SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0456-19

111 10TH AVENUE ASSOCIATES,

Plaintiff-Appellant,

v.

BOROUGH OF BELMAR
ZONING BOARD OF
ADJUSTMENT,

Defendant-Respondent.

Argued September 23, 2020 – Decided April 12, 2022

Before Judges Accurso, Vernoia, and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3443-18.

Dennis M. Galvin argued the cause for appellant (Davison, Eastman, Muñoz & Paone, PA, attorneys; Dennis M. Galvin, of counsel and on the briefs).

Kevin E. Kennedy argued the cause for respondent.

The opinion of the court was delivered by

ACCURSO, J.A.D.

In this prerogative writs action, plaintiff 111 10th Avenue Associates appeals from a trial court judgment affirming the denial of its application for a conditional use variance, N.J.S.A. 40:55D-70(d)(3), by defendant Zoning Board of Adjustment of the Borough of Belmar. We affirm, substantially for the reasons expressed by Judge Mara E. Zazzali-Hogan in her written opinion of September 13, 2019.

Plaintiff is the owner of a lot in the beach block of 10th Avenue in Belmar located in the Borough's R-75 residential zone. There are two buildings on the lot, each of which contains five apartments, which plaintiff has marketed as summer rentals for the past fifteen years. The property is within the Borough's MF-75 overlay zone in which multi-family cluster development is a permitted "conditional use to allow for the transition from existing high density residential uses, exceeding seven dwelling units per lot" and "to provide for the creation of a multi-family attached 'townhouse style' cluster development within the R-75 residential zone . . . with a shared access lane providing entry to attached accessory garage structures." Borough of Belmar Ordinance § 40-6.13.

Plaintiff proposed to demolish the two existing buildings on its property and replace them with six townhouse units. As plaintiff's proposed development did not, however, meet four of the specific conditions for the permitted conditional use — lot size, lot diameter, frontage and permitted structures of not less than four nor more than five "townhouse style" side-by-side residential clusters — it applied to the Borough's zoning board of adjustment for a conditional use variance. The board heard the application over two nights of hearings. Plaintiff presented the testimony of one of its principals, as well as that of its planner, engineer and architect.

Plaintiff's principal, Nicholas Antipin, testified he and his brother bought the property "as rentals" in 2003 but now found renting the units "a challenge," because "it's difficult to control kids." Antipin claimed he and his brother were "having problems with neighbors" and with Belmar, and although they had been "working closely with the Town, . . . [a]nd they help us with the kids, . . . we're still on the Animal House list."[1] Indeed, plaintiff conceded it had been on "the Animal House list" in four of the preceding six years.

[1] Belmar Ordinance section 26-11, enacted pursuant to N.J.S.A. 40:48-2.12(n)-(r), provides procedures requiring "an owner of rental property which has become the source of at least two substantiated complaints to post a bond or equivalent security to compensate for any future damage or expense

Antipin testified they wanted to demolish the existing buildings, "put up these new structures and sell them" to people who might want to live there year-round and "eliminate this whole Animal House thing."

Plaintiff's architect explained plaintiff proposed erecting three buildings on the site, "two buildings at the front of the property [that] are basically mirror images of each other," which "are narrower in width so that a drive can be accomplished in between the two that accesses the rear of the building." Instead of providing four or five "townhouse style" side-by-side residential clusters, plaintiff was proposing two narrow buildings facing the street separated by a driveway, each having two separate units with the "tenants on top of each other." The architect explained the building in the rear of the property was "set up where the division is down the middle and the tenants are side-by-side." Each unit would have two-bedrooms and a one-car garage, although the garages in one of the buildings were long enough to park two cars in each garage, one behind the other.

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suffered from future repetition of disorderly, indecent, tumultuous or riotous conduct." See United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 64-73 (App. Div. 2001) (explaining the ordinance and its enabling act).

Plaintiff's engineer explained the lot was 11,250 square feet, 2,750 square feet below the minimum lot size of 14,000 for the overlay zone. He testified an eighteen-foot-wide driveway would run between the front two buildings in the center of the lot and "service[] the rear parking area, which has a 24-foot-wide driveway." The lot frontage of 75 feet was 25% below the 100 feet required. Because the lot did not meet the frontage requirement, it also fell below the minimum required lot diameter by the same 25%.

According to the engineer, "the undersized nature of the property" made "it difficult if not impractical and difficult to comply with the section of the ordinance" requiring not fewer "than four side-by-side residential clusters," because the narrowness of the property would mean "[t]he placement of the building would be basically sideways to the street." The engineer explained that besides seeing "the side of the building" from the street, "having the backup area into the driveway would create a problem from having enough room for a 24-foot-wide driveway and then having parking against the side of the property just wouldn't fit." He testified that by configuring the units as proposed, plaintiff met both State and Borough requirements for parking with twelve on-site parking spaces, six garage spaces and six marked spaces in the

rear of the property, fourteen if one counted the two extra-long garages, and two on-street spots.

Plaintiff's planner testified that although the proposed development would reduce the site's nonconformities, including side and rear yard setbacks and impervious coverage, "there are still four that remain, and that's the minimum lot size, the minimum lot frontage, the minimum lot diameter, and the type of structures," prompting plaintiff to seek "a D-3 variance for the conditional use requirements." She opined, however, that as the lot was "already developed with a multifamily use at a higher density than what's proposed," plaintiff would be "reducing the intensity of the multi-family use on an existing undersized lot by going from ten units to six," and thus the site was still appropriate for the use despite plaintiff "need[ing] some variance relief."

The planner testified that because the proposed townhouses could be accommodated on the site without any relief for setback and coverage requirements, it indicated to her "that the lot has sufficient area and frontage and diameter for the use as it is being proposed, as opposed to how it currently exists." She also testified "the style of the housing that's being proposed, the two units being over/under and one side-by-side at the back rather than having

one long building with all the units connected is appropriate for this size of lot." In her view, "[b]reaking up these six units into the three structures" allowed "for a better visual impact at the site because it allows for a design that creates an appearance from the street of two single family homes with one driveway going between them as opposed to one long structure with multiple units visible from the street."

Numerous members of the public spoke against the application, complaining about the intensity of the proposed use. A next-door-neighbor talked about his many years of living next to the property and the noise and garbage on summer weekends and his refusal to call the police to complain out of fear of retaliation from summer renters. Other residents complained that owners of "Animal Houses" were being rewarded by being permitted to build larger than permitted multi-family dwellings in order to rid Belmar of their existing even-more-intense uses. Those residents expressed concern about trading over-intense summer rentals for over-intense year round residencies and urged the board to hew to the zoning ordinance and not employ a standard of the proposed development being better than what was there now.

Various board members questioned plaintiff's principal Antipin about specifics of the project and expressed concern over its intensity, asking

whether plaintiff would scale back the number of units to reflect the smaller lot size. Antipin refused, noting the density standard in the overlay zone would allow him and his brother seven units instead of the six plaintiff proposed. One member expressed his concern over the choice of voting to approve the application, which in his view squeezed too many units onto an undersized lot, or denying it and forcing the neighbors "to have to continue to live with the conditions as they have been for the foreseeable future." After being instructed by board counsel on the Coventry Square[2] standard for evaluating conditional use-variances, the board voted seven to zero to deny the application, subsequently adopting a resolution memorializing the same.

Plaintiff filed this prerogative writs application in the Law Division, challenging the denial of its application. In a twenty-two page written opinion, Judge Zazzali-Hogan rejected plaintiff's claims that the board's decision was arbitrary and capricious because plaintiff had demonstrated the site could accommodate the deviations from the conditional use standard, that it was "anti-rental and punitive to the developer" based as it was on the previous problems with summer rentals instead of the Coventry Square test, and that

[2] Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 298-99 (1994).

plaintiff was denied a fair hearing because the second hearing was conducted in the middle of the summer when residents were "fed up with summer craziness," and by the board's efforts to serve "the public's demand of a judicial lynching of an Animal House owner."[3]

After reviewing the evidence in the record and canvassing the applicable law, the judge determined plaintiff had not met its burden of proving the evidence before the board "was so overwhelmingly in favor of the applicant" that the denial was "arbitrary, capricious or unreasonable." Advance at Branchburg II, LLC v. Branchburg Tp. Bd. of Adjustment, 433 N.J. Super.

[3] Although plaintiff reiterates on appeal its arguments about the board's bias and the unfairness of the hearing, we find them without sufficient merit to warrant discussion in our opinion. See 2:11-3(e)(1)(E). The record reveals the board conducted its initial hearing on January 25, 2018, and scheduled the second hearing for February 22, which did not proceed because only five of the seven members of the board were in attendance, meaning plaintiff would need a unanimous vote to secure its variances. See N.J.S.A. 40:55D-70(d). Plaintiff's counsel's illness prevented the hearing from going forward in March, and his error regarding certain transcripts caused its cancellation in April. As noted by the trial judge, plaintiff's principal testified at the start of the first hearing that the impetus for redevelopment of the property was plaintiff's desire to eliminate the Animal House conditions, and, indeed, the entire thrust of its application was that the board should grant the variances because, in the words of its planner, "the net impact of this application is fewer units, better units, fewer variances and appropriate off-street parking." As plaintiff invited the board to consider that its proposed development would be better than what's there now, we do not find plaintiff was denied a fair hearing by the board, and members of the public, doing so.

247, 253 (App. Div. 2013) (quoting Med. Realty Assoc. v. Board of Adjustment, 228 N.J. Super. 226, 233 (App. Div. 1988)). Specifically, the judge found no error in the many references to the Animal House ordinance and plaintiff's property having been on the Animal House list during four of the preceding six years. The judge noted the issue was first raised by Antipin in his testimony to the board. Antipin told the board his motivation for demolishing the existing buildings and replacing them with more "high end" units he hoped to sell to individuals who would live in them and not rent them out, was to "eliminate this whole Animal House thing," leading to extended discussion of whether the application he proposed would accomplish that goal.

The judge found no proof the discussion instigated by plaintiff revealed any bias in the board against renters and no basis to support plaintiff's contention that the board "should not have permitted the public to comment on issues not germane to this application" or that it permitted "a judicial proceeding to devolve into a political rally against Animal Houses." The judge noted plaintiff had not supported its argument with references to the transcript, nor cited any law requiring the board "to silence the public." In contrast, the judge noted the board's citation to several instances in the hearing transcript where board members "intervened to ensure an orderly proceeding" and

specific statements it made both at the hearing and in the resolution underscoring that the alleged historical Animal House violations would not support a denial of the application.

Analyzing the requested conditional use variance in accordance with Coventry Square, the judge found the evidence supported the board's findings in the resolution that the site could not accommodate the problems associated with the use, including the board's finding that "[t]he smaller than required lot size/area compromises the overall aesthetic appeal of the site[,]" "the overall site circulation/efficiency[,]" and "the overall functionality of the proposal," and that "[t]he less than required lot area results in the property having a 'cramped/forced' feel[,] . . . an overbearing feeling/presence[,] . . . [and] an over-intense look/feel/presence." The judge specifically referenced the board's finding that plaintiff "did not provide sufficient testimony (lay or professional) to justify a deviation from the requirement related to the lay-out."

The judge concluded the board's findings were "specific and thorough," and that plaintiff had not refuted them with any citation to the record, instead offering only conclusory arguments that the findings were incorrect by "parrot[ing] the law" with "no significant analysis." In sum, the judge could

not find the board acted in an arbitrary or capricious manner in concluding plaintiff did not meet its burden for the grant of a conditional use variance.

Plaintiff appeals, reprising the arguments it made to the trial court, and adding that the court "misapplied and apparently misunderstand[s] the holding of Coventry Square" due to the "Svengali-like influence" of the board's counsel. We find those arguments meritless.

Because we apply the same standard as the trial judge in reviewing municipal action, Grubbs v. Slothower, 389 N.J. Super. 377, 382 (App. Div. 2007), and consider questions of law de novo without deference to interpretive conclusions we believe mistaken, Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin, 233 N.J. 546, 559 (2018), we need not address plaintiff's argument that the trial judge misapplied the Coventry Square standard.

Of course, municipal decisions enjoy a presumption of validity, and will only be overturned if arbitrary and capricious or unreasonable. Id. at 558. Zoning boards, in particular, "because of their peculiar knowledge of local conditions[,] must be allowed wide latitude in the exercise of delegated discretion." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)). And because we accord more

deference to a denial of a variance than to the grant of one in recognition that "variances tend to impair sound zoning," Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 199 (App. Div. 2001), "a party seeking to overturn the denial of a variance . . . must prove that the evidence before the local board was 'overwhelmingly in favor of the applicant,'" CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 579 (App. Div. 2010) (quoting Scully-Bozarth Post 1817 of the VFW v. Planning Bd., 362 N.J. Super. 296, 314-315 (App. Div. 2003)).

Applying those standards here, we are satisfied plaintiff's proofs fell short. A conditional use is defined in N.J.S.A. 40:55D-3 as:

> a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use as contained in the zoning ordinance, and upon the issuance of an authorization therefor by the planning board.

As Justice Garibaldi explained in Coventry Square, a conditional use "is permitted at those locations in the zone where the use meets the conditions set forth in the zoning ordinance." 138 N.J. at 287. "If the conditions are not satisfied, the use is not permitted." Cox & Koenig, New Jersey Zoning and Land Use Administration, § 34-1 at 751 (2022).

To establish entitlement to a conditional use variance under N.J.S.A. 40:55D-70(d)(3), an applicant must establish special reasons or positive criteria, i.e., "that the site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance," or, in other words, "that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems." Coventry Square, 138 N.J. at 299. The applicant must also satisfy the negative criteria, i.e., "that the variance can be granted 'without substantial detriment to the public good,'" and "that the variance will not 'substantially impair the intent and purpose of the zone plan and zoning ordinance.'" Ibid. (quoting N.J.S.A. 40:55D-70(d)). The Court has instructed the focus here "is on the effect on surrounding properties of the grant of the variance for the specific deviations from the conditions imposed by ordinance" and that "the board of adjustment must be satisfied that the grant of the conditional-use variance for the specific project at the designated site is reconcilable with the municipality's legislative determination that the condition should be imposed

on all conditional uses in that zoning district." Coventry Square, 138 N.J. at 299.

Plaintiff asserts its "deviations from the conditional use standards were de minimis," and it adequately demonstrated its proposal "to develop the townhomes at a lower density than what would otherwise be permitted under the ordinance . . . would therefore mitigate any possible negative impact that this development would have." It also ridicules the board's contention that plaintiff's failure to satisfy the design/layout conditional use standards "fatally compromised [its] proposal," stating "Fatally? Design standards are of the lowest concern in zoning law. This concern is no more than a pretext to cover the board's failings in this case."

As we see it, the failings were in plaintiff's proofs. None of plaintiff's expert witnesses testified, as plaintiff asserts, "that the deviations in this case were de minimis in light of the compliant density plan." While plaintiff's engineer addressed the density issue, plaintiff's planner barely mentioned it, noting only that plaintiff was "reducing the intensity of a multifamily use on an existing undersized lot by going from ten units to six." More important, the planner did not rely on "the compliant density plan" in opining the requested variances "do not impede the ability of this site to function with the use."

As already noted, plaintiff's engineer testified that configuring the units as the ordinance required by turning them sideways to the street, would impact the driveway and the backup area, making clear the necessary parking "just wouldn't fit." Breaking up the units into three buildings of two units each, rotating the front two buildings ninety degrees and making them over/under units instead of side-by-side clusters as required, allowed them to appear "like regular homes," albeit narrow ones because of the need to accommodate side yard setbacks and an eighteen-foot-wide driveway between the buildings. The engineer testified plaintiff would be "hard-put" to get four side-by-side structures on this site, "unless the buildings were very small," and still satisfy the ordinance's requirement of no more than fifty percent maximum building coverage and no more than seventy-five percent maximum impervious coverage.

As to the density, the engineer testified the overlay ordinance permitted one unit per 1,550 square feet. As plaintiff was proposing only one unit per 1,875 square feet, the engineer noted the proposal was "actually below the density by a nice percentage." While testifying plaintiff was "allowed to have seven units by density but we didn't cram in the seventh unit," the engineer did not explain how it would have been possible to do so given his testimony that

impervious coverage was already just below the 75% maximum at 73.4 % — "very close but not over" — and another unit would have required at least two more parking spaces, one of which would have to be enclosed in an attached accessory garage per the ordinance.

The planner's testimony was very brief, spanning no more than ten pages of the hearing transcripts. Noting that "[i]f this were a 100-foot-wide lot, three of those variances [frontage, area and diameter] would go away," she also noted "the lot is . . . currently developed with a multifamily use so we're not introducing a new multifamily use on an existing undersized lot, we are in fact reducing the intensity of a multifamily use on an existing undersized lot by going from ten units to six." Because the substance of the planner's opinion was so brief, we quote it essentially in its entirety. She testified the variances requested did not

> impede the ability of this site to function with the use, despite the fact that we need some variance relief. We have a lot that's already developed with a multifamily use at a higher density than what's proposed. Within that context, the variance relief for minimum lot size, minimum frontage and minimum lot diameter are existing conditions but the proposed reduction in density reduces the impact of the undersized nature of the lot. So despite the area and dimensions of the lot, the proposed townhouses can be accommodated on the site without any relief for setback, area (sic) — for setback, coverage limits. And this indicates to me that

the lot has sufficient area and frontage and diameter for the use as it is being proposed, as opposed to how it currently exists.

Now, the style of the housing that's being proposed, the two units being over/under and one side-by-side at the back rather than having one long building with all the units connected is appropriate for this size of lot. Breaking up these six units into the three structures also allows for a better visual impact at the site because it allows for a design that creates an appearance from the street of two single family homes with one driveway going between them as opposed to one long structure with multiple units visible from the street.

. . . .

There's no detrimental impact that would result from the requested variances. The character of the surrounding neighborhood is already a mix of multifamily uses and single-family homes. The proposed townhouse style and condo style units is more consistent with this pattern than the existing ten apartments on the site is. The proposed buildings meet all the requirements for setbacks and coverage, so there's no detrimental impact to light, air and open space. And adequate parking is provided off-street. In fact, the parking ratio is actually being improved because we're going to eliminate the existing non-conforming parking condition.

Lastly, approval of the subject application with the variance would not be inconsistent with the intent and purpose of your master plan and zoning ordinance. The 2016 master plan reexamination report does address multifamily housing specifically and says that this is the appropriate area in Belmar to have this type

> of housing. The use is also preexisting on the site. The site contains an existing multifamily use that's at a much higher nonconforming density than what's being proposed, which brings me to the last point I'd like to make which is that this application brings the site much more into conformity with the ordinance requirements for this use.
>
> We're eliminating seven existing variance conditions under the conditional use standard. Of those seven conditions that are going to be improved are density, side yard setback, combined side yard setback, rear yard setback, height, impervious coverage and the access lane width. Which leaves us only with the variance relief that the applicant feels that they cannot eliminate through site plan.

The planner concluded her testimony by providing her opinion that "the net impact of this application is fewer units, better units, fewer variances and appropriate off-street parking. So in sum total I think that the variance relief in this instance is justifiable."

A review of the expert testimony makes clear plaintiff did not offer expert opinion that the compliant density plan made the requested deviations de minimis as it argues here. It also establishes the lack of support in the record for plaintiff's position that its compliant density plan undermined the board's conclusion that the proposed cluster development was too intense for the undersized lot, and the required variances for lot area, frontage and

diameter as well as design layout detrimentally affected the suitability of the site for the multi-family cluster development envisioned by the ordinance.

Plaintiff's engineer testified to the impossibility of building four reasonably sized side-by-side structures on the site while satisfying the ordinance's lot coverage requirements. Although touting the size of the lot would have permitted seven units, the engineer made clear he was only able to achieve plaintiff's desired six units and fourteen on-site parking spaces by separating the units into three buildings of two units each, one building behind the others, making the front two buildings over/under units instead of side-by-side clusters as required, with one building having two-car garages, but instead of side-by-side parking, the cars would have to be lined up one behind the other.

The planner's opinion that plaintiff's proposed six townhouses could be accommodated on the site without any relief for setback or coverage limits, indicating to her "that the lot has sufficient area and frontage and diameter for the use as it is being proposed," ignores entirely the engineer's testimony that it could only be achieved by eschewing the municipality's vision for multi-family cluster development in the overlay zone, that is single-family "townhouse style" residential units, developed as not less than four nor more than five side-

by-side residential clusters. Her opinion that the engineer "breaking up these six units into the three structures" in order to achieve plaintiff's desired yield would "allow[] for a better visual impact at the site," ignores the conditions imposed by the ordinance and merely substitutes her aesthetic sensibility for that of Belmar's elected representatives. See N.J.S.A. 40:55D-2(i) (including among the purposes of zoning the promotion of "a desirable visual environment through creative development techniques and good civic design and arrangement"); Burbridge v. Mine Hill, 117 N.J. 376, 387 (1990) (acknowledging the general purposes of the zoning law include aesthetics).

In light of the testimony presented at the hearing, we agree Judge Zazzali-Hogan was correct to affirm the board's finding that plaintiff's inability to comply with the ordinance's conditions for lot size, diameter, frontage and permitted structures of not less than four nor more than five "townhouse style" side-by-side residential clusters materially affected the appropriateness of the site for the conditionally permitted use. The evidence supports the board's findings that plaintiff did not establish its undersized lot could accommodate the problems — the aesthetic concerns, the functionality of the development and its overall intensity — associated with its proposed six unit, multi-family

cluster development despite not being able to comply with the conditions of the ordinance for lot size, diameter, frontage and permitted structures.

Although plaintiff contends the board failed to adhere to the Coventry Square standard, our review convinces us the board was appropriately focused on plaintiff's specific deviations from the conditional use standard — lot size, diameter, frontage and permitted structures — and whether those deviations materially affected the suitability of the site for the proposed use. See Coventry Square, 138 N.J. at 298-99. Plaintiff's assertion that "[d]esign standards are of the lowest concern in zoning law," provides no basis for the board to simply ignore the municipality's legislative determination that all multi-family cluster development in the overlay zone should be single-family "townhouse style" residential units, developed as not less than four nor more than five side-by-side residential clusters. See id. at 299 (noting with respect to the second prong of the negative criteria that "the board of adjustment must be satisfied that the grant of the conditional-use variance for the specific project at the designated site is reconcilable with the municipality's legislative determination that the condition should be imposed on all conditional uses in that zoning district").

A review of the testimony adduced at the hearing makes plain plaintiff was the party that failed to adhere to the Coventry Square standard. With respect to the negative criteria, plaintiff failed to offer expert opinion that its proposed multi-family cluster development "would not have a more detrimental effect on the neighborhood than construction of the project in a manner consistent with the zone's restrictions." See Grubbs, 389 N.J. Super. at 390. Instead, the planner's testimony was that plaintiff's proposed multi-family development would not have a more detrimental effect on the neighborhood than plaintiff's existing "lot that's already developed with a multifamily use at a higher density than what's proposed." As she testified, "[w]ithin that context, the variance relief for minimum lot size, minimum frontage and minimum lot diameter are existing conditions but the proposed reduction in density reduces the impact of the undersized nature of the lot" (emphasis added).

Establishing a proposed development not able to meet the conditions the ordinance established to address those problems associated with the use is better for the neighborhood than what's there now is not consistent with Coventry Square, and, as the board found, "not enough" to compel it to approve plaintiff's variance application. We accordingly agree with Judge

Zazzali-Hogan the board's finding that plaintiff's witnesses did not provide sufficient testimony, either lay or professional, to justify the deviations from the conditional use requirements is amply supported in the record.

Plaintiff's remaining arguments, to the extent we have not addressed them, are without sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.