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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1135-21

OCEAN MENTAL HEALTH SERVICES, INC.,

Plaintiff-Appellant,

v.

170 ROUTE 9, LLC, and BERKELEY TOWNSHIP ZONING BOARD OF ADJUSTMENT,

Defendants-Respondents.

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Argued February 6, 2023 – Decided July 10, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3100-20.

Bernard M. Reilly argued the cause for appellant (Gasiorowski & Holobinko, attorneys; R.S. Gasiorowski, of counsel and on the briefs; Cathy S. Gasiorowski, on the briefs).

Victor J. Herlinsky argued the cause for respondent 170 Route 9, LLC (Sills Cummis & Gross PC, attorneys; Victor J. Herlinsky and Kenneth F. Oettle, of counsel and on the brief; Erin E. Barrett, on the brief).

Alexander Pavliv argued the cause for respondent Berkeley Township Zoning Board of Adjustment (Pavliv & Rihacek, LLC, attorneys; Alexander Pavliv, on the brief).

PER CURIAM

In this land use action, plaintiff Ocean Mental Health Services, Inc. appeals from the November 19, 2021 Law Division order dismissing its complaint with prejudice. Plaintiff filed a complaint in lieu of prerogative writs challenging the decision of defendant Berkeley Township Zoning Board of Adjustment (Board). The Board granted defendant 170 Route 9, LLC (applicant) use and floor area ratio variances to construct and operate a detoxification center and an inpatient aftercare treatment facility in Berkeley Township (Township). Having considered the arguments and applicable law, we affirm.

I.

We glean these facts from the record. In December 2019, the applicant applied for a building permit to construct a detoxification center and an inpatient aftercare treatment facility at 170 Route 9 in Bayville (the property), located in

the Town Center 1 (TC1) Zone, a small-scale commercial subdistrict in Berkeley Township. Plaintiff, a New Jersey non-profit corporation that operates approximately twenty-three community mental health centers throughout the State, operates one of its mental health centers adjacent to the applicant's proposed development site. In addition to the mental health center, plaintiff operates a special education grammar school and high school at the same location.

The Township's zoning official denied the application because: (1) the applicant's proposed "detox and [aftercare] facilities [were] not permitted uses in the TC1[zone]"; (2) the proposal did not "meet the required minimum number of parking spaces for that type of use"; (3) the "proposed lot coverage of 40.4%" exceeded the TC1's maximum allowable impervious coverage of 30%; and (4) the "[m]ajor site plan and use variance[s]" required the Board's approval.

The applicant subsequently sought approval of use, floor area ratio, and bulk variances from the Board. The Board elected to bifurcate the application process by first addressing the use and floor area variances before addressing the bulk variances in a subsequent site plan approval process. As a result, the Board considered the use and floor area variances at a public hearing conducted on September 9, 2020. To support its proposal, the applicant presented

testimony from Matthew Wilder, a professional engineer/planner; Kevin Stewart, a detox/aftercare expert; Daniel Condatore, an architect; and Scott Kennel, a traffic expert. There were no objectors and no opposing testimony offered at the hearing.

The applicant's witnesses provided a general overview of the proposal to construct "a detox facility in the front of the property and an inpatient facility in the rear," both facilities to be "licensed by the State" to treat "drug and alcohol addiction." The property, which was approximately 3.564 acres, would have a 200-foot-long driveway "coming from Route 9" with "gated access" that would be "fully monitored [twenty-four] hours a day by on-site guards." Past the gate, there would be "circular navigation around the entirety of the [first] building," which would be "the detox building," with "a drop-off area on the east side" and "[twenty-one] parking spaces" to accommodate "[twenty-five] full-time employees," with a maximum of fourteen employees on a shift.

Like the detox building, the inpatient facility in the rear would be "a three-story building." In addition to exam rooms, community rooms, and office space, the inpatient facility would include "71 [patient] rooms and 142 beds." The building would have twenty-six parking spaces to accommodate "a total staff of [forty-five] employees," with a maximum of twenty-two employees on a shift.

Unlike the detox facility, visitors would be permitted at the inpatient facility but on an "extremely limited" basis and "on appointment . . . only." As a result, "the traffic generat[ed]" would be "on the lower side" than "more intensive use[s]," and "the parking proposed [would] be adequate to accommodate the peak demands for the two buildings."

The proposal justified exceeding "the floor area ratio" based on "the minimum traffic . . . and parking demand[s] for the[] proposed uses." Aesthetically, the proposal encompassed a landscape plan of "approximately 250 trees and 75 shrubs" with "curb and sidewalk" extensions "along [the] property frontage" in order to "beautify[] the site from the inside," "screen[] and buffer[] th[e] site . . . from Route 9," and "reduc[e] the storm water runoff."

Significantly, Wilder testified that the proposed uses were "inherently beneficial uses." In support, Wilder highlighted a 2016 study that ranked Ocean County second amongst New Jersey counties for most opioid overdoses. He also cited legislation declaring alcohol and drug addiction "major health problems facing the residents of the State" and calling for the establishment of treatment programs throughout the State. Additionally, he referred to caselaw classifying drug treatment facilities as inherently beneficial uses under N.J.S.A. 40:55D-70.

Wilder pointed out that because the property had "no abutting residential neighbors," there was "no real detrimental impact to the public related to th[e] application." Wilder observed that the property's adjacent uses included a salvage yard and plaintiff's mental health facility, which he described as a "somewhat similar use." According to Wilder, the "nearest school" was "about 4,300 feet south down Route 9." Wilder also noted that although the zoning ordinance allowed the TC1 zone to "be developed with . . . multi[-]tenant retail spaces," there had yet to be "significant or substantial redevelopment in th[e] area." Wilder explained that due to its "depth" and "limited frontage," it would be difficult to develop the property as a retail space because "retail spaces that sit back . . . 700 feet from the road" typically struggle. Wilder stressed that the proposal would advance the aims of the zoning ordinance by adding "high quality architecture and landscaping" to the area.

The Board raised concerns about security at the facility. One Board member asked about fencing and whether the facility would admit "people [who were] considered dangerous." Stewart responded that people with certain criminal convictions would not be admitted to the facility. Another Board member observed that Wilder had failed to account for a nearby school in his report. Additionally, Board engineer Ernie Peters inquired whether the proposal

would ensure that future surrounding developments would have shared interconnected access points to Route 9 in accordance with the zoning plan. After receiving assurances that the concerns would be addressed in greater detail during the subsequent site plan approval process, the Board approved the use and floor area ratio variances.

On September 23, 2020, the Board adopted a resolution memorializing its decision granting the variances. The resolution included summaries of the witnesses' testimony, which was accepted by the Board as unopposed. The resolution contained the following conclusions:

> The Board is satisfied that the purposes of the Municipal Land Use Law will be advanced by the deviation from the ordinance and that the benefits of this deviation will [s]ubstantially outweigh any detriment as an appropriate use, will promote the public health, safety, morals and general welfare, wi[ll] provide light, air, and open space and [p]rovide for additional uses associated with the permitted business use.
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> . . . The Board is satisfied that the granting of the variances as recited above will not have a substantial detriment to the public good and will not substantially impair the intent and purposes of the [z]oning [p]lan and [z]oning [o]rdinance of the Township of Berkeley.

In an apparent drafting error, the resolution mistakenly stated that the Board had also approved bulk variances. However, the resolution's title correctly reflected that the Board had only approved use and floor area ratio variances.

In its ensuing complaint challenging the Board's decision to grant the variances, plaintiff asserted, among other things, that the Board's decision was "arbitrary, capricious, unreasonable and contrary to law" because the applicant submitted insufficient proofs to justify granting the variances. Further, the complaint asserted that the Board failed to consider the Township's newly adopted ordinance that recognized behavioral healthcare facilities and detoxification centers "as a [c]onditional [u]se in Berkeley Township's Forest Area – Light Industrial Zone," and failed to address the requirements imposed by the ordinance upon such uses.[1] Plaintiff also alleged that the resolution's "findings of fact and conclusions of law" were inadequate to justify granting the relief sought.

Following a hearing conducted on October 4, 2021, the trial judge dismissed plaintiff's complaint with prejudice, "find[ing] that the Board's decision to grant variance relief to the [a]pplicant was supported by substantial

[1] The ordinance was adopted on September 21, 2020, two days before the adoption of the resolution granting the applicant's variances.

evidence [in] the record, and was not arbitrary, capricious, or unreasonable." In a written opinion issued on November 19, 2021, the judge rejected plaintiff's argument that the Board "circumvented the intent of the [g]overning [b]ody" by granting the variance for the TC1 zone when "the [g]overning [b]ody [had] adopted an [o]rdinance conditionally permitting [a]pplicant's proposed uses in the Forest Area Light Industrial Zone."

The judge explained that "[a]lthough the Township authorized this use as a conditional use in the Forest Area Light Industrial Zone, an applicant retain[ed] the right to make application in any other zone for a use variance that would authorize th[e] use. That is the very essence of the nature of a variance." Further, the judge agreed that the applicant was not required to meet the "zoning requirements of the Forest Area Light Industrial Zone" because "[t]he [p]roperty [was] not located in that zone, and the Municipal Land Use Law d[id] not require a Board to apply conditional use requirements of another zone."

Instead, the judge observed that to obtain a use variance, the applicant had to satisfy the requirements of N.J.S.A. 40:55D-70(d) by demonstrating that there were "special reasons" for granting the variance (positive criteria), and that the variance "'[could] be granted without substantial detriment to public good and [would] not substantially impair the intent and purpose of the zone plan and

zoning ordinance'" (negative criteria). After summarizing the Board's findings, the judge agreed that the applicant's detox center and residential drug treatment facility were "[i]nherently beneficial uses" and concluded that the Board's determination that the applicant's proposal satisfied both the positive and negative criteria was supported by the record. This appeal followed.

II.

"Our review of 'a municipal board's action on zoning and planning matters, such as variance applications, [is] limited to determining whether the board's decision was arbitrary, unreasonable, or capricious.'" Columbro v. Lebanon Twp. Zoning Bd. of Adjustment, 424 N.J. Super. 501, 508 (App. Div. 2012) (alteration in original) (quoting Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 198 (App. Div. 2001)). "A board acts arbitrarily, capriciously, or unreasonably if its findings of fact in support of a grant or denial of a variance are not supported by the record, or if it usurps power reserved to the municipal governing body or another duly authorized municipal official." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013) (citation omitted) (first citing Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998); and then citing Leimann v. Bd. of Adjustment of Cranford, 9 N.J. 336, 340 (1952)). Thus, "[t]he

crucial question for our review is 'whether the board followed the statutory guidelines and properly exercised its discretion.'" Columbro, 424 N.J. Super. at 508 (quoting Med. Ctr. at Princeton, 343 N.J. Super. at 199). We also review the "trial court's interpretation of the law and the legal consequences that flow from established facts" de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Plaintiff agrees that the applicant's "proposed uses are inherently beneficial" but argues that the Board's decision to grant the use variance was arbitrary, capricious, and unreasonable because the Board did not utilize the balancing test articulated in Sica v. Board of Adjustment of Wall, 127 N.J. 152, 165-66 (1992), to properly assess the positive and negative criteria. Plaintiff also contends that by ignoring the "carefully circumscribed conditional requirements which make the proposed uses permitted in Berkeley Township's Forest Area Zone," "[t]he grant of the use variance amounts to spot zoning," and the Board "deprived itself of the ability to conduct a [meaningful] analysis of whether these uses . . . cause substantial impairment to Berkeley Township's [z]oning [o]rdinance or [m]aster [p]lan."

The Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163, provides, in relevant part, that boards of adjustment are empowered to, "[i]n particular cases

for special reasons, grant a variance to allow departure from regulations . . . to permit: (1) a use or principal structure in a district restricted against such use or principal structure, . . . [and] (4) an increase in the permitted floor area ratio." N.J.S.A. 40:55D-70(d). However, the provision includes the following limitation:

> No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, 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.
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> [N.J.S.A. 40:55D-70.]

In Sica, our Supreme Court interpreted the statute as establishing both positive and negative criteria. The Court explained:

> The statute requires proof of both positive and negative criteria. Under the positive criteria, the applicant must establish "special reasons" for the grant of the variance. 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 the purpose of the zone plan and zoning ordinance."
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> [Sica, 127 N.J. at 156.]

"If a proposed use qualifies as an 'inherently beneficial' use, the burden of proof of an applicant for a use variance is 'significantly lessened' with respect to

both the positive and negative criteria." Salt & Light Co. v. Willingboro Twp. Zoning Bd. of Adjustment, 423 N.J. Super. 282, 287 (App. Div. 2011) (quoting Smart SMR, 152 N.J. at 323). "'An inherently beneficial use'" is presumed to satisfy the positive criteria, and it does not have to satisfy an "enhanced quality of proof" for the negative criteria, as set forth in Medici v. BPR Co., 107 N.J. 1, 21-24 (1987). Salt & Light Co., 423 N.J. Super. at 287 (quoting Smart SMR, 152 N.J. at 323). "Instead, the satisfaction of the negative criteria involves weighing the evidence relating to the positive and negative criteria under the procedures set forth in [Sica, 127 N.J. at 165-66] . . . ." Salt & Light Co., 423 N.J. Super. at 287.

In Medici, the Court declared that "if the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use." 107 N.J. at 4. Additionally, the Court "require[d] an enhanced quality of proof, as well as clear and specific findings by the board of adjustment, that the grant of a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance." Ibid. The Court explained that "[s]uch proofs and findings must satisfactorily reconcile the grant of a use variance with the ordinance's

continued omission of the proposed use from those permitted in the zone." Ibid. The Court stated that "[t]his added requirement will apply in all use-variance cases." Id. at 4-5.

In Sica, the Court clarified that Medici's "enhanced standard does not apply to inherently beneficial uses." Sica, 127 N.J. at 155. The Court explained that "[f]or inherently beneficial uses, [it] ha[d] never required . . . that the site be particularly suitable." Id. at 160. Instead, the Court stated that determining whether to grant a use variance for an inherently beneficial use requires "a balancing of positive and negative criteria." Id. at 164. To that end, the Court offered "the following procedure as a general guide" for municipal boards:

> First, the board should identify the public interest at stake. . . .
>
> Second, the [b]oard should identify the detrimental effect that will ensue from the grant of the variance. . . .
>
> Third, in some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use. . . .
>
> Fourth, the [b]oard should then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.
>
> [Id. at 165-66.]

N.J.S.A. 40:55D-70(d) "substantially codifie[d] the Sica balancing test." Smart SMR, 152 N.J. at 324. Thus, "even with an inherently beneficial use, an applicant must satisfy the negative criteria." Ibid.; see also Salt & Light Co., 423 N.J. Super. at 287 (observing that for inherently beneficial uses, "satisfaction of the negative criteria involves weighing the evidence relating to the positive and negative criteria").

Applying these principles, we are convinced the Board did not abuse its discretion in concluding that the applicant satisfied the positive and negative criteria under Sica. Significantly, the Board hearing included testimony and discussion regarding the public interests at stake, the potential detrimental effects of the proposed use, and the balancing of the positive and negative criteria.

Pointing to the property's proximity to its property, plaintiff asserts that the applicant's property is not particularly suited to the proposed use and the Board erred in determining that the proposed use satisfied the positive criteria. However, because the suitability of the site is irrelevant to determining whether an inherently beneficial use, like the one at issue here, satisfies the positive criteria, we reject plaintiff's contention.

Likewise, contrary to plaintiff's suggestion, the Board was not required to consider the Township's conditional use requirements for detox centers and residential drug treatment facilities in the Forest Area Light Industrial Zone when considering a use variance application for the TC1 Zone.[2] "[T]he analyses of use variances and conditional use variances are fundamentally different" and proceed on "entirely different premise[s]." TSI E. Brunswick, LLC v. Zoning Bd. of Adjustment of E. Brunswick, 215 N.J. 26, 44 (2013). "The former proceeds in the context of a use that the governing body has prohibited, whereas the latter proceeds in the context of a use that, if it complies with certain conditions, is permitted." Ibid.

Finally, plaintiff argues the Board's resolution was "deficient" because "[m]ere recitals of testimony together with a parroting of the statutory language is inadequate," underscoring the Court's warning in Medici about conclusory resolutions being susceptible to challenges. Plaintiff contends the resolution

[2] Specifically, plaintiff argues that because "the [a]pplicant's proposal does not comply with [three] of the [ten] conditional requirements" imposed by the "recently adopted . . . [o]rdinance making [b]ehavioral [h]ealth [c]are [f]acilities and [r]esidential [m]edical [d]etoxification [c]enters conditionally permitted uses in its Forest Area Zone," the applicant "did not demonstrate its proposed use is peculiarly fitted or particularly suitable for the [s]ubject [p]roperty." According to plaintiff, the three conditional requirements the applicant cannot meet are its proximity to another mental health facility (plaintiff's), its proximity to a school (plaintiff's), and its excess patient capacity.

lacked "sufficiently detailed findings and conclusions" and included approval for bulk variances, which "were not even before the . . . [b]oard for discussion."

N.J.S.A. 40:55D-10(g)

> requires a municipal agency to reduce each decision on any application to writing in the form of a resolution that includes findings of fact and conclusions of law. The resolution may be adopted at the time of the decision, at a meeting held within forty-five days of the decision, or in compliance with a court order compelling action within a specified time.
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> [N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment of Weehawken, 370 N.J. Super. 319, 332 (App. Div. 2004).]

"The factual findings set forth in a resolution cannot consist of a mere recital of testimony or conclusory statements couched in statutory language." Id. at 332-33. "Rather, the resolution must contain sufficient findings, based on the proofs submitted" to permit a reviewing court to determine whether the board of adjustment "analyzed the applicant's variance request in accordance with the [Municipal Land Use Law] and in light of the municipality's master plan and zoning ordinances." Id. at 333. "Without such findings of fact and conclusions of law, the reviewing court has no way of knowing the basis for the board's decision." Ibid.

In Medici, the Court explained that a board's "findings must satisfactorily reconcile the grant of a use variance with the ordinance's continued omission of the proposed use from those permitted in the zone" and "provide a more substantive basis for the typically conclusory determination that the variance 'will not substantially impair the intent and purpose of the zone plan and zoning ordinance.'" 107 N.J. at 4 (quoting N.J.S.A. 40:55D-70(d)).

To that end, the Court offered the following guidance:

> [I]n the event a use variance is challenged, a conclusory resolution that merely recites the statutory language will be vulnerable to the contention that the negative criteria have not been adequately established. The board's resolution should contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the master plan and zoning ordinance, and determined that the governing body's prohibition of the proposed use is not incompatible with a grant of the variance. If the board cannot reach such a conclusion, it should deny the variance.
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> [Id. at 23.]

Here, we are satisfied that the Board's resolution complied with the requirements of N.J.S.A. 40:55D-10(g) and informs us of the basis for the Board's decision. Because there was no opposition at the hearing, the Board accepted the testimony of the applicant's witnesses and made findings by summarizing each expert's testimony. Further, the resolution analyzed the

applicant's variance request based on the competent expert testimony in accordance with the statute and the municipality's master plan and zoning ordinances.

Although the resolution could have provided a more robust discussion of the zoning plan and ordinance, we are satisfied that the resolution is adequate as written. Moreover, a drafting error in a resolution does not necessarily invalidate a board's decision as suggested by plaintiff. See Park Ctr. at Route 35, Inc. v. Zoning Bd. of Adjustment of Woodbridge, 365 N.J. Super. 284, 287 (App. Div. 2004) (affirming a decision where the record "demonstrate[d] that the [b]oard intended to impose, even though not stated in its resolution, a condition for its approval").

Affirmed.

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

CLERK OF THE APPELLATE DIVISION