SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5716-14T3

WORLD WHEAT FOUNDATION, INC.,

Plaintiff-Appellant,

v.

PLANNING BOARD OF THE
TOWNSHIP OF SADDLE BROOK,

Defendant-Respondent,

and

THE TOWNSHIP OF SADDLE BROOK,

Defendant.

Argued December 21, 2016 – Decided July 20, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3217-14.

Richard J. Kapner argued the cause for appellant.

Stephen F. Pellino argued the cause for respondent (Basile Birchwale & Pellino, LLP, attorneys; Mr. Pellino, of counsel and on the brief).

PER CURIAM

In this prerogative writ matter, plaintiff World Wheat Foundation, Inc. appeals from the July 8, 2015 Law Division order of judgment, which affirmed the denial of plaintiff's application to defendant Planning Board of the Township of Saddle Brook (Board) for site plan approval and a parking variance to permit plaintiff's property to be used as a vocational school. For the following reasons, we affirm.

I.

We derive the following facts from the record. Plaintiff is a church-based, not-for-profit philanthropic organization. Plaintiff purchased the property at issue in 2013. The property consists of 29,198.27 square feet and is located in the B-2 Secondary Business Zone of the Township of Saddle Brook (Township). Plaintiff's proposed use of the property as a vocational school is a permitted use within the B-2 zone.

Prior to plaintiff's acquisition of the property, it was owned and operated by the Brookwood Convalescent Home, a full-time residential facility for the elderly (the Convalescent Home), which was not a permitted use in the B-2 zone. The Convalescent Home began operations in 1964, but had ceased its operations for approximately two-and-one-half years prior to the hearing on plaintiff's application.

Plaintiff submitted an application to the Board for site plan approval. Plaintiff also sought a parking variance because the application proposed twelve spaces, whereas the Township's ordinance required thirty-three spaces.

Plaintiff proposed to use the building located on the property as a vocational school to assist working-class Korean families with English, music, dance, and art. The intended students were school-aged children and adults who would take English language courses. Plaintiff's representative, Jay Kim, testified there would be approximately fifty-five students and no food service operations on the premises. The school's hours of operation would be 8:00 a.m. to 10:00 p.m. Monday through Friday, and 8:00 a.m. to 6:00 p.m. on Saturday. There would be three full-time employees: a director, a principal, and a secretary, and a part-time janitor and part-time instructors for the various classes. The students and instructors would come from neighboring communities in Teaneck and Fort Lee, and would be bussed to the school.

Kim testified that plaintiff owned three buses and two minivans that would be used for transportation. The vehicles would make continuous loops between pre-determined pickup locations in other municipalities and the school. The main drop-off point would be in the rear of the building. When questioned

if parents would be allowed to pick up their children, Kim testified that typically Korean parents would want their children to utilize the shuttle, but they would not be prevented from picking up their children if they so wished, or in the case of an emergency.

A large portion of Kim's testimony reflected the Board's concern about plaintiff increasing the number of students and instructors in the future, thus requiring more parking. The Board was also concerned about how the Township could enforce a condition of approval that students and instructors be bussed to the school. Addressing these concerns, Mayor Chamberlain made the following comment:

> MAYOR CHAMBERLAIN: [I]f I may interject and, [plaintiff's counsel], I sat on the . . . Planning Board years back. And an application came in too many years back, but I'm here again — an application came in our Korean church, Saddle River Road. Okay. They have been here, bless them as the people they are, stipulations were made at the Planning Board that th[ere] would be no off-street parking. Okay?
>
> MALE BOARD MEMBER: That's the church.
>
> MAYOR CHAMBERLAIN: Okay. Planning Board approved it.
>
> A year-and-a-half ago I spoke with the Pastor of the church because there was a situation based upon the Planning Board's approval . . . that the congregation was to be bussed.

> All those years later, they've now expanded to the most magnificent building . . . and . . . every side street, my daughter lives [nearby.]
>
> . . . .
>
> MAYOR CHAMBERLAIN: Now, here becomes the difficulty. You're sitting here with faithful people, people whose parents really care about activity for their children. And I highly respect that. I wish we had more of that in Saddle Brook that we would like for a building like this and offer it to our students. And I respect that.
>
> But . . . I'm speaking to the Pastor who had to go speak with his board of directors because they were still, having completed the construction, and I had asked him, I said I really would like to go back to what the Planning Board approved and could you look into the bussing.
>
> Well, hence, it's a year later. My thought and my own calendar planning is to meet with the Pastor of that church again, because as I said earlier my daughter lives [on a nearby street]. I go over to see my grandchildren, a party on a Sunday, I can't get near, near the house. And she only has a one car driveway.

Plaintiff's engineer, William R. Vogt, Jr. testified that "putting aside the number of parking spaces," there would be "safe access through the entire property for all anticipated vehicles including [an] ambulance[.]" Vogt calculated the required parking spaces based on the Township's ordinance, and stated:

> [A]s per your ordinance [S]ection 206-37 under the public and private secondary school and

> institutes for higher learning the requirement is one space for every classroom and every other room used by students plus one for every full-time student or one for every teacher and employee plus one for every full-time student whichever is greater.
>
> . . . .
>
> So when you work out the numbers the one per classroom is the more stringent number. So that is what the parking requirement is, is the [thirty-three] spaces according to our interpretation.
>
> And what we're presenting on the site, with the fact that two of the proposed spaces are substandard spaces we are providing [fourteen] spaces on the property.

Vogt further testified that, assuming four instructors and four employees drive, eight parking spaces would be sufficient. He did not expect a "queuing of cars" due to the rate of one van per hour dropping children off, and suggested utilizing one of the under-sized, non-conforming parking spaces as the handicap/van-accessible required spaces. He also testified, without direct proof, that the Convalescent Home was required to have approximately twenty-five parking spaces for its use, while it only had fourteen. The Board took issue with Vogt's calculation. The Board also questioned whether emergency vehicles would be able to safely enter and exit the property. Vogt testified that the parking turning radius on the existing driveway would be sufficient for an ambulance to safely navigate.

After further testimony from Vogt, Mayor Chamberlain stated:

> Okay. You're showing or you're trying to show the safety provision of an ambulance getting through, but I have a concern about the ten foot area. And now, God, forbid, accident, van flips over, [an] ambulance tries to get in.
>
> The measurements you gave on the van and the ambulance, they don't add up to the space we have.
>
> Now, I mean you have to be prepared, safety issue, for any catastrophic thing happening in this day and age because lately it's a — it's catastrophic, it happens.
>
> Looking down the road, God forbid explosion. And, you know, I may be getting a little off the track but it's [not] so out there, terrorist comes in. Bomb goes off in [the] building.
>
> Now we need fire trucks. We need an ambulance. Now I have a building . . . that goes on the south side egress with the lane, ten-foot-three that widens to fifteen-foot-three. Are we going to be able to safe[l]y rescue any God forbid students, residents, without the value of having the proper width for ingress and egress, particularly on the egress side.

Plaintiff's licensed planner, David Bilow, testified that plaintiff's proposed use would be a less intensive use; the prior use by the Convalescent Home was not permitted; and a vocational school with twelve on-site parking spaces would be sufficient.

The Board voted to deny the application, and memorialized its decision in a February 18, 2014 resolution. Regarding a N.J.S.A. 40:55D-70(c)(1) variance, the resolution provided as follows:

> 3. The Board finds that [plaintiff] has failed to demonstrate an undue hardship in conforming to the bulk zoning requirements of the B-2 Zone as a result of exceptional topographic conditions or physical features . . . . Rather, the existing building could be removed or modified by [plaintiff] so as to both reduce the amount of required parking spaces and increase the number of parking spaces provided on the [p]roperty. Therefore, the variance pursuant to N.J.S.A. 40:55D-70(c)(1) should not be granted.

Regarding a N.J.S.A. 40:55D-70(c)(2) variance, the resolution provided as follows:

> 5. The Board finds that [plaintiff] has failed to demonstrate how the benefits of the proposed improvements would substantially outweigh any possible detriment. [Plaintiff's] [p]lanner testified that the proposed use is less intense and requires fewer parking spaces than the former [C]onvalescent [H]ome on the [p]roperty did. However, this expert opinion was based in part on an assumption that the former convalescent home contained [two] beds per room. [Plaintiff] was unable to provide a factual basis for this assumption. In fact, the Board has reason to believe that the [C]onvalescent [H]ome may only have contained [one] bed per room, in which case the former use would require fewer parking spaces than the proposed school under the current Zoning Ordinance.
>
> 6. While the Board acknowledges that the proposed school is a permitted use in the B-2 Zone and that a change from a non-permitted

use to a permitted use is favored by the [Municipal Land Use Law], the Board finds that [plaintiff] has failed to demonstrate any benefits to the overall community that would substantially outweigh the detriment of the deviation.

7. N.J.S.A. 40:55D-70(c)(2) further provides that in order to grant variance relief, the Board must find that the same can be granted without detriment to the public good or any neighboring properties, and without substantial impairment to the intent and purpose of the Zone Plan and Zoning Ordinance.

8. The Board finds that the variance cannot be granted without substantial detriment to the public good or the neighboring properties or without substantial impairment to the intent and purpose of the Zone Plan. Based upon the proposed occupancy of the building as presented to the Board, the number of parking spaces proposed is less than half the number required pursuant to the Zoning Ordinance. The Board does not find the testimony of [plaintiff's] witnesses as to the number of instructors to be credible and accordingly, the Board has determined that the demand for parking at the [p]roperty would likely be greater than represented by [plaintiff]. The Board further finds that because no guarantee can be made as to any future increase in enrollment at [plaintiff's] school, the number of students and/or instructors could significantly increase, exacerbating the demand for parking and resulting in substantial detriment to the surrounding property owners.

9. In addition, the Board finds that the conditions set forth on the proposed [s]ite [p]lan present substantial safety concerns. As set forth above, a van in the process of loading or unloading at the rear of the

> building would prevent any other vehicle, including an emergency vehicle, from traversing the [p]roperty due to the narrowness of the access drives. Further, a van unloading a student in a wheelchair within the southern egress drive would prevent any other vehicle from exiting the [p]roperty.
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> 10. Based upon the foregoing, the variance with respect to minimum parking spaces should not be granted.

Plaintiff filed a complaint in lieu of prerogative writs, alleging: the Board's decision was arbitrary, capricious and unreasonable because the school was a permitted, less-intrusive and more suitable use of the property; and the objections made about parking and other issues were too minor to deny the application. Plaintiff also alleged that remarks about other Korean projects in Saddle Brook indicated bias toward plaintiff as a Korean organization, and certain Board members had a conflict of interest.

Judge William C. Meehan held a three-day trial, at which a former Board member, Joseph Ribarro, Councilman Joseph Conte, and Chamberlain testified. Ribarro testified as follows:

> Q: Did anyone, whether a board member or not ever tell you not to support [plaintiff's] application?
>
> A: No.
>
> Q: Did anyone at any time indicate to you that the application should not be supported

because the people behind the applicant were Korean?

A: No, I'm not going for that type of communication.

Q: Did you have any problem with the fact that the applicant was Korean?

A: No.

Q: Did you hear any board member express any bias against the applicant because it was or its [principals] were Korean?

A: Somebody might— someone might have said something, but I don't recall.

. . . .

A: If I recall, I think someone was talking about the parking at the Korean Church, which had nothing to do with this application, that they had problems there with parking.

Conte testified as follows:

Q: Did you hear anyone, whether in the meeting or outside the meeting make reference to the fact that the applicant was Korean?

A: No.

Q: Did you have any issue regarding the applicant as Korean for purposes of their development application?

A: No.

Q: During the hearing you made reference to possible stacking or backup of vehicles with respect to the possible drop off and pick up of students. Do you recall that?

A: It's been a few years, yeah. So many things I think were said, yes. Yes.

Q: Are you aware during your two years on the board, the issues where bombings, shootings, or terroristic attack being raised with respect to any other applicants?

A: No.

Q: This is the only one. Correct?

A: Yes. I don't even— I don't even recall that to be honest with you.

When asked why she referenced the parking issue at the nearby Korean church, Chamberlain testified as follows:

A: Okay. I made reference because when I was Mayor for my first term, my five years, I sat on the planning board for that application. Now the planning board that I was sitting with currently from 2011, my last four years, there were new members there. And we have three churches on Saddle River Road. So in order for me to convey to the new members I pointed out the Korean Church experience, because of the two other churches on Saddle River Road.

And I did not know any address, with a number.

. . . .

Q: Okay. So again, why the reference to a Korean Church for an application for a vocational school not on the same road?

A: The reason being the applications were similar in nature regarding parking.

. . . .

A: Well when the . . . Korean Church on Saddle River Road came in for the application, there was insufficient parking. However it did pass. And it was memorialized that there be no off-street parking. However, as the years went on, the parking lot not only congested to the point of the curb, which would cause a safety issue for an ambulance or a fire truck to get in, and I had been in the midst of current mayorship, speaking with the pastor. And I had made a comment to him. And we were working on the parking issue, because I had said, as an example, God forbid, if one of your members of the congregation has a heart attack the ambulance cannot get in there or a fire truck. So that was my concern and my experiences from that application.

Relative to this application, even though it wasn't a church, I felt that they were similar in nature regarding the safety of those students. And the fact of enforcement on the church application, the memorialization as I stated earlier said, our building inspector doesn't work Sundays, police work is at a minimum, so the enforcement issue is not there.

. . . .

Q: Of the three churches you mentioned on Saddle River Road did all of them have parking issues on Sunday?

A: Not to my knowledge, sir.

Q: Just the Korean church?

A: Yes, sir.

Chamberlain also testified that she did not raise issues of shooting, terrorism, or explosions on any other applications during her time as mayor.

In a June 22, 2015 written opinion, Judge Meehan found as follows:

> In the present matter, the Board's decision was not arbitrary, capricious or unreasonable. The Board's decision to deny the variance relief sought by plaintiff was based on a reasonable belief that parking and traffic would be an issue at the Property. The resolution clearly details these concerns. Although plaintiff's experts testified that twelve parking spaces are sufficient for the proposed use, the Board had legitimate concerns. There is no way for the Township of Saddle Brook or the Board to enforce the bussing of students and teachers to the site. If parents begin to drive their children to the Property instead of utilizing the bussing system, there will be an influx of traffic during drop off and pick up times, and no way for the Township to enforce use of the buses. For those reasons, the court also finds that plaintiff has not sufficiently proven that the vocational school requires fewer parking spaces than the convalescent home that was previously operating on the Property.
>
> Additionally, the fact that plaintiff seeks to convert the Property into a conforming use is also not dispositive here. Regardless of that fact, the Property requires a parking variance, and the Board's parking and traffic concerns are not negated simply because the site conforms to the local zoning code and ordinances.
>
> Further, the court finds that bias towards Koreans did not play a role in the Board's decision. Review of the record below indicates that the board members referenced other Korean properties that did not relate to the present site. However, those references were relevant to the present application in that there were traffic and

> parking issues relating to those sites. The fact that properties were owned and operated by Koreans did not play a role in the decision-making process. Additionally, the Board made inquiries regarding the safety of the building and its future students. These inquiries were warranted given the recent current events in schools. The fact that the issue of safety was not raised at another hearing for a different type of application for a school is not dispositive. Child safety is a legitimate concern, and the Board acted within its authority when it addressed this issue.

On July 8, 2015, the judge entered an order of judgment affirming the Board's decision. This appeal followed.

In reviewing a planning board's decision, we use the same standard used by the trial court. Cohen v. Bd. of Adjustment of the Borough of Rumson, 396 N.J. Super. 608, 614-15 (App. Div. 2007) (citations omitted). Like the trial court, our review of a planning board's decision is limited. Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998). We give deference to a planning board's decision and will reverse only if its action was arbitrary, capricious, or unreasonable. Zilinsky v. Zoning Bd. of Adjustment of Verona, 105 N.J. 363, 367 (1987).

We give even greater deference to a planning board's decision to deny a variance in preservation of a zoning plan than a decision to grant a variance. Nextel of N.Y., Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 38 (App. Div. 2003).

Where a planning board has denied a variance, the applicant must prove that the evidence before the board was "overwhelmingly in favor of the applicant." Ibid. However, where the issue on appeal involves a purely legal question, we afford no special deference to the trial court's or the planning board's decision, and must determine if the board understood and applied the law correctly. D. Lobi Enters., Inc. v. Planning/Zoning Bd. of the Borough of Sea Bright, 408 N.J. Super. 345, 352 (App. Div. 2009). Applying the above standards, we discern no reason to disturb the Board's or Judge Meehan's decision.

II.

Plaintiff contends that because the proposed use would bring the property into conformity with the zoning code and would be a less-intense, more suitable use than the former Convalescent Home, the objections made concerning parking and other issues were too minor a basis to deny the application. We disagree.

The issue here and throughout the Board hearings and trial, centered wholly on parking. Plaintiff's argument as to the Convalescent Home is entirely misplaced. It is immaterial how many parking spaces that use would have required. The Convalescent Home began operating in the 1960's, well before the adoption of the current zoning plan. Whether or not the Convalescent Home was conforming as to parking is, thus, totally immaterial. Plaintiff's

application was judged on its own merits and based on the current zoning ordinance and current safety and emergency concerns. Plaintiff's argument is essentially that because the Convalescent Home did not have sufficient parking, it should not be required to have sufficient parking as well. This is counter to the Municipal Land Use Law and applicable case law.

Parking is a valid, legitimate focus of both sound planning and zoning. "One of the purposes of zoning is to lessen vehicular congestion in the streets and highways." Wawa Food Mkt. v. Planning Bd. of Ship Bottom, 227 N.J. Super. 29, 35 (App. Div.), certif. denied, 114 N.J. 299 (1988) (citing N.J.S.A. 40:55D-2(h)). "A necessary corollary to that purpose is that off-street parking requirements also advance the legitimate municipal interest in decreasing traffic congestion since vehicles, which would otherwise park on the streets, are required to park on the proposed site." Ibid. (citing Zilinsky, supra, 105 N.J. at 369). In short, plaintiff's application failed to ameliorate the legitimate concerns of the Board concerning: (1) intensity of the parking; (2) the lack of spaces; (3) the enforceability of the bussing of students as opposed to regular pick-up and drop-off; and (4) the lack of available handicap spaces. Accordingly, in denying the parking variance, the Board's action was not arbitrary, capricious, or unreasonable.

Plaintiff continuously maintains that the Board should have granted the parking variance because it produced unrefuted, uncontradicted expert testimony. However, this argument misses the point, as it is the applicant's burden of proof to meet the criteria necessary for a variance; the Board has no similar burden.

> Very often it happens that only the applicant submits any evidence to the board but it should be noted that the absence of evidence in support of a denial of a requested variance does not in itself mean that the board's denial of a variance is arbitrary. The burden rests with the applicant to establish the criteria for the grant of the variance and it must demonstrate the affirmative evidence in the record dictates the conclusion that a denial would be arbitrary.
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> [Cox & Koenig, New Jersey Zoning and Land Use Administration, § 18-4.3 at 372-73 (2017).]

See also Kenwood Assocs. v. Bd. of Adjustment of Englewood, 141 N.J. Super. 1 (App. Div. 1976).

Plaintiff also points to two other applications the Board heard, and contends that the Board did not voice similar concerns in those applications as the ones raised in its application. Plaintiff provided to Judge Meehan an application for a senior apartment complex and a daycare and maintained that no concerns about emergencies were voiced during those hearings and that those applicants received the necessary approvals. This argument is misplaced because, generally, other applications before the same

board do not present any kind of precedent and each application is judged on its own merits. "Generally speaking, the granting of a variance to one property owner does not create a precedent for the granting of a variance to other property owners, since each variance must stand or fall on its own peculiar factual circumstances." Cox & Koeniq, supra, § 28-3 at 605; see also Kohl v. Mayor & Council of Fair Lawn, 50 N.J. 268, 276 (1967).

In sum, plaintiff failed to meet the statutory criteria for the required site plan and parking variance approvals. Accordingly, the Board's decision was not arbitrary, capricious, or unreasonable.

III.

Plaintiff contends that the Board, and Chamberlain in particular, exhibited racial bias against plaintiff because it is a Korean organization. Plaintiff asserts that the references made about other Korean establishments, particularly a Korean church in the municipality, and raising issues of explosions, terrorism, and bombs, were inappropriately directed only at plaintiff's application.

Chamberlain testified as to why she made the complained-of comments. First, the comments had nothing to do with either plaintiff or the church being of Korean heritage. Rather, Chamberlain used that identifier simply to distinguish it from

three other churches located on the same road as the Korean church. She also stated that none of the other churches had a similar parking problem.

Chamberlain's comments were pertinent to plaintiff's application in that the church she referenced was granted a variance conditioned on a certain level of parking. When the church violated the condition, the Township had limited enforcement power. Chamberlain raised the issue again in plaintiff's application because much of the testimony regarding staffing and student levels and parking was based solely on Kim's testimony with no promise or requirement that the levels would not increase in the future. Accordingly, there were legitimate reasons for this discussion and it is clear that racial bias played no part in the denial of plaintiff's application. Similarly, the concerns about terrorism and other violent concerns were reflective of a perceived rise in the number of such incidents in schools in particular. Plaintiff's argument on this point simply lacks merit.

IV.

Plaintiff contends that Chamberlain and Conte failed to disclose that the Township had previously commissioned a study of plaintiff's property for its suitability as affordable housing for

the elderly. Plaintiff argues that this conflict of interest was never revealed and tainted the Board's decision on its application.

Pursuant to N.J.S.A. 40:55D-23(b), as applicable to planning boards, "[n]o member of [the board] shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest." Our Supreme Court has defined the general contours of conflicts:

> (1) "Direct pecuniary interests," when an official votes on a matter benefitting the official's own property or affording a direct financial gain; (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and (4) "Indirect [p]ersonal [i]nterest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.
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> [Wyzykowski v. Rizas, 132 N.J. 509, 525 (1993).]

Whether a conflict "is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." Id. at 523 (quoting Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958)). "The question will always be whether the

circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." Ibid.

Plaintiff's argument fails for several reasons. First, plaintiff never requested that any of the Board members recuse themselves. Plaintiff was fully aware of the purported conflict because it was plaintiff's counsel who introduced the report commissioned by the Board into evidence at the hearing. However, even then, plaintiff's counsel's comments indicate that he introduced the report to contrast the Board's interpretation as to what was considered a permitted use, not to establish a conflict of interest.

Second, plaintiff has not argued, nor is there any evidence, that the alleged conflict fits into any of the categories enunciated in Wyzykowski. The actions taken by Chamberlain or Conte represent the interests of the municipality, not either individual personally.

Finally, plaintiff has not shown how the alleged conflict tainted the Board's decision. Plaintiff merely presented a report commissioned by the Board on behalf of the Township over a year and one-half before plaintiff's application. Plaintiff's conclusion that Chamberlain and Conte were "protecting the

Township's interest rather than deciding [plaintiff's] proposal" is mere speculation.

V.

Plaintiff contends that the preexisting nonconforming parking lot should be entitled to continue under its use of the building. We disagree.

N.J.S.A. 40:55D-68, which addresses preexisting nonconforming structures, provides: "Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." Specifically as applied to parking, if a property owner operated without existing off-street parking, it would be permitted to continue to do so even after the adoption of a zoning ordinance requiring off-street parking. See Dresner v. Carrara, 69 N.J. 237 (1976); Ric-Cic Co. v. Bassinder, 252 N.J. Super. 334 (App. Div. 1991) (applying the same principle to protect a nonconforming parking arrangement while the business was being physically rebuilt).

In Wawa Food Market, supra, we distinguished a situation like that in Dresner and an application for a parking variance. We wrote:

> However, unlike the existing building, which establishes a "footprint" on the character of the property precluding compliance with the set-back requirements, the number of parking spaces is computed based on floor area and the number of employees. Thus, the number of parking spaces required is dictated by the extent and manner by which the facility is used, not the preexisting nature of the structure. Distinguishable is the case where property has been used for a particular business purpose since prior to the passage of an off-street parking ordinance. In such a circumstance, where the nature and intensity of the business remains the same, continued use of the property without off-street parking is protected as a nonconforming use.
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> [Wawa Food Market, supra, 227 N.J. Super. at 37-38.]

Thus, the only exception to a valid conforming parking variance is a nonconforming use which will remain of the same nature and intensity as the prior user. Here, such is not the case. The prior use was by the Convalescent Home, which provided full-time care for elderly residents. Parking included employees, residents, and visitors. Plaintiff's proposed parking is very different. Its proposed use of the property involved busses shuttling students and staff to the site. Even a less intense use, as plaintiff argues this would be, is still a difference in use. Accordingly, the nonconforming parking lot should not have been protected for plaintiff's benefit.

VI.

Lastly, plaintiff contends that the Board's written resolution memorializing its decision "cites reasons for the Board's actions, but which reasons are utterly lacking in evidentiary support and are not found in the transcript of the hearing."

Pursuant to N.J.S.A. 40:55D-10(g), the planning board's decision must include findings of fact and conclusions based thereon. Mere recitals of testimony do not satisfy this responsibility. Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div. 1988), certif. denied, 118 N.J. 216 (1989). If a variance is denied, the factual findings must not merely recite but instead must demonstrate with reference to facts and testimony on the record that there is no hardship or that no special reasons exist, or otherwise that the statutory requisites for the grant of a variance are absent. See Cox & Koenig, supra, § 19-7.2 at 435.

The Board's resolution adequately complies with this statutory mandate. The statutory criteria and the Board's reasons for denying the application are considered together and the Board made supported conclusions based on the factual record. The resolution discusses the application of both (c)(1) and (c)(2) variances and how plaintiff failed to meet its burden or address the Board's persistent concerns regarding parking and safety.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION