SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0154-21

RONALD C. WRONKO
and CARMELA WRONKO,

Plaintiffs-Appellants,

v.

MC TUSCANY II PROPERTY, LLC and THE PLANNING BOARD OF THE TOWNSHIP OF LAKEWOOD,

Defendants-Respondents.

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Argued February 1, 2023 – Decided March 13, 2023

Before Judges Vernoia, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0676-20.

Ronald J. Wronko argued the cause for appellants (Law Offices of Ronald J. Wronko, LLC, attorneys; Ronald J. Wronko, on the briefs).

David W. Phillips argued the cause for respondent MC Tuscany II Property, LLC (Sills Cummis & Gross PC,

attorneys; Joseph B. Fiorenzo and David W. Phillips, of counsel and on the brief).

Jilian L. McLeer argued the cause for respondent The Planning Board of the Township of Lakewood (King, Kitrick, Jackson, McWeeney & Wells, attorneys; John J. Jackson III, of counsel and on the brief; Jilian L. McLeer, on the brief).

PER CURIAM

In this action in lieu of prerogative writs, plaintiffs Ronald C. Wronko and Carmela Wronko appeal from an August 5, 2021 order granting judgment in favor of defendants MC Tuscany Property, LLC (Tuscany), and the Lakewood Township Planning Board (the Board). We affirm.

I.

In 2015, Tuscany applied to the Board to develop twenty single-family homes on lots located at 742 Ocean Avenue in Lakewood (property). The property is depicted on the Lakewood Township Tax Map as Block 194, Lots 1 and 4; Block 195, Lots 1-3; Block 196, Lots 1-5; Block 197, Lots 3, 5, and 8; and Block 198, Lot 10. The application sought preliminary and final major subdivision approval with zoning variance relief. Plaintiffs reside at 1108 East County Line Road, Lakewood, adjoining the proposed development.

The property is located in the R-15 residential zone, which allows for detached single-family housing, public and private schools, and places of

worship. The R-15 zone calls for the following minimum bulk requirements: (1) 15,000-square-foot lot area; (2) 100-foot lot width; (3) thirty-foot front yard setback; (4) twenty-foot rear yard setback; and (5) 10-foot side yard setback on each side with an aggregate of twenty-five feet. Only places of worship are exempt from the 15,000-square-foot lot area minimum.

The property is also subject to a separate Lakewood ordinance requiring riparian buffer conservation overlay zones whose purpose is to ensure adequate vegetation on lands adjacent to streams, lakes, or other bodies of water. The riparian zone also requires a 300-foot-wide buffer surrounding Category One waterways,[1] as well as upstream tributaries within the same watershed.

North of the property lies East County Line Road, and south of the property is Cabinfield Branch, a Category One stream that flows through Lakewood. As a result, the property is subject to a riparian buffer zone that extends 300-feet from Cabinfield Branch's center. Tuscany was required to account for the buffer zone in its proposed subdivision.

[1] N.J.A.C. 7:9B-1.4 defines Category One waters as "those . . . for protection from measurable changes in water quality based on exceptional ecological significance, exceptional recreational significance, exceptional water supply significance or exceptional fisheries resource(s) to protect their aesthetic value (color, clarity, scenic setting) and ecological integrity (habitat, water quality and biological functions)."

As mentioned, Tuscany submitted its initial application to the Board in 2015 for preliminary and final major subdivision approval and sought both bulk variance and other relief. Specifically, Tuscany requested: (1) a minimum lot area variance of 12,000 feet where 15,000 square feet was required; (2) minimum lot width variance of seventy-eight feet where lot widths of 100 feet are required; and (3) deviation from the twenty-five-foot side yard requirements. On December 15, 2015, following a public hearing, the Board approved and adopted Tuscany's initial application by way of resolution (first resolution). Neither plaintiffs, nor any other interested parties, appealed from that decision.

At the time of the first resolution, Ocean County required a twenty-five-foot dedication for its right-of-way on East County Line Road. In 2017, however, the county amended its Master Plan, and increased the right-of-way to forty-three feet. As a result of the increase, Tuscany was required to submit an amended preliminary and final major subdivision application (amended application).

The amended application sought the following variance relief:

> 1. Minimum Lot Area Variances: New Lot 1.01 in Block 194, Lots 1.01 and 1.10 in Block 195, and Lot 5.01 in Block 197 were reduced to lot areas of approximately 10,400 square feet due to the change in right-of-way requirements.

> 2. Minimum Lot Width Variances: New Lots 1.01 and 1.10 in Block 195 were reduced to lot widths of less than [seventy-eight] feet due to the change in right-of-way requirements.
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> 3. Minimum Front Yard Setback Variances: New Lots 1.01 and 1.10 in Block 195, new Lots 1.05 and 1.06 in Block 195, new Lot 1.02 in Block 194, and new Lot 5.01 in Block 197 require front yard setbacks of less than [thirty] feet due to the change in right-of-way requirements.

In addition, Tuscany requested specific design waivers relative to the enhancement of a separate road that would access the development.

On October 29, 2019, the Board conducted a hearing regarding the amended application where it considered testimonial and documentary evidence, as well as comments from the public. Specifically, Tuscany called as witnesses Graham MacFarlane and Brian Flannery, both professional engineers and professional planners.

MacFarlane testified Ocean County's increased right-of-way imposed a new, non-self-induced hardship on Tuscany that warranted additional variance relief. Comparing the amended application to the initial application, MacFarlane emphasized the first resolution approved twenty lots and the amended application still sought development of those same twenty-lots. He

also testified a traffic study was previously completed and submitted in the original application to the Board, which the county reviewed and accepted.

Plaintiffs' counsel cross-examined Tuscany's witnesses and expressed concern regarding the development's proposed variances, how those variances would impact the riparian zone, and Tuscany's alleged failure to support its amended application with an accurate survey. Specifically, counsel questioned MacFarlane regarding Tuscany's reliance on a survey conducted by New Lines Engineering, originally completed in November 2018, and subsequently revised in December 2019 as it pertained to the exact location and boundaries of the buffer zone. He further questioned why MacFarlane made no reference to his own field study in Tuscany's amended application. In response, MacFarlane stated his "office had also performed a survey to identify where that [buffer zone] line fell. And [his] surveyor and [New Lines's] surveyor worked together to determine the exact location," as reflected on the amended application.

While MacFarlane conceded the initial application estimated the riparian buffer zone would transect two of the proposed homes, he explained that estimation was "not based upon a detailed field survey." MacFarlane further testified he conducted a detailed field survey for the revised plan in 2018, confirming the location of the riparian buffer zone, and he asserted there was

"no impact to the . . . wetlands . . . or [the] riparian buffer . . . [in the amended application.]" Finally, MacFarlane stated the surveyor was present at the proceeding if the Board wished to elicit testimony from him.

During this exchange, the Board's attorney, John J. Jackson, noted "[Tuscany][,] . . . had done the survey and [that was] the survey [the Board] [was] relying on [,] [as] [r]ight now there [was] no competing survey." The Board's engineer, Dave Mango, further explained "the 300[-]foot [r]iparian buffer just ha[d] to be established . . . on the map with survey information, . . . and tied to the property." The Board Chairman, Yechiel Herzel, clarified that the original application was approved "on [the] condition of getting the proper [buffer] line" and confirmed that Tuscany now "ha[d] the proper line" about which MacFarlane testified.

Flannery also testified to the hardship Tuscany experienced due to the change in the right-of-way requirement. Tuscany represented at the hearing it consented to building fences to protect vegetation, would erect bollards to discourage trespassers, and agreed to one-way streets for exiting and entering the development from East County Line Road.

After considering the testimony and documentary evidence submitted by Tuscany, as well as the public commentary, the Board unanimously approved

and adopted the amended application and detailed its reasoning in an amended resolution. The Board initially concluded the amended application was consistent with the development of the area, and the application met the necessary requirements for preliminary and final site plan approval, pursuant to N.J.S.A. 40:55D-49 and -50. Further, the Board determined Tuscany sufficiently demonstrated its need for the variances under both N.J.S.A. 40:55D-70(c)(1) and (c)(2).

As to subsection (c)(1), the Board found the county's additional right-of-way taking following Tuscany's 2015 approval for the development created a hardship for Tuscany, "related to this specific piece of property." With respect to subsection (c)(2), the Board found Tuscany's proposal was "reasonable in both size and purpose" and the benefits of additional residential homes "substantially" outweighed any detriments.

The Board further determined Tuscany's amended application allowed for improvements consistent with the Municipal Land Use Law (MLUL), specifically "[t]o encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare." See N.J.S.A. 40:55D-2(a). Finally, the Board conditioned its approval on several requirements, such as compliance

with representations made during the hearing, providing a recorded deed delineating the riparian buffer zone to alert potential homeowners of its presence, and obtaining "all approvals required by any [f]ederal, State, [c]ounty, or [m]unicipal agency having regulatory jurisdiction over this development."

On March 9, 2020, plaintiffs appealed the Board's decision and amended resolution by filing a complaint in lieu of prerogative writs in which they requested the court reverse the Board's decision, contending it was "arbitrary, capricious, and unreasonable." Plaintiffs specifically claimed Tuscany's amended application was fatally flawed due to its failure to include an accurate survey. Further, plaintiffs argued the Board did not have the authority to approve a final site plan. Finally, plaintiffs contended the Board's decision was arbitrary and capricious because Tuscany did not address the possible impacts on neighboring properties, or how the approved variances ran afoul of Lakewood's Master Plan and zoning regulations.

After considering the parties' arguments and submissions, Judge Marlene Lynch Ford entered judgment in favor of defendants, dismissed plaintiffs' complaint, explained her decision in a written opinion, and issued a conforming order. The judge concluded "there was clearly substantial evidence to support the Board's determination that the requirements for the variance relief were

met," obligating the trial court "to give great deference to the weight afforded evidence given by the Board."

In contemplating the positive and negative criteria required to approve variance relief under N.J.S.A. 40:55D-70(c)(1), the judge explained the Board's decision was supported by positive criteria based on the "unusual condition of the property," "its location to an environmentally sensitive area," combined with the county's change in its right-of-way requirement. The judge also determined the negative criteria were met as Tuscany established "the detriments of granting relief would [not] outweigh the benefits." In support of this finding, Judge Lynch Ford relied on Tuscany's promise to erect the necessary protective fencing and bollards, its promised storm management plans, and traffic studies.

The judge also rejected plaintiffs' argument that the omission of an updated survey rendered the Board's decision arbitrary and capricious. Specifically, Judge Lynch Ford explained "the survey, although not part of the record, was . . . provided through testimony of expert opinion as to the location of the riparian buffer zone."

With respect to plaintiffs' claim the Board's decision was allegedly inconsistent with Lakewood's Master Plan, Judge Lynch Ford concluded an approval by the Board for variance relief "that is not strictly aligned with the

Master Plan" does not by itself render a Board's decision "arbitrary, capricious, or unreasonable." She specifically noted, Lakewood's Master Plan "recognized the unique population growth in [Lakewood] over the course of several years and include[d] a goal of providing adequate housing to meet future residential and non-residential growth."

As to plaintiffs' claim the Board lacked authority to grant a final site approval because Tuscany had yet to receive all other necessary approvals, the judge explained the MLUL did not require a specific order in which approvals needed to be obtained. Judge Lynch Ford noted it was commonplace for a Board's decision to conditionally require an applicant to obtain approval from all other necessary governmental agencies and the Board's decision was clearly "conditioned on obtaining other governmental approvals from agencies having regulatory control of the project." This appeal followed.

II.

On appeal, plaintiffs reprise the same arguments rejected by Judge Lynch Ford. First, they assert Tuscany's application was deficient as it failed to attach the updated survey in its submission to the Board, depriving plaintiffs' review of the survey as well as the opportunity to prepare a competing survey. Plaintiffs further contend Tuscany failed to present any evidence, testimonial or

otherwise, "addressing . . . the benefits or detriments to the zone from the proposed variances," and in reaching its conclusion the Board incorrectly focused solely on the hardship to Tuscany. Plaintiffs also argue the Board lacked the authority to grant final approval, absent "evidence [the additional and conditional approvals] had already been obtained."

Plaintiffs further contend the Board's decision was arbitrary and capricious as the amended application failed to "address potentially significant impacts on neighboring properties," and Tuscany did not offer any testimony regarding these impacts at the hearing. Plaintiffs argue Tuscany failed to establish hardship for the variances as it offered no testimony or evidence illustrating the plot of land being "exceptionally shallow, narrow, or of any unusual shape warranting a variance." Instead, plaintiffs claim the only hardship suffered by Tuscany due to the increased right-of-way requirement was financial, and Tuscany failed to offer any testimony properly addressing the positive or negative criteria as required under N.J.S.A. 40:55D-70(c).

III.

"Our standard of review for the grant or denial of a variance is the same as that applied by the Law Division." Advance at Branchburg II, LLC v. Branchburg Twp. Bd. of Adjustment, 433 N.J. Super. 247, 252 (App. Div. 2013).

"We defer to a municipal board's factual findings as long as they have an adequate basis in the record." Ibid. However, a zoning board's legal determinations are subject to de novo review. Jacoby v. Zoning Bd. of Adjustment, 442 N.J. Super. 450, 462 (App. Div. 2015). "[C]ourts ordinarily should not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law." Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58-59 (1999).

"[W]hen a party challenges a zoning board's decision through an action in lieu of prerogative writs, the zoning board's decision is entitled to deference." Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 229 (2013). "Courts give greater deference to variance denials than to grants of variances, since 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); see also Branchburg, 433 N.J. Super. at 253. "[T]he burden is on the challenging party to show that the zoning board's decision was 'arbitrary, capricious, or unreasonable.'" Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (quoting Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965)).

The Legislature has delegated to municipalities the power to regulate local land use through the MLUL, N.J.S.A. 40:55D-1 to -163. Where the proposed subdivision is not in compliance, planning boards also have the power to grant variances under N.J.S.A. 40:55D-70(c), commonly called "(c)" variances. N.J.S.A. 40:55D-70(c) states, in relevant part, that a Board has the power to grant variances:

> (1) [w]here: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or . . . an extraordinary and exceptional situation uniquely affecting a specific piece of property . . . the strict application of any regulation pursuant to . . . this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property . . . [or] (2) where in an application or appeal relating to a specific piece of property the purposes of this act . . . would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment.
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> [N.J.S.A. 40:55D-70(c).]

Under subsection (c)(1), an applicant must show that exceptional or undue hardship will result if the variance is not granted. Chirichello v. Zoning Bd. of Adjustment, 78 N.J. 544, 552 (1979). What is essential is that the unique condition of the property must be the cause of the hardship claimed by the applicant. Lang, 160 N.J. at 56.

The hardship criteria of a (c)(1) variance is unaffected by personal hardship, financial or otherwise. Ten Stary Dom P'ship. v. Mauro, 216 N.J. 16, 29 (2013). The focus is "whether the strict enforcement of the ordinance would cause undue hardship because of the unique or exceptional conditions of the specific property." Lang, 160 N.J. at 53. The hardship standard does not require the applicant to prove that without the variance the property would be zoned into inutility. Id. at 54. The applicant need only demonstrate the property's unique characteristics inhibit the extent to which the property can be used. Id. at 55.

With respect to (c)(2) applications, our Supreme Court has stated:

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

A (c)(2) variance, then, is not based upon the "hardship" but "requires a balancing of the benefits and detriments from the grant of the variance."

Bressman v. Gash, 131 N.J. 517, 523 (1993). The analysis focuses on advancing the purposes of the MLUL and the benefits to the community.

In sum, the application for a variance under (c)(2) requires:

> (1) [that it] relates to a specific piece of property; (2) that the purposes of the [MLUL] would be advanced by a deviation from the zoning ordinance requirement; (3) that the variance can be granted without substantial detriment to the public good; [and] (4) that the benefits of the deviation would substantially outweigh any detriment . . . .
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> [William M. Cox & Stuart R. Koenig, New Jersey Zoning and Land Use Administration, § 29-3.3 at 441 (2023) (citations omitted).]

The MLUL further provides that a (c) variance under either subsection cannot be granted unless the applicant establishes what is colloquially referred to as the negative criteria, proving that "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; see also Lang, 160 N.J. at 57 ("Whether a . . . variance is sought under subsection (c)(1) or (c)(2), the applicant must also satisfy the familiar negative criteria . . . .").

The "negative criteria" are not satisfied where "merely the purposes of the owner will be advanced." Kaufmann, 110 N.J. at 563. Rather, the community

must receive a benefit due to the fact that the variance represents a better zoning alternative for the property. Ibid. Thus, the focus of the "negative criteria" is on the characteristics of the land that present an opportunity for improved zoning and planning for the benefit of the community. Ibid. The "negative criteria" also focus on the impact that the variance will have on the specific adjacent properties affected by the deviations from the ordinance, Lang, 160 N.J. at 57, as well as any detriment to the zoning plan, Kaufmann, 110 N.J. at 565.

Further, "it is well settled that the Board 'has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal.'" Kramer, 45 N.J. at 288 (quoting Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (App. Div. 1960)); see also Bd. of Educ. of Clifton v. Zoning Bd. of Adjustment, 409 N.J. Super. 389, 434 (2009) ("Zoning boards may choose which witnesses, including expert witnesses, to believe.").

Pursuant to these principles and having thoroughly reviewed the record, we affirm for the reasons expressed in Judge Lynch Ford's thorough and well-written opinion. It is clear to us the judge considered both N.J.S.A. 40:55D-70(c)(1) and (c)(2) in issuing her decision. We are satisfied the judge properly considered the positive and negative criteria required under subsection (c) in

concluding the Board's determination was supported by substantial and credible evidence in the record.

First, the Board specifically addressed the advancement of the purposes of the MLUL in its amended resolution and determined Tuscany's application, which allowed for the creation of residential homes, substantially outweighed any detriments impacting the neighboring lots. That finding was supported by both MacFarlane's and Flannery's testimony and Tuscany's representations it would construct fences to protect vegetation, erect bollards to discourage trespassers, and agree to one-way traffic flow.

We also find unpersuasive plaintiffs' contention the Board's decision was arbitrary and capricious because it violated Lakewood's Master Plan and negatively effects housing density for the surrounding lots. The variances sought and obtained by Tuscany did not increase the overall development of the lots. Rather, the amended application was consistent with the original development plans after considering the effect on the development as a result of the county's increase in the size of its right-of-way. The Board's decision had no substantive effect on the development's overall density and the variances consistent with the original plan to construct twenty homes.

To the extent we have not addressed the remaining arguments raised by plaintiffs it is because we have determined they lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.