SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5504-15T3

MATTHEW GLENN, RICHARD ZEGHIBE and DEAN PARKER,

Plaintiffs-Appellants,

v.

CITY OF CAPE MAY PLANNING BOARD, CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT and ADIS, INC., t/a LAMER BEACHFRONT INN,

Defendants-Respondents.

Argued August 8, 2017 – Decided September 11, 2017

Before Judges Hoffman and Currier.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-0408-15.

William J. Kaufmann argued the cause for appellants (Cafiero & Kaufmann, PA, attorneys; Mr. Kaufmann, on the briefs).

Richard M. King, Jr. argued the cause for respondents City of Cape May Planning Board and City of Cape May Zoning Board of Adjustment (Law Office of Richard M. King, Jr., LLC, attorneys; Mr. King, on the brief).

Richard M. Hluchan argued the cause for respondent Adis, Inc., t/a LaMer Beachfront Inn (Hyland Levin LLP, attorneys; Mr. Hluchan, on the brief).

PER CURIAM

In this action in lieu of prerogative writs, plaintiffs Matthew Glenn, Richard Zeghibe, and Dean Parker appeal from the Law Division's July 7, 2016 order in favor of defendants, the City of Cape May Planning Board (the Board) and Adis, Inc. (Adis). The order affirmed the Board's approval of Adis's application for redevelopment of its motel and restaurant properties. We affirm.

I.

Adis operates a motel known as the LaMer Beachfront Inn, located on the corner of Beach and Pittsburgh Avenues in Cape May. The motel property consists of 141 units and an adjacent 146-seat restaurant, which is located in a separate building on the same lot. Both the motel and restaurant are permitted uses in the C-3 zone.

Cape May Ordinance §525-49C, "Off-street parking standards" (the Ordinance), governs parking at motel and restaurant facilities. See Cape May, N.J., Ordinances §525-49C(2) and (4). The Ordinance requires restaurants to provide "at least one parking space for each four seats provided for patrons based on maximum seating capacity"; it requires motels to provide "at least one parking space for each guest sleeping room, plus one space per

employee on the largest shift." Ibid. According to the Cape May Master Plan Reexamination, which the city last revised in March 2009, there is a general parking shortage on many beachfront blocks during the summer season.

Since 2009, Adis has filed several applications with the Board to redevelop its LaMer property, which have required variances from the Ordinance. First, in 2009, Adis sought to demolish the motel's existing "laundry and maintenance support building" and to construct a new laundry building with eight additional rooms above the structure. It further sought to demolish the existing restaurant and to construct a new 146-seat restaurant with twenty-one additional motel units above, for 162 total units. Because the terms of the Ordinance required 219 parking spaces for this redevelopment, Adis proposed to provide 183 parking spaces and requested a variance for the remaining spaces. The Board denied the variance, rendering the rest of the application moot.

Next, in early 2010, the Board considered Adis's application to demolish the laundry building and to construct a new four-story building with eight additional motel rooms, for 141 total units. The Board approved this application in April 2010, determining that Adis was not required to obtain a parking variance.

Plaintiffs appealed this decision to the Law Division, which affirmed in April 2011.

In the fall of 2010, Adis submitted a new proposal, now seeking to demolish the restaurant and laundry building and to construct a ninety-six seat restaurant with seventeen motel units above the structure and two units above the laundry addition. Adis sought a parking variance, which the Board denied, again rendering the rest of the application moot.

In connection with its fall 2010 application, Adis raised the concept of "shared parking,"[1] which is "the use of parking spaces to serve two or more individual land uses without conflict or encroachment." Recognizing that changes to parking rules should be made by ordinance, the Board established a committee to review the issue. In its 2013 report, the committee declined to recommend that Cape May adopt a shared parking ordinance, instead recommending the Board consider the issue "on a case by case basis as part of the application for variance procedure already established." It further recommended that any applicant seeking a variance be required to provide an expert study. The Board unanimously endorsed this report in October 2013.

[1] Adis also submitted the "shared parking" concept in connection with its 2009 application.

Following the committee report, Adis submitted a new application in early 2014, proposing to construct twenty-one motel units above the existing restaurant. Adis did not apply for a parking variance, taking the position that one was not required for this redevelopment. The Board disagreed, finding Adis was required to apply for a variance, and thus it did not consider the merits.

Thereafter, in February 2015, Adis submitted the application at issue on appeal. Similar to its 2009 proposal, Adis sought to demolish the existing restaurant and to construct a new 146-seat restaurant with twenty-one motel units above, for 162 total units on the property. Adis determined that under the terms of the Ordinance, its proposed redevelopment would require 227 parking spaces: 162 for the motel units; thirty-seven for the restaurant; eighteen for motel employees; and ten for restaurant employees. Because the existing property only contained 173 spaces, Adis proposed to create nine additional spaces and to seek a variance, contending that 182 spaces total would be sufficient under a shared parking arrangement.

The Board conducted hearings on this proposal on April 28, 2015, and May 26, 2015. Adis presented the expert report and testimony of traffic engineer David Shropshire. According to Shropshire, the Ordinance treats Adis's motel and restaurant as

separate entities for parking purposes. Citing data from the Institute of Transportation Engineers (ITE), which recognizes that restaurants "can be an amenity or an auxiliary use to a motel or hotel," Shropshire stated, "I believe the ordinance requirements are very conservatively defined, and the shared parking is certainly an idea that can be incorporated into these two uses being together."

Shropshire then described the parking analysis he conducted on the property by observing the motel and restaurant at various times from August 1, 2014 through August 3, 2014. Based upon his observations, Shropshire calculated a "peak parking rate" of 1.05 spaces per occupied unit, for the "blended use" of the motel and restaurant. Assuming that all 162 proposed units would be occupied during peak conditions, he concluded that the parking demand would be 171 spaces, meaning the proposal for 182 spaces was sufficient to handle the demand. He further explained that according to ITE data, the industry standard demand for a motel and restaurant was lower, at 0.85 spaces per occupied unit.

Adis further presented the testimony of Vincent Orlando, a professional engineer and land use planner, who discussed the statutory positive and negative criteria required for the granting of a "(c)(2)" variance under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-70(c)(2). Regarding the positive criteria, he

found the proposal met two of the purposes outlined in N.J.S.A. 40:55D-2. First, applying N.J.S.A. 40:55D-2(m), Orlando stated:

> We have an existing hotel, we have an existing restaurant. There's a need for hotel rooms obviously in the City of Cape May.
>
> Utilizing this space and this parking would lessen the cost of development, instead of putting a hotel somewhere else. But more importantly, it would be a more efficient use of the land.

Second, Orlando testified the plan would meet the environment requirements of N.J.S.A. 40:55D-2(g), by obviating the need for additional impervious blacktop coverage that could affect drainage management.

With respect to the negative criteria, Orlando noted the proposal provided adequate parking, and it complied with the Board's "directive" to consider shared parking in variance applications. He added, "And I believe that there's no substantial detriment to the zone plan, again, because of the parking study that was done by Mr. Shropshire." Orlando further concluded there was no detriment to the public good, although street parking fills up during the daytime, because street parking is "plentiful" at nighttime during high restaurant demand.

Plaintiffs presented the expert testimony of Brian Murphy, a licensed professional engineer and land planner. Murphy testified that based upon his math, "the number of employees and the parking

associated with [the motel] may be slightly understated." However, he did not provide testimony to contradict Shropshire's expert report and conclusions. With regard to the positive and negative criteria, Murphy testified Adis's proposal would result in substantial detriment and was contrary to the purposes of the Cape May zoning ordinance. Specifically, he opined that the proposal would negatively affect the adjacent residential neighborhood by creating competition for parking.

Craig Hurless, the Board's engineer, gave his opinion regarding plaintiff's claim that res judicata barred Adis's application. He found res judicata did not apply because Adis's previous applications were not "substantially similar" to the present application. Hurless noted the 2009 application was the "closest" but concluded "the variance circumstances with regard to setbacks" were different, and the construction of the structure "requires different variances." The Board adopted Hurless's recommendation.

The Board further voted 7-2 to approve Adis's application, which it formalized in a resolution dated January 12, 2016. The Board noted in the resolution that it reviewed Shropshire's expert report and testimony, "with no contrary expert testimony having been presented." It accepted that the restaurant and motel had different peak parking demands, and that the overlap of restaurant

and motel patrons supported utilizing "the 'shared parking' concept." The Board found the plan advanced the purposes of zoning because it "encourages efficient use of the land, satisfies a need for hotel rooms, encourages capital improvement for the betterment of the community, provides sufficient space for commercial uses, and helps reduce[] the need to increase impervious coverage for parking on the site." It found no substantial detriment, citing Shropshire's report, "as well as the existing use of the property as a restaurant and hotel, and to some extent the available parking on the street nearby."

On August 17, 2015, plaintiffs filed a complaint in lieu of prerogative writs, arguing the Board's decision was arbitrary, capricious, and unreasonable because Adis had not proved the requisite positive and negative criteria. Plaintiffs further contended the Board erred by finding the doctrine of res judicata did not bar Adis's application. Following a hearing, on July 7, 2016, the Law Division judge issued an order and written memorandum decision, affirming the Board.

This appeal followed. Plaintiffs raise two main issues for our consideration, asserting (1) the Board's granting of the variance was improper because Adis failed to establish the statutory positive and negative criteria, and (2) the Board should

have barred Adis's application on res judicata grounds. We address these arguments in turn.

II.

"Our standard of review for the grant or denial of a variance is the same as that applied by the Law Division." Advance at Branchburg II, LLC v. Twp. of Branchburg Bd. of Adjustment, 433 N.J. Super. 247, 252 (App. Div. 2013). Specifically, "when a party challenges a zoning board's decision through an action in lieu of prerogative writs, the zoning board's decision is entitled to deference." Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 229 (2013). We grant zoning boards "wide latitude in the exercise of delegated discretion" due to "their peculiar knowledge of local conditions." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)).

When reviewing a board's decision, we presume its "factual determinations . . . to be valid," and we will only reverse if the decision "is arbitrary, capricious or unreasonable." Kane Props., supra, 214 N.J. at 229. We will "not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law." Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58-59 (1999).

N.J.S.A. 40:55D-70 authorizes local zoning and planning boards to grant variances from zoning ordinances. Here, the Board granted Adis a "(c)(2)" variance, pursuant to N.J.S.A. 40:55D-70(c)(2). Applicants seeking to establish a (c)(2) variance must show "that the purposes of the MLUL would be advanced, the variance can be granted without substantial detriment to the public good, the benefits of the variance will outweigh any detriment, and that the variance will not substantially impair the intent and purpose of the zoning plan and ordinance." Jacoby v. Zoning Bd. of Adjustment, 442 N.J. Super. 450, 471 (App. Div. 2015).

Our courts refer to the balancing of benefit and detriment as proving "the positive and negative criteria." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 30 (2013). Satisfaction of the positive criteria "requires a showing that 'the purposes of [the MLUL] would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment.'" Chicalese v. Monroe Twp. Planning Bd., 334 N.J. Super. 413, 427-28 (App. Div. 2000) (quoting N.J.S.A. 40:55D-70(c)(2)). The purposes of zoning include providing "sufficient space in appropriate locations . . . according to their respective environmental requirements in order to meet the needs of all New Jersey citizens," N.J.S.A. 40:55D-2(g), and encouraging "coordination of the various public and private

procedures and activities shaping land development with a view of lessening the cost . . . and to the more efficient use of land." N.J.S.A. 40:55D-2(m). The "Interpretation and purpose" section of the Cape May zoning ordinance contains provisions that mirror these MLUL purposes. See Cape May, N.J., Ordinances §525-2B(7) and (13).

As to the negative criteria, the applicant must prove "that the variance would not result in substantial detriment to the public good or substantially impair the purpose of the zone plan" and zoning ordinance. Ten Stary Dom P'ship, supra, 216 N.J. at 30; N.J.S.A. 40:55D-70.

Importantly, our Supreme Court explained that when assessing whether to grant a (c)(2) variance:

> no [(c)(2)] variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a [(c)(2)] case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a "hardship" on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.
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> [Kaufmann v. Planning Bd., 110 N.J. 551, 563 (1988) (emphasis omitted).]

In short, the granting of a "(c)(2) variance will stand if, after adequate proofs are presented, the Board concludes that the

'harms, if any, are substantially outweighed by the benefits.'" Jacoby, supra, 442 N.J. Super. at 471 (quoting Kaufmann, supra, 110 N.J. at 565).

With these standards in mind, we turn to plaintiffs' arguments. Plaintiffs contend Shropshire and Orlando's testimony on the negative criteria was inadequate, noting that neither expert referenced how the proposal would comply with the Master Plan. Plaintiffs further assert the Board inappropriately disregarded Murphy's testimony without explanation, and it erroneously stated that plaintiffs provided "no contrary expert testimony." Further, plaintiffs claim Orlando's conclusion regarding the negative criteria was net opinion. With regard to the positive criteria, plaintiffs argue Adis failed to show how the variance would advance the purposes of zoning and the MLUL, N.J.S.A. 40:55D-2.

We reject these arguments, finding the Board's decision to grant the variance was not arbitrary, capricious, or unreasonable and was supported by substantial evidence in the record. Regarding the negative criteria, Shropshire established that a worst-case scenario of peak demand would require 171 parking spaces. Since Adis's proposal provided for 182 spaces, Orlando appropriately relied on this report to conclude that the plan would not cause substantial detriment. Moreover, because the Board previously decided to consider shared parking on a case-by-case basis when

evaluating variance applications, Orlando correctly noted the proposal did not impair the purposes of Cape May's zoning plan; the lack of explicit reference to the Master Plan does not alter this result. See Ten Stary Dom P'ship, supra, 216 N.J. at 30. Because the evidence supported Orlando's conclusions, plaintiffs' assertion that Orlando rendered a "net opinion" also lacks merit. See Buckelew v. Grossbard, 87 N.J. 512, 524 (1981).

As to the positive criteria, Orlando testified the plan promoted efficient use of the land and lessened costs because it added to an already existing motel, rather than creating a new structure. See N.J.S.A. 40:55D-2(m). He also noted the variance would serve environmental requirements by obviating the need to increase the impervious coverage on the property. See N.J.S.A. 40:55D-2(g). Based upon this evidence, we find no basis to disturb the Board's conclusion that Adis's proposal advanced the purposes of zoning and substantially outweighed any detriment.

We further conclude the Board's decision to disregard Murphy's testimony was not arbitrary, capricious, or unreasonable. We have held that zoning boards "may choose which witnesses . . . to believe," but the "choice must be reasonably made." Bd. of Educ. v. Zoning Bd. of Adjustment, 409 N.J. Super. 389, 434 (App. Div. 2009). "[T]he choice must be explained, particularly where the board rejects the testimony of facially reasonable witnesses."

Id. at 434-35. Here, we find the Board's decision to credit the testimony of Shropshire and Orlando was reasonable. Although the Board should have better explained why it did not credit Murphy's testimony, given that Adis satisfied the positive and negative criteria, we decline to disturb the Board's decision on this basis. We also note the Board's statement that plaintiffs presented "no contrary expert testimony" was only in reference to Shropshire's report, which Murphy did not refute.

We now turn to plaintiffs' res judicata argument. "The principle of res judicata has evolved principally in the judicial system to prevent the same claims involving the same parties from being filed and brought before a court repeatedly." Ten Stary Dom P'ship, supra, 216 N.J. at 39. Res judicata is applicable to actions before a zoning board. See Russell v. Bd. of Adjustment, 31 N.J. 58, 65 (1959). Our Supreme Court has explained:

> If an applicant files an application similar or substantially similar to a prior application, the application involves the same parties or parties in privity with them, there are no substantial changes in the current application or conditions affecting the property from the prior application, there was a prior adjudication on the merits of the application, and both applications seek the same relief, the later application may be barred. It is for the Board to make that determination in the first instance.
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> [Ten Stary Dom P'ship, supra, 216 N.J. at 39.]

However, even where an application is "closely similar" to a prior application, if the applicant demonstrates changed circumstances, "it is within the discretion of the board whether to reject the application on the ground of res judicata, and the exercise of that discretion may not be overturned on appeal in the absence of a showing of unreasonableness." Mazza v. Bd. of Adjustment, 83 N.J. Super. 494, 496 (App. Div. 1964), appeal dismissed, 47 N.J. 161 (1966); see also Russell, supra, 31 N.J. at 67 (noting courts should not disturb a board's finding unless it is arbitrary, capricious, or unreasonable).

Plaintiffs argue the Board should have barred Adis's 2015 application on res judicata grounds because it was substantially similar to Adis's 2009 application and sought greater relief than its fall 2010 application. However, contrary to plaintiffs' assertion, the Board did not reach the full merits of either application. See Ten Stary Dom P'ship, supra, 216 N.J. at 39. The Board's engineer further opined that the applications were not substantially similar. Finally, the Board's decision to consider shared parking in 2013 constitutes a sufficient change in conditions to warrant consideration of the current application and variance. See Russell, supra, 31 N.J. at 66. We are therefore satisfied the Board's decision was not arbitrary, capricious, or unreasonable.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION