

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.

SUPREME COURT DOCKET
NO. 090407

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 REPLY BRIEF**

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POINT II

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POINT I

This petition presents a question of general public importance concerning the negative criteria under the Sica analysis for which land use boards and applicants need guidance; specifically, the question of the impact of master plans, N.J.S.A. 40:55D-70.d as amended in 1997, and the denial of a rezoning application for the intended use.

The Montville Zoning Board (“Board”) is seeking a clarification that is needed to the second prong of the 4-part test in Sica v. Bd. of Adjustment of Twp. of Wall, 127 N.J. 152 (1992), after the 1997 amendment to the Municipal Land Use Law (“MLUL”), not a complete undoing of the decision. This is an issue of clear public importance to municipalities, land use boards, and applicants throughout the state. It is crucial that they understand the effectiveness and possible limits of their efforts to plan for and zone for their communities through the statutory process established in the MLUL. N.J.S.A. 40:55D-70.

The questions that need to be addressed by this Court in the context of applying the Sica analysis after the 1997 MLUL amendment to N.J.S.A. 40:55D-70.d are:

- 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) use variance for an inherently beneficial use?**
- and,

2. Conversely, 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?

In Sica it was argued that an applicant is not required to satisfy the enhanced quality of proof which requires an applicant to affirmatively reconcile the omission of the use from the zone plan. Id. at 155. However, none of the land use cases since 1997 have held that the Board is precluded from considering the impact upon the master plan or the zoning history of the property as proper considerations for the impact on the negative criteria¹. However, the decision in this matter requires that the Board ignore the recent 2019 Master Plan Amendment and the Township's recent denial of the request to rezone the Property for the same use, but at a lower density². By determining that the zoning board was arbitrary, capricious and

¹ Respondent's reliance on Smart SMR of NY, Inc. v. Fair Lawn Bd. of Adj., 152 N.J. 309 (1998), is misplaced and misguided. The Court in that decision recognized the 1997 amendment to the MLUL, but did not discuss its application. The Court in Smart SMR declined to recognize the USMR cell towers as inherently beneficial uses and, therefore, did not evaluate the Board's decision on the basis of an inherently beneficial use analysis.

² In opposition, Respondent has ignored and nearly omitted entirely the 2018 Township determination denying the application to rezone this Property by a predecessor to Respondent. That rezoning application requested 150 units of

unreasonable to consider those two negative impacts upon the zone plan and zoning ordinance under the Sica criteria, clarification is needed by this Court as to the balance between inherently beneficial uses versus usurping the planning board and governing body's zoning and planning authority.

The decision in Medici v. BPR Co., 107 N.J. 1 (1987), created an affirmative requirement for applicant to reconcile the absence of a use in the master plan in non-inherently beneficial use cases. That is different than recognizing the importance for a Board to look to the master plan and the recent denial of a zone change for guidance, specifically where the municipality has so recently reviewed the very property and use at issue. Especially after the 1997 MLUL amendment, such review by the Board must be permitted.

POINT II

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).

The Appellate Division in Salt and Light affirmed the Board's decision to give deference to the township zoning and planning decisions. In Salt and Light,

precisely the same uses -- congregate care senior apartments, assisted living units and memory care, yet Respondent here requested 165 units for the same uses shortly afterwards.

the applicant requested a variance for a two-family home in an area with only single-family homes. The long history of zoning and planning in the township for single-family homes was credited with supporting to the Board's decision to hold strictly to the single-family uses permitted in the zone.³ It was part of the support cited for the Board's denial of the request for a two-family home for transitional housing for homeless families, an inherently beneficial use. Id. at 287. The court reasoned:

The second step in the weighing process required by *Sica* is identification of “the detrimental effect that will ensue from the grant of the variance.”[*Sica*] 127 N.J. at 166, 603 A.2d 30. The detrimental effect of plaintiff's proposed duplex is that it would conflict with the single-family zoning of the neighborhood in which it would be located. Moreover, the neighborhood has been completely built-out in conformity with this zoning with single-family houses on relatively small lots of approximately one-fifth of an acre. Therefore, the detrimental effect of the proposed duplex upon the zoning in the area would be significant. (emphasis added). Id. at 287.

Notably, Salt and Light was decided after the 1997 amendment to the MLUL, and the court cited the amendment and recognized the importance of the

³ Respondent has misstated the surrounding zoning for the Property in order to distance itself from the reasoning in Salt and Light. This Property is surrounded by solely single-family zoning, including single-family homes to the south, townhomes to the west, single family homes to the east, and a single family home with a non-conforming business to the north. DA 19

zone plan and history of zoning of the municipality, as required by that amendment. Salt and Light, *supra*, at 286. The Appellate Division decision cited with approval the Board's reasoning:

In making this determination, the Board found that "Willingboro was built many years ago as a grouping of single-family homes," that plaintiff's proposed duplex would be located "in the middle of a block containing only single-family homes," and that its proposed use for two families "would constitute a substantial detriment to the neighborhood." We are satisfied that this detriment was not arbitrary, capricious, and unreasonable[,] [Sica] *Id.* at 166-167, 603 A.2d 30, and therefore must be sustained. *Id.* at 287.

However, the Supreme Court has not spoken on how this consideration fits within the second prong of the Sica criteria. The consideration of the negative criteria, where there are relevant facts, should be allowed to include a consideration of the master plan and the history of zoning and planning in the municipality, especially where that includes a recent denial of a request to rezone the property for the same uses. Boards must be permitted to weigh these relevant facts in the determination of the "substantial detriment." To ignore such consideration is to ignore the 1997 amendment to the MLUL and its intended effect on land use decisions.

Most of Respondent's brief in opposition intentionally ignores that the Montville Township Committee had reviewed this Property at the request of an

interested purchaser for a zone change to permit senior living uses, and had rejected that request just before the Planning Board undertook the 2019 Master Plan update, and less than 2 years before this application was filed. The Respondent argues that the omission of senior uses from the permitted uses for the Property has no meaning, despite this Property being specifically considered by the Planning Board and then specifically removed from the new overlay zone that included these uses. The absence of a senior living use designation for this site spoke volumes and again ratified the governing body's recent decision not to rezone the Property. Respondent's argument that its absence was not instructive is disingenuous at best.

The facts of this case do not match those in other land use cases, where the absence of a use in a zone can be explained away by the fact that the property, the zone, or the use may not have been considered by the municipality in the last master plan or zoning update, or that perhaps the use did not exist back then. This Property and the senior living uses were very recently considered and were specifically rejected.

The Respondent also argues that the Board should ignore these required legislative actions of the Township and its planning board, because there is no mention of them in the 2019 Master Plan. The 2019 Master Plan document

specifically discussed senior living uses and addressed where the planning board determined they should be permitted. DA 86. The absence of this Property on that list is a clear determination by the planning board not to permit that use at this Property. The MLUL proscribes what is to be included in master plans and it does not require an affirmative statement regarding considerations that were rejected (even where the minutes of the planning board bear out that omission), as the Applicant seems to be requesting. N.J.S.A. 40:55D-28.

The Township Planner, who was also the Board's Planner, appropriately kept the Board informed of these important decisions regarding land use in the Township. The Board correctly applied its local knowledge in evaluating the application and its decision was supported by its understanding of the local zoning ordinance, the 2019 Master Plan and the history of planning for the Property and senior living uses.

This Court needs to provide guidance as to the appropriateness of a zoning board considering such specific zoning history and the significance a board may give to these facts when weighing the negative criteria.

POINT III

Respondent attempts to create issues where none exist, instead of addressing the significant recent efforts by the Township to properly plan and zone for this Property and senior living uses in the Township.

Respondent, in its brief, points to a discussion at the Montville Planning Board hearing on December 12, 2019, at the time of adoption of the 2019 Master Plan update, as being somehow nefarious. PB 3. Instead, that testimony cited by Applicant verifies that the planning board had specifically considered the Property for inclusion in the newly created senior overlay zone and decided not to include it⁴. The adoption of a master plan requires a public hearing and input from the community. N.J.S.A. 40:55D-28. Members of the public are free to make any comments they wish for or against the plan, and the township cannot limit their right to free speech. The cited exchange confirms that the public hearing was indeed conducted as required, and the planning board considered this Property in its deliberations.

Additionally, Respondent's recitation of the Board's statement at PB 4 provides exactly the same representations made in the Board's brief to the Appellate Division and this Court. The 2019 Master Plan was adopted. The senior living overlay zoning ordinance was not yet implemented. The Board clearly sets forth this distinction at page one of its brief. See DB at 1. It is the planning board

⁴ Notably, this factual history controverts Respondent's argument in other parts of its brief where it asserts that the omission of this Property on the list of sites for the senior housing overlay zone as suggesting that it was not considered, and that the 2019 Master Plan considerations for senior living uses should have no impact on this case.

that adopts the Master Plan and all amendments, and it is the 2019 Master Plan which stands as the current planning guidance in Montville

Respondent's inclusion of these issues are nothing more than an attempt to distract this Court from the Respondent's inability to provide any meaningful justification for the Board to ignore the facts that the Property was twice rejected for a zoning change, for the same use, just before it made an application for a use variance for the same rejected use, and at a higher density.

Conclusion

Municipalities and land use boards need clarification of the impact of the 1997 amendments to the MLUL on the second prong of the Sica analysis. They need to know if actions such as the recent rejection by a governing body of a request to rezone a property can be considered when that same property is the subject of a use variance for that same denied use. They also need to know if the efforts of municipalities to comply with the MLUL and the master plan process are sufficient to protect the municipal zoning scheme, or if the master plan can be summarily ignored by applicants and, therefore, land use boards conducting a review under Sica even after the 1997 MLUL amendment. That amendment emphasized the requirement *even in inherently beneficial use cases* that an applicant must show “that such a 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-70.d. Unless this Court acts to clarify the impact of the zone plan, applicant’s will continue to argue that inherently beneficial uses must be approved regardless of the zoning and planning history, and municipalities and zoning boards will not fully understand their roles under the MLUL.

Respectfully submitted,

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