SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1520-20
A-1531-20
A-1564-20

HARTLAND GOLF AND ARCADE, and OUR ENDLESS SUMMER,

Plaintiffs-Appellants,

v.

WAINWRIGHT AMUSEMENTS and THE BOROUGH OF SHIP BOTTOM LAND USE REVIEW BOARD,

Defendants-Respondents.

MAYOR AND COUNCIL OF THE BOROUGH OF SHIP BOTTOM, a Body Politic,

Plaintiffs-Appellants,

v.

WAINWRIGHT AMUSEMENTS,

Defendant-Appellant

and

THE BOROUGH OF SHIP BOTTOM
LAND USE REVIEW BOARD,

Defendant-Respondent.

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Argued March 28, 2022 – Decided April 11, 2022

Before Judges Fasciale and Petrillo.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket Nos. L-1499-19 and L-1828-19.

Kelsey A. McGuckin-Anthony argued the cause for Mayor and Council of the Borough of Ship Bottom as appellants in A-1520-20 and as respondents in A-1564-20 (Dasti, Murphy, McGuckin, Ulaky, Koutsouris & Connors, attorneys; Jerry J. Dasti, of counsel; Kelsey A. McGuckin-Anthony, on the briefs).

Dennis M. Galvin argued the cause for Hartland Golf and Arcade and Our Endless Summer as appellants in A-1531-20 and as respondents in A-1564-20 (Davison, Eastman, Munoz, Paone, PA, attorneys; Dennis M. Galvin and Christina N. desGroseilliers, of counsel and on the briefs).

John Paul Doyle argued the cause for Wainwright Amusements, as appellants in A-1564-20 and as respondents in A-1531-20 (Carluccio, Leone, Dimon, Doyle & Sacks, LLC, attorneys; John Paul Doyle, of counsel and on the brief; Michael A. Jedziniak, on the brief).

Kevin S. Quinlan argued the cause for Borough of Ship Bottom Land Use Board respondent in A-1531-20.

PER CURIAM

These three appeals, which we have consolidated for this opinion, involve actions in lieu of prerogative writs (collectively, the three actions). The same judge (the judge) issued an order and rendered a comprehensive written decision adjudicating the three actions. In general, the three actions deal with whether one party can operate a family amusement and entertainment center inside a CVS pharmacy building located in a General Commercial (GC) Zone that had been vacant for approximately seven years.

In the first action (the Golf action), plaintiffs Hartland Golf and Arcade and Our Endless Summer[1] (Golf) challenged a use variance that defendant Borough of Ship Bottom Land Use Board (Board) granted to defendant Wainwright Amusement, LLC (Wainwright). Golf is a competitor of Wainwright and owns amusement facilities in the Borough of Ship Bottom. In the second action (the Borough action), plaintiff Mayor and Council of the Borough of Ship Bottom (Borough) challenged the Board's authority to grant the variance to Wainwright and otherwise contended that the Board's decision

[1] Although plaintiffs Hartland Golf and Arcade and Our Endless Summer are two separate parties with different facilities, we refer to them collectively as Golf.

was unsupported by the record and unreasonable, arbitrary, and capricious. In the third action (the Wainwright action), Wainwright challenged the Borough's Amusement Games Licensing Ordinance (Licensing Ordinance) arguing it was facially invalid. [2]

Golf and Wainwright appeal from a December 29, 2020 order entered by the judge upholding the variance. The judge issued the order after conducting a de novo review of the record. Wainwright also appeals from the same order, which did not adjudicate on the merits its contention that the Licensing Ordinance was invalid. As to Wainwright, the judge dismissed its counterclaim for failure to exhaust administrative remedies.

We affirm the Board's grant of the use variance. Wainwright's application met the negative and positive criteria required by statute, substantial credible evidence supports the Board's decision, and the Board did not exceed its authority in granting the use variance. But we reverse and remand the judge's order dismissing the Wainwright action. Based on the limited record, we cannot discern if the zoning portion of the ordinance amounts to "spot zoning," which might also be relevant to Wainwright's counterclaim and arguments on appeal.

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[2] Wainwright points out in its merits brief in the Wainwright action that a councilmember in the Borough owns competitor Golf.

I.

In January 2019, Wainwright applied to the Board, seeking a use variance under N.J.S.A. 40:55D-70(d)(1), to remodel the abandoned CVS pharmacy building located at 702-716 Long Beach Boulevard, Ship Bottom, into an arcade and amusement facility.[3] The arcade and amusement facility would include an XD theater with interactive virtual reality technology, a game room, an escape room, a snack bar, and amusement games.[4] The Board conducted hearings in March 2019 and April 2019. Wainwright presented testimony from the project engineer, a principal of the applicant, the project's traffic engineer, and the expert planner. The Board also heard testimony from several interested parties, which the judge characterized as a "mixture of support, concern[,] and opposition." In May 2019, the Board adopted a resolution approving the use variance. The Board's approval was subject to Wainwright securing a gaming

[3] Wainwright notes that it presented the conceptual plan for a family amusement and entertainment center at a Borough Council meeting on December 27, 2018. Instead of pointing out the proposed use would never be licensed, the Council recommended that Wainwright seek a use variance from the Board, which led to the variance application at issue.

[4] Wainwright explains that a virtual reality means sitting in a chair with a screen that an individual can interact with; the café sells hot pretzels, churros, hotdogs, and pizza; the escape room is used for solving riddles to get to the next room; and the game room includes arcade-type games.

license from the Borough pursuant to the licensing portion of the Licensing Ordinance.

In June 2019, Wainwright's competitor, Golf, filed its complaint in lieu of prerogative writs against Wainwright and the Board alleging: (1) the Board's decision to grant the application was arbitrary, unreasonable, and capricious; (2) the Board usurped the role of the governing body; and (3) the Board failed to adhere to the standard established in Medici v. BPR Co., 107 N.J. 1 (1987). Golf, which owns two arcade and family entertainment facilities in Ship Bottom within the areas prescribed in the zoning portion of the Licensing Ordinance, sought to invalidate the variance.

It appears that Wainwright attempted to apply for a license to operate amusement games on or around June 19, 2019. The Borough acknowledged receipt of the application but stated that it was "unable to consider" it. On October 8, 2019, Wainwright sent the application to the New Jersey Office of the Attorney General's Legalized Games of Chance Control Commission. The application was then apparently forwarded back to the Borough. The Borough then informed Wainwright, again, that it was in receipt of the application but

would not consider it.[5] The judge found Wainwright did not formally apply for the license.

The Borough filed an identical complaint in lieu of prerogative writs against Wainwright and the Board the next day. Wainwright filed its answer and counterclaim asserting that the zoning and licensing portions of the Licensing Ordinance, which purportedly regulate and require a license for amusement facilities only in prescribed areas of the Borough, are void and unenforceable as illegal spot zoning and violate Wainwright's due process and equal protection rights.

In August 2020, the judge dismissed Wainwright's counterclaim with prejudice "as no formal application was made by Wainwright . . . for an amusement gaming license and no formal action was taken by the Borough of such application." After that, the judge remanded the Golf and Borough actions to the Board because he believed there were deficiencies in its approval of the use variance. The judge instructed the Board to set forth specific findings of facts and conclusions of law and to not hear any more testimony or legal arguments.

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[5] At oral argument, the Borough maintained that Wainwright failed to apply for a license, while Wainwright asserted that it submitted a formal license application to the Borough, which the Borough did not approve.

Complying with those directions, the Board adopted an amended resolution (Amended Resolution) granting the use variance to Wainwright. On December 8, 2020, the judge issued an opinion upholding the Board's decision, as memorialized in the Board's September 16, 2020 Amended Resolution. In his written decision, the judge concluded, "the Board's issuance of the variance to Wainwright was a rational determination based upon the evidence adduced at the public hearings." On December 29, 2020, the judge entered the order under review.

On appeal, Golf raises the following points for our consideration:

> [POINT] I
>
> THE [JUDGE] ERRED WHEN [HE] DETERMINED THAT THE BOARD'S APPROVAL OF [WAINWRIGHT'S] REQUEST FOR A USE VARIANCE WAS PROPER BECAUSE IT DID NOT SATISFY THE STATUTORY CRITERIA.
>
> > A. [Wainwright] Did Not Satisfy [T]he Positive Criteria Required [O]f [T]he Municipal Land Use Law.
> >
> > B. [Wainwright] Did Not Satisfy [T]he Negative Criteria Required [O]f Municipal Land Use Law.
>
> [POINT] II
>
> THE [JUDGE] ERRED WHEN [HE] DETERMINED THAT THERE IS NO DIFFERENCE BETWEEN AN

OMITTED PERMITTED USE [AND] [A] PROHIBITED USE.[6]

A. Arcades Are A Prohibited Use In Ship Bottom.

B. The Board Usurped The Authority Of The Governing Body.

The Borough raises the following points:

POINT I

HAD THE [JUDGE] CONSIDERED [BOROUGH'S] ARGUMENT THAT THE LAND USE BOARD ACTED OUTSIDE ITS SCOPE OF AUTHORITY, THE [JUDGE] WOULD HAVE FOUND THAT THE LAND USE BOARD ACTED IMPROPERLY IN GRANTING THE USE VARIANCE.

POINT II

THE SHIP BOTTOM LAND USE BOARD'S GRANTING OF THE USE VARIANCE TO WAINWRIGHT . . . WAS ARBITRARY[,] CAPRICIOUS[,] AND UNREASONABLE.

POINT III

WAINWRIGHT . . . HAS FAILED TO EXHAUST ITS ADMI[N]INISTRATIVE REMEDIES CONCERNING [THE BOROUGH'S] DENIAL OF WAINWRIGHT'S GAMING LICENSE APPLICATION.

[6] We altered the capitalization of Golf's points I and II to comport with our style conventions but omitted the alterations for readability.

On appeal, Wainwright raises the following points:

> POINT I
>
> [THE BOROUGH]'S ORDINANCE IS FACIALLY INVALID AND AS APPLIED TO WAINWRIGHT[.]
>
> > A. The Ordinance Lacks The Requisite Legal Standards To Be Valid And Enforceable Because It Is Not Rationally Related To Any Legitimate Public Concern.
> >
> > B. The Eatontown[7] Opinions Squarely Support Wainwright's Facial Challenge [T]o [T]he Ordinance With [A] Strikingly Similar Fact Pattern.
> >
> > C. The Borough's Ordinance [I]s Not The Result [O]f A Rational Use [O]f Its Police Power Nor Does [I]t Meet All The Standards Required For Legally Valid Ordinances.
> >
> > D. The Ordinance Violates Various Statutory Provisions [I]n [T]he New Jersey Amusement Games Licensing Law.[8]
> >
> > E. The Ordinance Is Also Facially Invalid Because It Advances Only The Private Pecuniary Interests Of The [Borough]; Not The General Welfare; [A]nd, As Applied, It Constitutes Illegal "Spot Zoning."

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[7] Supercade Cherry Hill, Inc. v. Borough of Eatontown, 178 N.J. Super. 152 (App. Div. 1981); Am. On Wheels, Eatowntown, Inc. v. Bd. of Adjustment of Borough of Eatontown, 178 N.J. Super. 155 (App. Div. 1981).

[8] N.J.S.A. 5:8-100 to -130.

F. The Ordinance Is Invalid Because It Usurps The Exclusive Authority Of The Zoning Board.

POINT II

THE [JUDGE] ERRED BY RULING THAT [THE COURT] LACKED JURISDICTION OVER WAINWRIGHT'S COUNTER-CLAIM AGAINST THE BOROUGH BASED UPON THE "EXHAUSTION OF ADMINISTRATIVE REMEDIES" DOCTRINE[.]

A. Wainwright Challenged The Borough's Ordinance Exclusively On Facial [A]nd As-Applied Grounds.

B. The "Exhaustion [O]f Administrative Remedies" Doctrine [I]s Inapplicable [T]o Facial [A]nd As-Applied Challenges [T]o Municipal Ordinances.

C. The . . . Judge Had Jurisdiction [T]o Rule [O]n Wainwright's Facial [A]nd As-Applied Challenges [T]o [T]he Borough's Ordinance.

II.

We first address the Board's grant of the use variance to Wainwright. "When reviewing a trial [judge's] decision regarding the validity of a local board's determination, 'we are bound by the same standards as was the trial [judge].'" Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 462 (App. Div. 2015) (quoting Fallone Props., LLC v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)). We

"give deference to the actions and factual findings of local boards and may not disturb such findings unless they [are] arbitrary, capricious, or unreasonable." Ibid. Local zoning boards have "peculiar knowledge of local conditions" and must be afforded "wide latitude in the exercise of delegated discretion." Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965). However, we give less deference to a board's grant of a variance than a denial because "[v]ariances to allow new nonconforming uses should be granted sparingly and with great caution since they tend to impair sound zoning." Burbridge v. Governing Body of Twp. of Mine Hill, 117 N.J. 376, 385 (1990) (alteration in original) (quoting Kohl v. Mayor of Fair Lawn, 50 N.J. 268, 275 (1967)).

The Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163, vests a zoning board with the power "[i]n particular cases for special reasons, [to] grant a variance to allow departure from regulations . . . to permit . . . a use or principal structure in a district restricted against such use or principal structure." N.J.S.A. 40:55D-70(d)(1). The burden on the applicant to show "special reasons" is often referred to as the positive statutory criteria. See Smart SMR of N.Y., Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998). "No variance . . . may be granted . . . without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not

substantially impair the intent and the purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70. "This is sometimes referred to as one of the 'negative' statutory criteria for the grant of a use variance." Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 76 (App. Div. 2006) (quoting Smart SMR, 152 N.J. at 323).

A.

There are three circumstances in which "special reasons" may be found. Ibid. First, "the proposed use inherently serves the public good." Ibid. Second, the applicant "would suffer 'undue hardship' if compelled to use the property in conformity with the permitted uses in the zone." Ibid. (quoting Medici, 107 N.J. at 17 n.9). And third, "the use would serve the general welfare because 'the proposed site is particularly suitable for the proposed use.'" Ibid. (quoting Smart SMR, 152 N.J. at 323). Zoning boards analyze whether these special reasons exist, and in prerogative writs actions the judge considers whether the board's action was arbitrary, capricious, or unreasonable, and whether it acted properly in accordance with the statutory standard. Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 54-55 (1998).

The judge noted as to the first circumstance that "the proposed use of an amusement/gaming facility is not an inherently beneficial use and thus subject

to an enhanced quality of proof."[9] That is undisputed. Wainwright concedes that the second circumstance is not applicable because it would not suffer undue hardship if not granted a use variance. Only the third circumstance for finding special reasons is relevant to Wainwright's application. Indeed, Wainwright asserts the application meets the third circumstance because the "site is particularly suited for [the] proposed family amusement and entertainment center."

Our Court considered the meaning of particularly suited in Price v. Himeji, LLC, 214 N.J. 263, 292-93 (2013). Demonstrating that a proposed site is particularly suited for the proposed use "does not require proof that there is no other potential location for the use nor does it demand that the project 'must' be built in a particular location." Id. at 293.

> Rather, it is an inquiry into whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone. Most often, whether a proposal meets that test will depend on the adequacy of the record compiled before the zoning board and the sufficiency of the board's

[9] Our Court pronounced the enhanced quality of proof in Medici for uses that are not inherently beneficial, requiring that "in addition to proof of special reasons, an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance." 107 N.J. at 21.

> explanation of the reasons on which its decision to grant or deny the application for a use variance is based.
>
> [Ibid.]

The Board heard conflicting testimony at the hearing and made the requisite findings of fact to support its conclusion that the proposed site was particularly suited for an amusement facility. See Klug v. Bridgewater Plan. Bd., 407 N.J. Super. 1, 13 (App. Div. 2009) (noting that if conflicting expert testimony is offered during an application's hearing, the board will decide which testimony to accept). In its Amended Resolution, the Board exercised its unique expertise and determined the property, previously an abandoned CVS pharmacy, was particularly suited to be an entertainment facility because of several compelling reasons. It concluded (1) the surrounding uses are predominantly commercial; (2) the property is located in the central strip of community services as set forth in the Borough's 2018 Master Plan Re-examination; (3) the site has sufficient buffering in the nature of an existing fence and surrounding trees; (4) the retention of a commercial use in the district is preferable to the potential for the site to be converted to residential use in a predominantly commercial district; (5) the proposed hours of operations, restrictions on lighting, and restrictions on garbage collection are sufficient to minimize the impact on surrounding sites; (6) no new construction is proposed; and (7) the applicant and its traffic expert

testified that the site is suited for the proposed use and has adequate parking and ingress and egress.

The Board's findings and conclusions are rooted in the competent evidence. It heard testimony from Wainwright's expert planner Michael Kauker, who opined that the site is suitable for its proposed use because of the existing building and parking spaces located on the property, its use is consistent with the surrounding commercial area, and the area's growing population has a need for a new entertainment facility. In the area surrounding the proposed site, there is a surf shop, a motel, a few buildings for residential use, and a 7-Eleven. Also, traffic expert Scott Kennel testified that the proposed site would generate less traffic if granted the variance than its previous use as a CVS pharmacy.

The Board considered and rejected evidence produced by Golf. For example, Golf presented testimony from licensed planner Andrew Thomas who stated the site is not particularly suited for an entertainment facility because it does not adjoin similar uses due to the increase in residential use in the immediate area. Thomas further opined that the proposed use would be the largest amusement use in the Borough, and the site location is designed for smaller retail use. The Board considered Golf's presentation but did not agree with its position.

We conclude the Board's finding in its Amended Resolution that the site is particularly suited for an entertainment facility is supported by sufficient credible evidence. Wainwright's traffic expert and expert planner's testimony regarding the surrounding commercial area, growing population, and traffic impact support the conclusion that the site is well-suited to be an entertainment facility. The Board had the opportunity to weigh witness credibility and the arguments based on its specific expertise and knowledge of the community. That is especially important here because a Borough councilmember owned Golf—Wainwright's competitor—and likely had an interest in preventing Wainwright from operating a competing amusement facility. The record on which the Board's decision was made was both complete and thorough and the Amended Resolution sufficiently addressed the reasons for finding the proposed use was particularly suited.

B.

The negative criteria require "proof that the variance 'can be granted without substantial detriment to the public good' and that it 'will not substantially impair the intent and purpose of the zone plan and zoning ordinance.'" Smart SMR, 152 N.J. at 323 (quoting Sica v. Bd. of Adjustment, 127 N.J. 152, 156 (1992)). To prove that the variance will not be a substantial detriment, the Board

"focuses on the effect that granting the variance would have on the surrounding properties." Price, 214 N.J. at 286. As for substantial impairment of the intent and purpose of the zoning plan, the Board "must reconcile the grant of the variance for the specific project at the designated site with the municipality's contrary determination about the permitted uses as expressed through its zoning ordinance." Ibid.

On the first prong of the negative criteria, "[t]he board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute 'substantial detriment to the public good.'" Medici, 107 N.J. at 22 n.12 (quoting Yahnel v. Bd. of Adjustment of Jamesburg, 79 N.J. Super. 509, 519 (App. Div. 1963)).

Here, the Board found that the proposed use advanced the public good for the following reasons. First, removing "an existing public nuisance and replac[ing] [the] same with a viable business . . . provides . . . services customarily associated with family resort communities." Second, the "bathrooms [are] available to the general public." Third, the proposed site will "provide[] security." Fourth, the application "[p]rovides for adequate screening for light, noise[,] and odors so as to not impact negatively upon the adjacent

properties." Fifth, the application "provides a less intense use [than] other permitted uses which will reduce congestion and traffic." Sixth, the application "provides a family[-]oriented business within the commercial zone which will be accessible by vehicle, on foot or by bicycle."

Kauker testified that the proposed application "will not be a substantial detriment to the public good, namely [to] the surrounding area" because most of the site's "activity is going to be contained in the interior of the building," and there was adequate parking. Kauker further confirmed that none of the uses of the proposed site would be visible from the building's exterior, and the application proposed will greatly improve the outside of the building to "promote a desirable visual environment."

There is sufficient evidence supporting the Board's finding that the use variance will not cause substantial detriment to the public good. As Kauker noted, the property is currently a vacant CVS pharmacy. Transformation of the space from an unoccupied pharmacy to an entertainment facility will improve the exterior of the building and provide an amenity to residents of the Borough. With little impact on traffic and adequate parking spaces, there is no credible evidence that the application will cause a substantial detriment to the public good. The Board also took measures to ensure protection of the public good

when granting the use variance, including requiring the bathrooms to be open to the public, limiting the hours of operation, controlling the lighting's impact on surrounding areas, and mandating security measures. Zoning boards routinely make these types of findings.

The second prong of the negative criteria requires a board to "reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district" as defined by our Court in Medici. Eagle Grp. of Princeton v. Zoning Bd. of Adjustment of Hamilton Twp., 274 N.J. Super. 551, 562 (App. Div. 1994) (quoting Medici, 107 N.J. at 21).

In Medici, the board granted the applicant's use variance to construct a four-story motel. 107 N.J. at 4. Our Court held that in the use-variance context, when the variance sought does not inherently serve the public good, "an enhanced quality of proof and clear and specific findings by the board of adjustment" is required to determine that "the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance." Id. at 21. Applying this heightened standard, our Supreme Court found that because the governing body in Medici amended the zoning ordinance several times before and after the board had granted use variances to three different motels but never amended the ordinance to include motels as a permitted use, there was evidence

of a specific intent by the governing body that the master plan and zoning ordinance exclude motels. Id. at 21-25.

Applying the Medici standard, the Board determined that granting the use variance is consistent with and advanced the purpose of the Borough's Master Plan because: (1) "[t]he site is located in the 'central strip of community services' as set forth in 2018 [M]aster Plan [Re-examination]"; (2) the proposed development "'encourages the occupancy of vacant commercial properties' in the 'Commercial District'"; (3) "[t]he proposed use further advances the goal articulated in the master plan to permit mixed uses as a means of stemming the tide of conversions of commercial uses to residential [uses]"; and (4) "[t]he 2018 Master Plan [Re-examination] does not retain the prohibition on amusement games as explicitly set forth in prior revisions." Again, the Board reached these conclusions relying on the entire record before it by crediting the testimony on behalf of Wainwright.

The 2000 Re-examination Report of Ship Bottom's Master Plan initially prescribed that "amusement type uses are not a permitted use in any zone with the Borough." The 2006 Master Plan Re-examination again reaffirmed "that amusement type uses are not a permitted use in any zone within the Borough." In 2003, the Borough adopted the Licensing Ordinance. The licensing portion

of the ordinance requires the properties with existing non-conforming amusement uses—including Golf's facilities—maintain a gaming license and limits the extent of their operations. Importantly, the 2018 Master Plan Re-examination did not retain the previously included statement that amusement uses were not permitted in the Borough. The Board correctly recognized this important fact.

Thomas, testifying for Golf, stated that the Council's contemplation of permitted areas for amusement uses in the zoning portion of the ordinance demonstrates an intent to exclude the uses in other areas in the Borough. Thomas also stated that the 2018 Master Plan Re-examination did not indicate the Borough's desire or need for expanded amusement uses in the Borough because "nothing in the 2018 Master Plan . . . refuted that statement from [the 2006 Master Plan Re-examination], again saying that the Board reaffirms that amusement type uses are not a permitted use in any zone." The Board was not persuaded.

Kauker, on behalf of Wainwright, testified before the Board that the preservation of commercial property and the elimination of vacant property in the Borough was consistent with the Borough's 2018 Master Plan Re-examination, which encouraged occupancy of vacant commercial properties

within the commercial district. Kauker also stated that the Master Plan's goal "to promote policies and strategies that meet the demand of current and future populations" was served by Wainwright's application because it sought to provide "an amenity to the residents and visitors" of the Borough.

Contrary to Golf and the Borough's contentions, the Borough's actions do not reflect a specific intent to ban all amusement facilities in the Borough. The 2000 Re-examination states that amusement facilities are not a permitted use in the Borough, yet in 2003, the Borough adopted the licensing portion of the ordinance to regulate the existing non-conforming amusement uses. The Board noted in its Amended Resolution that the "2018 Master Plan [Re-examination] does not retain the prohibition on amusement games as explicitly set forth in prior revisions." That important fact is undisputed and is telling as to the Amended Resolution.

The Board's omission of a prohibition on amusement uses in the 2018 Master Plan Re-examination reasonably indicates the abandonment of its previous prohibition. If the Borough intended to exclude amusement uses as prohibited, as had been the case, they had the opportunity but did not do so in the 2018 Master Plan Re-examination. Furthermore, it is logical to conclude that prohibition of a use also does not determinatively preclude granting a use

variance on reconciliation grounds, as the purpose of the statute delegating variance power to the Board is to allow "a use or principal structure in a district restricted against such use or principal structure" for special reasons. N.J.S.A. 40:55D-70(d)(1) (emphasis added).

The Board also noted that several of the uses proposed in the Wainwright application, including escape rooms, chaos rooms, and XD theaters, were not known or in existence at the time the present ordinance was enacted. Unlike in Medici, where the governing body contemplated the need for motels but chose not to include them as a permitted use when amending the ordinance, the Borough could not have contemplated some of the newly developed uses in Wainwright's application at the time of the 2000 Re-examination Report and subsequent re-examinations because they were not in existence. The Board's Amended Resolution also noted that the Borough itself has changed since the 2000 Re-examination. The Board stated the proposed uses "promote the goals of advancing Ship Bottom's place as a family resort as it has evolved since adoption of the existing ordinance."

It is settled that the "action of a board will not be overturned unless it is found to be arbitrary and capricious or unreasonable, with the burden of proof placed on the plaintiff challenging the action." Grabowsky v. Twp. of

Montclair, 221 N.J. 536, 551 (2015). "A zoning board's land use decisions thus 'enjoy a presumption of validity.'" Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin, 233 N.J. 546, 558 (2018) (quoting Price, 214 N.J. at 284). That much is undisputed.

On this record, there is substantial credible evidence supporting the Board's decision to grant the use variance. Consistent with a zoning board's "peculiar knowledge of local conditions, [it] must be allowed wide latitude in [its] delegated discretion," Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 597 (2005), the Board thoroughly reviewed the testimony and evidence and detailed its findings in its Amended Resolution. When weighing the benefits and detriments of granting the variance, the Board found numerous benefits to the community and noted that any detriments were insignificant. And in his review, the judge was "satisfied that [the Board's] decision is based upon facts reasonably found in the record and that those facts support the conclusions it reached in granting the variance." The Board's approval is therefore supported by sufficient, credible evidence in the record, and is not arbitrary, capricious, or unreasonable.

C.

The Borough contends that the Board usurped the governing body's authority because its grant of the use variance altered the character of the district and ignored the zoning portion of the ordinance. Golf contends that the Board usurped the governing body's authority by granting the use variance for a prohibited use.

We apply a deferential standard of review to a zoning board's decision, but the board "may not, in the guise of a variance proceeding, usurp the legislative power reserved to the governing body of the municipality to amend or revise the [zoning] plan." Price, 214 N.J. at 285 (alteration in original) (internal quotation marks omitted) (quoting Feiler v. Fort Lee Bd. of Adjustment, 240 N.J. Super. 250, 255 (App. Div. 1990)). "In short, the Zoning Board may not rezone by variance." Victor Recchia Residential Const., Inc. v. Zoning Bd. of Adjustment of Twp. of Cedar Grove, 338 N.J. Super. 242, 253 (App. Div. 2001). The issue of usurping authority is "of particular concern when a zoning board considers a use variance because 'as the term implies, [it] permits a use of land that is otherwise prohibited by the zoning ordinance.'" Price, 214 N.J. at 285 (alteration in original) (quoting Nuckel v. Borough of Little Ferry Plan. Bd., 208 N.J. 95, 101 (2011)). When a board's action constitutes a

"jurisdictional excess," "the action must be reversed for that reason alone." Dover v. Bd. of Adjustment, 158 N.J. Super. 401, 414 (App. Div. 1978).

1.

"[T]o determine whether a municipal governing body has standing to sue regarding the grant of a use variance, a [judge] must consider whether the requested variance would substantially alter the character of the district as set forth in the applicable zoning ordinance." Twp. of N. Brunswick v. Zoning Bd. of Adjustment of N. Brunswick, 378 N.J. Super. 485, 491 (App. Div. 2005). The judge looks to the following factors in making this determination: "(1) the size of the tract; (2) the size of the tract relative to the size and character of the district in which it is located and of the municipality as a whole; (3) the number of parcels into which the tract will be subdivided; and (4) the nature and extent of the variations from district regulations that is sought." Ibid.

In North Brunswick, the board of adjustment granted use and bulk variances to permit construction of a high-rise luxury apartment building in a zone that only allowed single-family detached homes with height restrictions. Id. at 488-89. One year earlier, the Township rezoned the property at issue from multi-family dwellings into the current zone for single-family homes to prevent excessive density in the residential area. Id. at 494. Based on the "particularly

damning" ordinance history, this court found the variances substantially altered the zoning plan and constituted a usurpation of Township authority. Ibid. We concluded the board ignored the Township's recent zoning change seeking to "avoid[] excessive density in this predominantly residential neighborhood," and "blatantly rejected the Township's zoning plan and improperly arrogated to itself the power to substitute its idea of an appropriate zone plan." Ibid.

Such is not the case here. The Board's granting of the use variance to Wainwright does not directly contradict the Borough's recent zoning changes as the variances did in North Brunswick. In fact, the Borough's 2018 Master Plan Re-examination decisively omitted its previous longstanding prohibition against amusement uses. And under the four factors for determining substantial alteration, the property at issue relative to the district is not sizable, the proposed use is consistent with the GC nature of the district, most of the surrounding properties are commercial uses, and the application does not propose new construction of the property. The record supports the Board's determination that the use variance does not substantially alter the character of the district. Thus, we conclude the Borough does not have standing to challenge the Board's grant of the use variance.

2.

N.J.S.A. 40:55D-62 vests power in the local governing body to zone, and a board of adjustment "may not, in the guise of a variance proceeding, usurp the legislative power reserved to the governing body of the municipality to amend or revise the plan." Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555, 561 (App. Div. 1996) (quoting Feiler, 240 N.J. Super. at 255). For example, a zoning board's grant of use variances to the applicant "based on its view that the present zoning of the tract [was] inappropriate" constituted a usurpation of municipality power. Id. at 564.

In Feiler, we reversed a board of adjustment's grant of use and bulk variances for a mixed commercial and high use residential application. 240 N.J. Super. at 255-56. The project was on a 15.69-acre site zoned partly for commercial use and partly for one- and two-family residences. Id. at 252. The project site encompassed the entire residential zone. Ibid. The board of adjustment justified granting the use variance because it found the residential use for which the property was zoned to be inappropriate. Id. at 254. We concluded the board exceeded its authority by effectively rejecting the existing zoning and replacing it with a new zoning plan through the granting of the use variance. Id. at 255-56.

Here, the Board's grant of a use variance to Wainwright did not exceed its authority or encroach on the municipality's power to zone. The judge found that the Board did not usurp the Borough's authority because "the Board's decision was based upon competent evidence, as the Board found the facts to be, and applying those facts reasonably reconciled the omission of the proposed use from the local ordinance." The use variance here differs from the variances in Feiler in both impact and intent.

The Board did not grant the variance to contradict the Borough's zoning plan, and the use variance did not have the effect of replacing the current zoning plan. In fact, the Board reasoned its granting of the variance was consistent with the Borough's Master Plan. Granting the use variance also serves a key purpose in the Borough's 2018 Master Plan Re-examination to encourage occupancy of vacant commercial properties and provide amenities to the growing residential population. The Board did not usurp the Borough's authority by granting the use variance to Wainwright.

III.

We next address the Wainwright action and the challenge to the Licensing Ordinance. Wainwright contends that the Licensing Ordinance was "enacted for the sole purpose of serving the private interests of the [c]ompetitors[—not

parties to this appeal[10]—]by permitting amusement licenses to be issued only for their two parcels." The Borough responds that the two amusement gaming facilities "were in existence at the time of the adoption of the . . . ordinances in question, making the existing gaming facilities pre-existing non-conforming uses." As such, the Borough contends the Licensing Ordinance is not intended to benefit the two gaming facilities, but rather limit future uses of that type.

The record must be more fully developed because the judge did not fully address Wainwright's argument that the zoning portion of the ordinance is invalid, and if so, what consequences flow from that determination. If the zoning portion of the ordinance amounts to "spot zoning" because it directly benefits just two plots of land, such a finding may impact Wainwright's application for a license. We leave the details of the remand to the discretion of the judge.

We make the following brief remarks. Spot zoning is "the use of the zoning power to benefit particular private interests rather than the collective interests of the community." Riya Finnegan, LLC v. Twp. of S. Brunswick, 197 N.J. 184, 195 (2008) (quoting Taxpayers Ass'n of Weymouth Twp., Inc. v.

[10] We note, Golf, which we understand to be the competitor, is not a party to the Wainwright action.

Weymouth Twp., 80 N.J. 6, 18 (1976)). And the test to determine spot zoning is:

> whether the zoning change in question is made with the purpose or effect of establishing or furthering a comprehensive zoning scheme calculated to achieve the statutory objectives or whether it is designed merely to relieve the lot of the burden of the restriction of the general regulation by reason of conditions alleged to cause such regulation to bear with particular harshness upon it. If it is in the latter category, the ordinance is invalid since it is not in accordance with a comprehensive plan and in effect is a special exception or variance from the restrictive residential regulation, thereby circumventing the board of adjustment to which is committed by our Zoning Act . . . the quasi-judicial duty of passing upon such matters, at least initially, in accordance with prescribed standards . . . . Our inquiry therefore has been directed to ascertaining whether in view of the purposes of the zoning act the action of the borough in rezoning . . . represents sound judgment based on the policy of the statute to advance the common good and welfare or whether it is arbitrary and unreasonable and furthers purely private interests.
>
> [Ibid. (alterations in original) (internal citations and quotation marks omitted) (quoting Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 249-50 (1954)).]

The ultimate "test is whether the particular provision of the zoning ordinance is made with the purpose or effect of furthering a comprehensive scheme or whether it is designed merely to relieve a lot or lots from the burden of a general regulation." Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 134 (1965).

The relevant portion of the Licensing Ordinance—5.16.010—states:

> It is hereby determined, declared and found that the [B]orough . . . constitutes a seashore resort with parts thereof customarily constituting amusement or entertainment area according to the customary understanding of said terms in the community, which parts thereof are more particularly described as follows:
>
> A. Area 1. All of the lands located within the area beginning one hundred twenty-six (126) feet southwesterly from the southeasterly sideline of 28th Street, measured parallel with Long Beach Boulevard and thirteen (13) feet northwesterly from the northeasterly sideline of Long Beach Boulevard, and extending thence southwesterly, parallel with Long Beach Boulevard twenty-six (26) feet, thence northwesterly parallel with 28th Street a distance of 28 to a point, thence southwesterly parallel with 28th Street a distance of 28 to a point, thence southwesterly parallel with 28th Street a distance of twenty-eight (28) feet to the point of beginning.
>
> B. Area 2. Beginning at the intersection of the northerly line of 4th Street, sixty (60) feet wide and the easterly line of Long Beach Boulevard, one hundred (100) feet wide, continuing thence north along the easterly line of Long Beach Boulevard one hundred (100) feet to a point; thence east along the southerly line of Lot 12, Block 131, one hundred (100) feet to the point of beginning . . . .

The two areas listed and described, and their amusement facilities, existed prior to the adoption of the 2000 Master Plan and Licensing Ordinance. As we pointed out, the 2000 Master Plan specifically prohibited "amusement type

facilities . . . in any zone within the Borough." The Borough contends the purpose of the zoning portion of the ordinance is to specifically allow these two areas' pre-existing non-conforming uses to continue. This is what the Borough relied on when it summarily rejected—or would not consider—Wainwright's licensing application. The Borough stated, "the subject property is not located within either of the two zones designated by the Borough's [L]icensing [O]rdinance, the Borough is unable to consider your . . . licensing application."

The judge did not make findings regarding the validity of the ordinance because he determined that the exhaustion doctrine applied. The judge concluded that

> no proper [licensing] application was ever made by Wainwright. While Wainwright argues any such application would be futile given the governing body's decision to appeal the use variance granted by its Board, that does not relieve [Wainwright] of following the duly-established procedures within the ordinance to submit a written application, pursuing that application before the governing body, establishing a clear record and, in the event of a denial, pursuing its administrative remedies of an appeal to the Gaming Commission.

The judge then dismissed Wainwright's counterclaim with prejudice and instructed Wainwright to first file the license application and then, if the application is denied, proceed with the administrative process.

Although we agree that Wainwright must formally apply for the license and a determination on the merits must be made, it is equally important on remand that the judge fully address Wainwright's contentions on the merits of its counterclaim, including issues related to "spot zoning." As the record stands now, we cannot consider Wainwright's substantive arguments challenging the ordinance. At a minimum, it is unclear what the intent was in the enactment of the ordinance. There are two areas containing an amusement facility, and a councilmember owns two facilities within those areas. This would arguably suggest—without a further development of the record—that the ordinance was "designed merely to relieve a lot or lots from the burden of a general regulation." Palisades Props., Inc., 44 N.J. at 134.

Affirmed in part, reversed in part, and remanded in part. We do not retain jurisdiction.