

**NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

KENSINGTON SENIOR DEVELOPMENT, LLC,	:	SUPERIOR COURT OF NEW JERSEY
	:	
	:	LAW DIVISION
	:	
Plaintiff,	:	
	:	
v.	:	ESSEX COUNTY
	:	DOCKET NO.: L-001710-19
	:	
	:	OPINION
THE TOWNSHIP OF VERONA AND THE ZONING BOARD OF ADJUSTMENT: OF THE TOWNSHIP OF VERONA	:	
	:	
	:	
Defendants.	:	

Decided: October 7, 2019

The following attorneys are counsel of record:

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By: The Honorable Thomas R. Vena, J.S.C.

Preliminary Statement

This matter is before the Court on Plaintiff, Kensington Senior Development, LLC's ("Plaintiff") Complaint in Lieu of Prerogative Writs. Defendants, the Township of Verona ("Verona") and the Zoning Board of Adjustment of the Township of Verona ("the Board") (collectively "Defendants") oppose.

Statement of Facts

Plaintiff is a Limited Liability Company from Virginia, but authorized to do business in New Jersey. The Board was established by Verona, pursuant to the Municipal Land Use Law ("MLUL") N.J.S.A. 40-55D-69. The Board is authorized to consider, among other things, applications for use and bulk variances and site plan approval.

Plaintiff is the contract purchaser for a building in Verona's Town Center District at 420 Bloomfield Avenue, Verona, New Jersey ("the building"), and land used as a parking lot located at 312 Claremont Avenue, Verona, New Jersey ("the lot"). In June of 2018, Plaintiff submitted an application to the Board for: (1) a use variance; (2) five bulk variances; and (3) a site plan approval, to permit the construction of a 92-unit assisted living facility at the building, with parking in the lot. Per the Township's ordinances, an assisted living facility is not permitted in Verona's Town center District and the lot is a pre-existing nonconforming use as the area is a Multi-Family Low-Rise Zone.

The Board conducted six hearings on the application, but ultimately denied Plaintiff's requests. A resolution (the "Resolution") memorializing the denial was adopted by the Board on February 14, 2019. Subsequently, Plaintiff filed this action alleging that the Defendants arbitrarily denied its application.

Legal Arguments

I. Plaintiff's Arguments

First, Plaintiff notes that a zoning board's actions are presumed valid, so the Plaintiff has the burden to prove the Defendants acted incorrectly or unlawfully. *Cell S. of N.J. v Zoning Bd. Of Adjustment*, 172 N.J. 81-82 (2002). A decision of a zoning board can be set aside only when it is arbitrary, capricious or unreasonable. *Id* at 81. Further, the Board's actions must be grounded in "evidence in the record." *Fallone Props., LLC v Bethlehem Twp. Planning Bd.*, 369 N.J. Super. 552, 562 (App. Div. 2004). Plaintiff contends the Board failed to consider the uncontroverted testimony of its experts and found "substantial" negative impacts without evidentiary support. Therefore, the Board's decision was arbitrary and should be reversed.

According to N.J.S.A. 40:55D-70(d), which addresses applications for use variances, there are "negative criteria" and "positive criteria" that an applicant must demonstrate. The "positive criteria" explains that the Board may grant a variance for "special reasons" to permit:

- (1) a use or principal structure in a district restricted against such use or principal structure;
- (2) an expansion of a nonconforming use;
- (3) a deviation from a specification or standard pursuant to section 54 of P.L.

1975, c 291 (C.40:55D-67) pertaining solely to conditional use.

For the "negative criteria," the Board cannot grant a variance if there is a "substantial detriment to the public good" and the variance will "substantially impair the intent and the purpose of the zone plan and zoning ordinance."

Notwithstanding these requirements, Plaintiff relies on *Sica v Bd. Of Adjustment*, 127 N.J. 152 (1992), in arguing its burden of proof should be significantly lessened. In *Sica*, the New

Jersey Supreme Court held that an “inherently beneficial” use satisfies the positive criteria. *Id.* If an applicant proves an inherently beneficial use, then a board must weigh the positive and negative criteria through a four-part test: (1) the public interest at stake; (2) the detrimental effect if the variance is granted; (3) if conditions on the use are issued, the adverse effect should be reduced; and (4) on balance, a board must determine if the variance would cause a substantial detriment to the public good. *Id.* at 160-161. The negative impact must be significant. *Id.* at 165.

Plaintiff contends there is no dispute that the building is inherently beneficial. The Resolution does not specifically say as much, but Plaintiff argues case law shows assisted living facilities are inherently beneficial. *See Jayber, Inc. v Mun. Council of Tp. Of W. Orange*, 238 N.J. Super 165, 175 (App. Div. 1990) and *Meridian Quality Care, Inc. v Bd. Of Adjustment*, 355 N.J. Super 328, 33 (App. Div. 2002). Therefore, Plaintiff believes the positive criteria were proven, and the *Sica* balancing test should be used. However, the Board failed to meet the *Sica* requirements.

First, the Resolution is silent regarding the public interests involved, but Plaintiff asserts the issue is clear. At one of the public meetings, the Board acknowledged that “[i]t’s clearly inherently beneficial to provide a place for people that are unable to care for themselves.” Moreover, Plaintiff’s experts testified at the meetings that Verona is devoid of assisted living facilities. Not only would the building fill that void, but it would also provide affordable housing, as ten percent of the beds in the building will be designated for low-income individuals.

Second, Plaintiff asserts that Defendants overstated the alleged detrimental effects of the variance. Specifically, the Board found that the variance would impair the Town Center Zone, increase traffic, create safety concerns for pedestrians and cause “vehicular turning conflicts.” Regarding the Verona Town Center Zone, the Board found detrimental effects because the

building will have street-level residential units in an otherwise retail-oriented area. Plaintiff argues that the area has had stagnant retail growth, and the building will only cause a mass of staff, residents and visitors to patronize local business.

The Board's second issue – increased traffic – is also disputed by Plaintiff's experts. Plaintiff's expert's study notes that there would not be "any material impact from a traffic perspective associated with this project." Similarly, the effects on pedestrian safety are overstated as the same expert notes the parking lot will not be used extensively and Plaintiff was willing to install a crosswalk. The final issue, the turning conflicts, is linked to the increased traffic. However, as Plaintiff's expert showed any effect would be minimal, the turning conflicts do not pose a problem.

Third, the Board did not address whether implementing conditions would reduce the negative effects. Plaintiff contends that itself, and its experts, made it "abundantly clear" that it was willing to work with Defendants to address the Board's concerns.

Finally, balancing the positive and negative criterion, Plaintiff argues that the variance would not cause a substantial detriment to the public good. The building would be inherently beneficial, and any negative effects are negligible, certainly not rising to the level of "substantial." Therefore, the denial of the application was arbitrary and should be reversed.

II. Defendants' Arguments

Defendants agree with Plaintiff that *Sica* is the controlling law in this matter, but deny that that the Board did not properly engage in the *Sica* balancing test. In fact, the records of the public meetings show that the Board expressly stated that they were governed by *Sica*. Furthermore, Defendants note not only that the decision of the Board is presumed valid, but also that it is entitled to substantial deference. *See Manalapan Realty v Twp. Comm. Of Manalapan,*

140 N.J. 366 (1995). In fact, a local board's denial of a variance – as is the case here – is entitled to greater judicial deference than a decision to grant a variance. *Northeast Towers, Inc. v Zoning Bd. Of Adjustment Borough of West Paterson*, 327 N.J. Super 476, 494 (App. Div. 2000). In order to overturn the denial of a variance, the moving party must prove that the evidence is “overwhelmingly” in favor of the applicant. *Id.* Defendants state that Plaintiff has not met the “extraordinary” burden the law implements. For that reason, the Board's decision should be upheld.

The Defendants argue that the Resolution specifically shows adherence to *Sica*. First, the Board agreed that the positive criteria was met. Then, the Board noted the negative aspects, as outlined by the Plaintiff. But, contrary to Plaintiff's statement, the Board did try to accommodate the variance through restrictions on traffic, but could not come up with an acceptable plan. Again, contrary to Plaintiff's argument, the Board did note the public interest – saying that Verona needs assisted-living facilities and that there is space in town for such an entity. However, because of the vehicle traffic, risk to pedestrians, lack of retail space (and Plaintiff's refusal to provide public retail space in the building), the Board determined that the detriments outweighed the benefits. Further, the detriments were both substantial and incapable of being adequately mitigated. Notably, this was not a quick, dismissive decision, as six public meetings were held.

Plaintiff's argument relies heavily on its traffic expert. Yet, Defendants state that it is in the Board's discretion to accept or reject the testimony of witnesses. *Kramer v Bd. Of Adjust, Sea Girt*, 45 N.J. 268, 288 (1965). And, as long as that decision is reasonable, the choice is conclusive on appeal. *Id.* This reasonable discretion extends to experts. *New York SMSA v Board of Adjustment of Township of Weehawken*, 370 N.J. Super. 319, 338 (App. Div. 2004).

The Board expressed concerns with the Plaintiff's expert's testimony regarding his traffic report. These concerns included: (1) dubious estimates regarding daily trips of the existing banquet facility and (2) reliance on Institute of Transportation Engineers ("ITE") generated numbers that seemed to contradict the expert's own testimony. Both members of the Board and members of the public disputed the ITE estimates. Furthermore, Verona's Engineer and the Chairperson for the Verona Environmental Commission expressed concern with the increase in traffic. The Board was clearly concerned with these issues, it debated, held numerous public forums and weighed the credibility of the testifying experts. Ultimately, it determined that the Plaintiff's expert was not persuasive, which is not grounds for a reversal of its decision. *See Kramer* at 296-297.

Separately, Plaintiff argues, in part, that Defendants owe an obligation to Verona regarding the affordable housing impact of the variance. Defendant sates that this is irrelevant because the Board designated the variance as inherently beneficial. Once again, Defendants do not dispute that label, but they do dispute the negative effects of the variance. Plaintiff also claims violation of the NJ Civil Rights Act, but fails to state a claim upon which relief can be granted. Importantly, the claim was raised for the first time in a reply brief, which is improper. *State v Smith*, 55 N.J. 476, 488, cert. denied, U.S. 949, 91 S.Ct. 232 (1970).

Finally, Defendants state that even if the Resolution was improper, the remedy is remand to the Board and not reversal of its decision. *New York SMSA v Board of Adjustment of Township of Weehawken*, 370 N.J. Super. 319, 335 (App. Div. 2004).

Legal Analysis

A. Prerogative Writ Standard

“Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by the rules of the Supreme Court, *as of right*, except in criminal causes where such review shall be discretionary.”

Alexander's Dep't Stores of New Jersey, Inc. v. Borough of Paramus, 125 N.J. 100, 107 (1991).

This Court’s review of the Board's decision must be based solely on the agency record. *Kramer v. Board of Adjustment, Sea Girt*, 45 N.J. 268, 289 (1965). Further, this Court must determine whether the Board's factual findings are based on “substantial evidence” and whether its discretionary decisions are “arbitrary, capricious and unreasonable.” *Id.* at 296–97.

B. Sica Standard

It is undisputed that the Board was required to comply with the balancing test set forth in *Sica v Board of Adjustment of Tp. Of Wall* 127 N.J. 152 (1992). In *Sica*, the Court held that the “enhanced standard does not apply to inherently beneficial uses.” *Id.* 161. The parties agree that the building’s use was inherently beneficial. As the inherently beneficial label was attached to Plaintiff’s application, the Board was required to weigh the following factors: (1) the public interest at stake; (2) the detrimental effect if the variance is granted; (3) if conditions on the use are issued, the adverse effect should be reduced; and (4) on balance, a board must determine if the variance would cause a substantial detriment to the public good. *Id.* at 160-161.

The crux of the dispute in this case is whether the Board complied with *Sica*’s balancing test. Ultimately, this is a mixed question of law and fact. This Court must determine, through records of public meetings and the Resolution, whether the Board adequately reviewed and debated the public interest and detrimental effects of granting the variance. Given this task, the

Court in *Sica* noted that a “board's decision is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable. *Id* at 166-167. The law grants local boards a “wide latitude” in the exercise of their discretion because they have specialized knowledge of the local area. *Id*.

In *Sica*, the New Jersey Supreme Court determined that the local zoning board arbitrarily denied a variance application because it did not mitigate the standard required by the applicant because the use was inherently beneficial. But this was not the only reason for reversal. Rather, the Court found that all other evidence weighed in the applicant’s favor:

The proposed center meets the requirements for the R-60 zone. The building setback and design will render the building unobtrusive. Uncontradicted testimony established the absence of traffic problems and of any diminution in the values of neighboring properties. It is not amiss, moreover, to note that the proposed use was authorized by the ordinance when Dr. Sica purchased the property.

Id.

The same is not true here.

It is not simply that the Board’s decision must have been arbitrary and capricious, it is also that the evidence must have been “so overwhelmingly” in favor of the applicant. *Northeast Towers, Inc. v Zoning Bd. Of Adjustment Borough of West Paterson* 327 N.J. Super 476, 494 (App. Div. 2000). This is a “heavy burden” that the Plaintiff must meet. *Id*. The record indicates quite clearly that the Board and the Plaintiff recognized the public interest. Verona would be benefited by an assisted living facility in the center of town. However, the detrimental effects are debated.

Plaintiff relies on the testimony of its expert to minimize the potential negative effects of granting the variance. Plaintiff, and its expert, may be entirely correct. However, it is not this Court’s obligation to ensure the best decision for Verona is made. The Defendants have presented sufficient evidence that they followed the *Sica* standard through the public forum

records and the Resolution. Furthermore, they have submitted reasonable evidence that Plaintiff's expert's testimony was flawed regarding the effect on traffic. In addition, Defendant notes that lack of retail space was a legitimate concern for the Board, and Plaintiff did not alleviate the issue. As for the third prong, the implementation of conditions, Defendant points to attempts by the Board to solve the traffic issue with Plaintiff, but to no avail.

Finally, regarding the balance of the negative and positive effects, the Board, in its discretion, determined the scale tipped to the negative side. After a number of public meetings, the Board felt it had enough information to deny the application. Plaintiff has not offered sufficient evidence to indicate the Board's decision was arbitrary. Further, the Plaintiff has not properly shown that the evidence overwhelmingly weighed in its favor.

Conclusion

For all of the foregoing reasons, on the basis of the authority cited herein and the argument of counsel, Plaintiff's Complaint is **DISMISSED** and the Board's decision to deny the Plaintiff's application is **AFFIRMED**.