended. 6T 90:19-22

The resolution also recognizes that the powers of zoning boards are limited under MLUL 70:55D-62 and 70, that only the governing body has the power to legislate and adopt ordinance changes, and only the planning board has the power to adopt a master plan. The Township Committee and Planning Board spent significant time and energy between 2018 and 2020 reviewing this Property and senior mixed living uses, and both determined not to permit those uses at the subject Property or to permit senior living zoning at a density over 14.3 units per acre. The Board, therefore, correctly decided not to grant the use variance and density variance for a use and larger density than the Committee had recently addressed and rejected for the site, and that the Planning Board had only months ago rejected for this use during its 2019 Master Plan update.

The Applicant appealed the Board's denial, the trial court overturned the Board's decision, and the Appellate Division upheld the trial court's decision. The Board now requests certification of the case for clarification of these issues.

Questions Presented:

1. What is the weight to be given by a Zoning Board, and therefore a reviewing Court, to a municipal denial of a rezoning request and a master plan update directing that use to alternate locations when considering a d(1) variance for an inherently beneficial use?

2. In inherently beneficial use cases evaluated under the Sica standards, what proofs are required for an applicant to overcome the negative criteria as to substantial detriment to the zone plan and zoning ordinance where the municipality declined the same rezoning request, and the Planning Board rejected the same use for the site in its master plan update?

Grounds for Certification:

1. **This petition presents questions of general public importance concerning the establishment of the negative criteria under Sica analysis for which land use boards need more guidance. Specifically, the questions of the impact of master plans, and N.J.S.A. 40:55D-70.d as amended in 1997.**

The Board strictly followed the test established in Sica v. Bd. of Adjustment of Twp. of Wall, 127 N.J. 152 (1992) in its decision to deny the application. See Db25-34. In summary, the Board, 1) identified the inherently beneficial use, 2) identified the substantial impairment to the zone plan and zoning ordinance, 3) sought to provide conditions, such as a significant reduction in units, but was told by Applicant that condition would make the use applied for not “viable,” 4) weighed the positive and negative and determined the substantial impairment of the zone plan and ordinance had not been overcome by the Applicant. The negative impact was contrary to the recent zone change denial and, in essence, a substantial rewriting of the recently updated 2019 Master Plan and existing zone plan, which

provided for other locations where the uses requested were permitted. Sica, supra, 127 N.J. at 165-166, Salt & Light Co v. Willingboro, 423 N.J. Super. 282 (App. Div. 2011), cert. den., 210 N.J. 108 (2012).

The Board's analysis of the application recognized the uses proposed as inherently beneficial, but the Board found that the Applicant failed to meet its burden as to the negative criteria. The Applicant did not, and under these facts could not, justify overthrowing the Township's zoning scheme to approve the requested use of this Property. The Township has many zones where senior citizen housing, assisted living, nursing homes, adult community housing, residential health care facilities and elder care centers are permitted uses. Da400-404. JMC's Property is not one of those locations. The contravention of this recent legislative decision not to rezone this Property would have been contrary to the MLUL statute, which requires that:

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 the zoning ordinance**. N.J.S.A. 40:55D-70d. (emphasis added).

Zoning Boards need direction from this Court on how to address the negative criteria in "inherently beneficial" use cases regarding establishing substantial detriment to the zone plan and zoning ordinance per the 1997 MLUL

amendment. In 1992, the Court in Sica directed that the enhanced quality of proof required in Medici v. BRP Co., 107 N.J. 1 (1987) is not required for inherently beneficial uses. Medici requires in every use variance case that an applicant affirmatively reconcile why the use requested has not been permitted in the zone.

Since Sica, in inherently beneficial cases that affirmative reconciliation from Medici may not be required, but an applicant is still required to address the negative impact. Five years after the Sica decision, the state legislature amended the MLUL and specifically added to N.J.S.A. 40:55D-70d the language “**including a variance or other relief involving an inherently beneficial use**” to the negative criteria, thereby confirming that an inherently beneficial use still needed to show that there was no substantial detriment to ... “**the intent and purpose of the zone plan and the zoning ordinance.**” (emphasis added)

The zone plan and zoning ordinance of a municipality are the result of the master plan. The state legislature through the enactment of the MLUL allows municipalities to create a zoning ordinance, however they are only permitted to do so after they create a Planning Board and adopt a master plan. N.J.S.A. 40:55D-62. In the Power to Zone, the MLUL provides:

The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the Planning

Board has adopted the land use plan element and the housing plan element of the master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the plans use plan element and housing plan element of the master plan or designed to effectuate such plan elements...

That master plan is required to include a land use element and housing element. It is also required to be updated at least every 10 years by the planning board, not the governing body.

The governing body shall at least every 10 years provide for a general reexamination of its master plan and development regulations **by the planning board, which shall prepare and adopt by resolution a report**... N.J.S.A. 40:55D-89. (emphasis added)

If the reexamination is not conducted the township's zoning ordinance loses the presumption of validity.

The absence of the adoption by the planning board of a reexamination report pursuant to ... (C.40:55D-89) shall constitute a rebuttable presumption that the municipal development regulations are no longer reasonable. N.J.S.A. 40:55D-89.1

The legislative scheme requires that zoning ordinances be created after the process of planning is completed and memorialized in a master plan adopted by a planning board. The master plan and the zoning ordinance are symbiotic, and zoning cannot exist in a municipality without the master plan.

Therefore, where a municipality spends as much time considering a property and a use as Montville did on this case, the Board was required to consider those

decisions, and the 2019 Master Plan documents as part of its weighing of the negative criteria. After Sica distinguished the enhanced criteria found in Medici, the legislature corrected the trend to stop considering the negative criteria for inherently beneficial uses and clearly clarified that requirement by adding “**including a variance or other relief involving and inherently beneficial use**” (L.1997, c. 145§1, effective June 30, 1997). The Governor at that time of adoption of the 1997 amendment explained:

In the court’s view, the determination that a use is inherently beneficial requires that the variance be issued, regardless of the local body’s analysis using the MLUL. In effect, the courts have presented this new rule of law as an overriding factor which municipalities must consider when reviewing applications... This amendment to the use variance law clarifies that it is not enough for a use variance applicant to prove the proposed use constitutes an inherently beneficial use, **under this bill**, an applicant must still prove that the use will not substantially impair the zoning plan. By restoring this balance, **municipalities will again be able to evaluate** a proposed use on a particular site to ensure that it does not negatively impact on **the overall zoning plan of the community**. Salt and Light at 282. (emphasis added)

Certainly, in some cases there will not be anything specific to consider, as a use or site may not have been given any attention. However, in this case there was a significant effort to determine the appropriate use for the Property and the appropriate locations and density for senior uses. Under Sica, and as further clarified by the statutory update cited above, the Board was correct to consider and rely on the directions given by the Township Committee and the Planning Board. Further, the

Applicant's failure to address the substantial impact on the zone plan and instead rely on the inherently beneficial use status alone, was exactly what the 1997 amendment was intended to bar.

The Township of Montville, after much consideration, determined that senior living uses should be in other locations and at lower densities. On these facts the Board should be able to rely on the municipal actions and guidance as support for its denial of a variance application unless proofs to the contrary are presented. The considerable history of this Property and the clear rejection of this use by the municipality at an even lower density should establish that the Board's denial was not arbitrary, capricious or unreasonable. This Court should make it clear that where a property and use have recently been reviewed by the municipality as part of a master plan update, and/ or a rezoning request (in the subject matter both had occurred), that the statutorily required planning process bears substantial weight in the Board's balancing of the negative and positive criteria.

If the master plan is not given substantial weight, that defeats the legislative intent above and is contrary to the entire zoning scheme in the MLUL. The process to undertake a master plan update requires great time, expense, and dedication from the members of the planning board and their professionals. The contents and analysis required are specified in the MLUL and public participation through

formal hearings are required. In fact, the legislature considers the master plan process so important that it included a penalty to incentivize municipalities to diligently observe this process. It does not make sense that a zoning board is not permitted to look to the master plan of its municipality in the review of the negative criteria, when zoning itself is not legitimate under the law without this updated planning document.

The removal of the enhanced quality of proof for inherently beneficial use cases in Sica does not prohibit a zoning board from considering the master plan and recent zoning action when they are directly relevant to a property or the zoning criteria at issue. Such a prohibition would be contrary to the zoning scheme set up by the MLUL and the plain language of the statute.

- 2. This petition presents questions of the interpretation of the Municipal Land Use Law N.J.S.A. 40:55D-70.d, and the need to reconcile the decision in this matter versus the contrary Appellate Division decision in Salt and Light Co. v. Willingboro Zoning Bd., 423 N.J. Super. 282 (App Div. 2011) cert. den., 210 N.J. 108 (2012) decided to the contrary.**

The Appellate Division and trial court decisions in this matter are in direct conflict with the Salt and Light case and the recognition of the importance of municipal planning as directed by the MLUL. In Salt & Light, the Court held:

We conclude that even though the proposed duplex for the homeless would be an inherently beneficial use that satisfies the positive criterion for a use variance, the board of adjustment did not abuse its discretion in determining that the public benefit to be derived from this proposed duplex was outweighed by the detrimental effect upon the integrity of the zoning plan that would result from construction of a two-family residence in an area zoned exclusively for single family residences. Id. at 282.

The proposed duplex for 2 homeless families would comply with all of the side yard and other bulk requirements, but it was in a zone for single family homes. The Board voted to deny the application and noted the negative criteria “would constitute a substantial detriment to the neighborhood,” because the duplex is “located in a single family residential zone... in the middle of a block containing only single family homes”. Id. at 283.

The trial court reversed the zoning board’s decision, and the Appellate Division reinstated the board’s denial of the inherently beneficial use variance. Id. at 284. The Appellate Court reviewed the Sica standard and quoted the language of the opinion -- “review of the decision of a Board of adjustment denying ... a variance for [inherently beneficial use] because of the failure to satisfy the negative criteria” under the Sica weighing process “is reversible only if arbitrary, capricious and unreasonable” Sica, supra, 127 N.J. at 166-67.

The Court in Salt and Light also specifically reviewed the history of the 1997 amendment to the MLUL 40:55D-70d (adding “including a variance or other relief

involving an inherently beneficial use,”) in holding “that the board did not abuse its discretion in concluding that plaintiff failed to satisfy the negative criteria for the grant of a use variance” Salt and Light, supra, 423 N.J. Super. at 282.

Similarly, in the instant case, the Applicant has proposed a 170,000 SF three story building with 165 units (20.1 units density per acre) and up to 221 residents plus staff and medical personnel, in a district zoned for single family homes at 2 units per acre⁴. For purposes of comparison, the Property is 8 acres and could potentially hold 10-14 single family homes. Fourteen single family homes at 3,000 SF each would be 42,000 SF of buildings spread out over the Property. In addition to the impact on the neighborhood, in the instant case the Township Committee and the Planning Board had recently examined the Property for the uses proposed and rejected those uses at a lower density at the site. (In 2018, the Allegro project, which the Township Committee denied, was proposed at 150 units or 18.75 units per acre density and the senior overlay zone was established at a maximum of 14.3 units per acre).

The Salt and Light decision established that, since the 1997 amendment correcting the application of the 4th prong of the Sica test, zoning boards must consider the negative impact and not just approve applications because they are inherently beneficial. A duplex proposed in a single-family residential zone in a

⁴ The Applicant in this case testified that the project was not “viable” with less than the proposed 165 units. 2T63:3-6.

municipality with no duplexes was enough of a negative impact in Salt and Light to sustain the denial of the inherently beneficial use. Surely, the massive size of the proposed facility in the R-20 zone in this matter, coupled with the recent zone change denial for the proposed use at a lower density and 2019 Master Plan omission of this Property, is even more compelling.

Neither the trial court nor the Appellate Division in this matter gave due consideration to the Salt and Light decision and reasoning, or to the legislature's statutory correction after Sica was decided. This Court needs to provide guidance to the lower courts and counsel to resolve the inherent conflict between the decision and reasoning in this matter versus that in Salt and Light.

Comments on Appellate Division Decision:

The decision of the Appellate Division ignored the significance of the municipal actions regarding the Property at issue and of the 2019 Master Plan's status as established in the Municipal Land Use Law. The Appellate Decision demonstrated a misunderstanding of the planning and zoning process established in the MLUL, and the distinct powers of the planning board, zoning board and governing body, as evidenced by the language of the decision. The Appellate Division stated:

We reject the board's argument that the respondent's application was impermissible because the zoning board omitted the property from being used for senior housing. (Supreme Court Appendix "SCA"18)

It was the Township Committee that rejected the re-zoning request, and it was the Planning Board that omitted it from the 2019 Master Plan update, not the zoning board

Again, mistakenly, the decision states, "The record shows the township's master plan had not yet been adopted...the master plan controls only once it has gone into effect. N.J.S.A. 40:55D-89." Decision. at 15. Both of these conclusions are incorrect. The Township's Master Plan was in effect, or else the Township could have no zoning ordinance at all. In addition, the 2019 Master Plan update was fully adopted by the Planning Board on December 12, 2019. Da71. Planning Boards adopt master plans, not governing bodies. N.J.S.A. 40:55D-28 specifically provides, "**The planning board** may prepare and after public hearing **adopt or amend a master plan** or component parts thereof, to guide the use of lands within the municipality," and N.J.S.A. 40:55D-89 further requires "at least every 10 years, provide for a general re-examination of its master plan and development regulations **by the planning board, which shall prepare and adopt** by resolution a report on the findings of such reexamination..." (emphasis added) The MLUL specifically directs that the master plan reexamination report include "the extent to

which there have been significant changes in the assumptions, policies, and objectives forming the basis for the master plan or development regulations as last revised, **with particular regard for the density and distribution of population and land uses...**" N.J.S.A. 40:55D-89c (emphasis added). It is true that the ordinances needed to codify the recommendations of the 2019 Master Plan into zoning ordinance had not all been adopted by the governing body, but that does not render Master Plan update null and void. The subject 2019 Master Plan update was duly adopted as provided by the MLUL, and the erroneous conclusion to the contrary by the Appellate Division led to an improper result in this case. Even without the adoption by the governing body of the overlay zone for senior housing, the recommendations for the location and density for that zone in the 2019 Master Plan update carries considerable weight, and the Zoning Board was compelled to consider that recommendation in its review of the negative criteria and the impact of the application on the zone plan and zoning ordinance. The Appellate Division decision demonstrates a lack of understanding of the municipal planning and zoning process in the MLUL. The panel was, therefore, unable to correctly evaluate the weight that the zoning board gave to the significant municipal actions of the Montville Committee and Planning Board with regard to the use of the Applicant's property.

Conclusion:

Both a municipal governing body's decision to not re-zone a site for a particular use, and a planning board's adoption of a master plan recommendation directing the location of that use, are significant actions under the MLUL that require consideration by a zoning board, and must be addressed by an applicant, in satisfying the negative criteria in inherently beneficial use cases. Zoning and planning board counsel, and their clients, need the Supreme Court to provide guidance on the weight of these types of municipal decisions in evaluating the substantial detriment to the zoning ordinance and zone plan under the MLUL.

Respectfully submitted,

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Certification

Pursuant to Rule 2:12-7(b), all of the undersigned counsel hereby certify that this petition for certification represents a substantial question and is filed in good faith and not for purposes of delay.

Dated: March 27, 2025

/s/ Kelly Carey