New Jersey
Appleseed

November 9, 2014

Mr. Joseph H. Orlando
Clerk, Appellate Division
Hughes Justice Complex
25 W. Market Street
P.O. Box 006
Trenton, New Jersey 08625-0006

Re: Hartz Raymond Blvd, Limited Partnership v. Zoning Bd. of Adjust., et al. and Ada Caro, et al., v. 28 McWhorter Street LLC., et al.
Appellate Docket No. A-003648-13T3

Dear Appellate Judges and Mr. Orlando:

Please accept this Letter Brief in lieu of more formal Reply Brief on behalf of the Caro Plaintiffs/Appellants in this matter (the "Objectors"). In its response, Defendant 28 McWhorter Street, LLC (the "Applicant") hides behind the decision of the trial court, which merely rubberstamped the ill-considered and haphazard decision of the Newark Zoning Board of Adjustment (the "Board"). A careful application of the principles of law governing a d(1) variance to the record at hand, rather than a mere repetition of Applicant's numerous misrepresentations of Newark's land use and planning documents, indicates that the Board's decision cannot be sustained.

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Objectors reply to arguments raised by the Applicant as follows:

I. CITY COUNCIL'S FAILURE TO HEAR AND DECIDE OBJECTORS' APPEAL DOES NOT CONSTITUTE A DELIBRATE AFFIRMATION OF THE BOARD OF ADJUSTMENT'S GRANT OF d(1) VARIANCE.

Both the Board and the Applicant defend the Board's decision in this matter by implying that the City Council's failure to hear, review and render a decision upon Objectors'

appeal constitutes a deliberate affirmation of the Board's decision that should be taken into consideration by a reviewing court. Board's Brief at pg. 3 ("Bd. Bf. at __'); Applicant's Brief at pp.50-52 ("App. Bf. at ___). Such an assertion is wrong as a matter of law and fact.

In Committee for a Rickel Alternative v. City of Linden, 111 N.J. 192 (1988), the N.J. Supreme Court made clear that a governing body's failure to hold a hearing, conclude a review and render a decision within 95 days from the date a zoning board's decision is published, constitutes nothing more than a "statutory affirmance" of the Board's grant of the variance. Id. at 199. According to the Court, N.J.S.A. 40:55D-17(c) "reflects a legislative 'purpose . . . to require expeditious disposition of appeals by the governing body,'" id. at 198 (citations omitted), not a basis on which courts may interpret municipal inaction as approval on the merits. Cf. Feiler v. Fort Lee Bd. of Adjustment, 240 N.J. Super. 250, 251 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991)(where court did not address applicants' contention that the Council's decision by "consensus" not to hear business owner's appeal constituted an affirmation of the zoning board's action). Accordingly, the Newark City Council's failure to exercise its option to get involved when its zoning board granted a d(1) variance in this

matter cannot be found, as a legal matter, to constitute a deliberate approval of that decision.

There is also nothing in the record that indicates or explains why Objectors' appeal, which is filed with the City Clerk under N.J.S.A. 40:55D-17, did not appear on the City Council's agenda. There is little doubt that the record indicates that the City Council was active between October 15, 2012 and January 22, 2013, as the Applicant points out. (App. Bf. at 52). However, full agendas with highly pressing matters concerning the budget do not prove that any one person or group of people made a conscious decision not to hear the appeal; and even if there were such a decision, that municipal inaction was tantamount to approval of the underlying decision.

A review of newspapers articles appearing at that time, provide a better explanation for the City Council's failure to hear this appeal. Though City Council agendas were full and the Council active, it appears that the Council was actively fighting among itself and with the Mayor over many controversial matters in the middle of a General Election, where at least one council member was elected to Congress, and needed to be replaced.[1] Whether the Council as a whole, or any member, was

[1] See e.g., David Giambusso, The Star-Ledger, "Battle over Newark Water Agency continues to flow," September 16, 2013; "Speculation Grows over Newark City Council seat held by Payne," November 18, 2012; "Citizens rush council members as chaos

paying attention to what the Board was doing on any one application is mere speculation. And that is the reason why this Court may not consider anything short of an affirmative vote by the majority of the council, after a hearing and *de novo* review, to be an approval by the governing body.

II. NEITHER CHANGED MARKET CIRCUMSTANCES IN 2008 NOR HISTORICAL BAN ON PARKING LOTS AS A PRINCIPLE USE JUSTIFY GRANT OF A d(1) VARIANCE IN 2012.

Throughout its brief, the Applicant seeks to justify its use variance by "changed [economic] circumstances." E.g., App. Br. at 43. The 2008 nationwide recession may explain why the Applicant did not go forward with its mixed-use, seven story residential project for the site (which was approved by the Board in 2006), id. at pp. 7,14; but it is not clear how such market downturn relates to an analysis of either the positive[2] or negative criteria with respect to its application in 2012.

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erupts," November 20, 2012; "Division mounts as Newark Council, Cory Booker vote again on Speight," December 5, 2012.

[2] It is an accepted principle of New Jersey land use law, that the alleviation of financial hardship "is not a purpose of zoning or, by itself, a special reason for a use variance." Cox, William, New Jersey Zoning and Land Use Administration, §7-4.3 (Gann 2010). Case law makes it clear that the "inability to make the most profitable use of property will *not* qualify" as an undue hardship, id. at §7-4.3(d); and it is only when "an area is zoned in such a way as to preclude any possible profitable use," that an owner, such as Applicant may be able to demonstrate undue hardship to justify the grant of a d(1) variance. Ibid. No such showing has been made here.

Notwithstanding this lack of clarity, Applicant appears to be saying that the 2008 economic downturn rendered the 2004 update of the Land Use Element of the Master Plan moot. See App. Br. at pp. 14, 43 (referring to the 2004 Land Use Plan as "outdated"). That is, if moot, the grant of a variance for a surface parking lot cannot substantially impair the intent of an "outmoded" Master Plan. (App. Br. at 20-21). The Applicant, however, does not specify what aspect of that 2004 Plan it claims was no longer feasible due to the recession: its designation of the McWhorter property as within the S-T transitional district (Pa424), or its decision to continue Newark's policy of making off-street "Parking" solely an accessory use (Pa430)? In any event, Newark's post-recession planning documents, Newark's 2009 Master Plan Re-examination Report, and the 2012 Mobility Element continue Newark's ban of parking lots as a principle use, and share the 2004 Master Plan's hostility to surface lots. Indeed, the 2012 Master Plan, which rezones the Applicant's property as mid-rise residential, further reduces the requirements for off-street accessory parking in this zone. (Pa458). In this way, the Board's decision to grant a variance for a surface parking lot in 2012 does substantially impair the 2004 Master Plan and 2012 Mobility Report of the 2012 Master Plan, contrary to Applicant's empty assertion otherwise.

The facts of this case also make Applicant's macro-change in economic circumstances argument irrelevant to the standards governing its d(1) application. Although the Applicant did not pursue its development plans that were approved in 2006, it continued to lease the "light industrial building" then existing on the site to a church for a period of at least 5 years – a permitted use under the S-T designation, and the zoning ordinance. Plaintiffs' Initial Brief at p.7 ("Pls. Br. at __). The record is vague as to why the Applicant ceased renting that building, though it is apparent that the Applicant proposed demolishing the building as part of its use variance application, simply because the Applicant did not want to replace the building's roof. Id. at 8. However, the fact that the Applicant thought that employing his property as a commercial parking lot – a nonconforming use – would be more profitable than continuing to lease the existing building is not per se a sufficient reason for granting a variance. As the Appellate Division stated in Wajdengart v. Broadway-Thirty-Third Corp., 66 N.J. Super. 346, 356 (App. Div. 1961):

> [M]erely because it would be more beneficial financially to the owner to utilize the land as a parking lot is not a "special reason" contemplated by the statute.

In addition to the above "undue financial hardship" argument, both the Applicant and the Board seemingly justify the

Board's grant of the variance by claiming that "paved parking lots are not allowed in any zone in the City," (Bd. Br. at 3), and thus all surface parking lots that do exist in the "City do so by virtue of a use variance." App. Br. at 40. This exaggeration ignores the fact that parking lots are prohibited pursuant to Newark's 1959 Zoning Ordinance, as amended, only as a principle use; and thus, there are numerous parking lots throughout the City, surface and deck, which are accessory to residences, businesses and offices, that did not require Board approval.[3] In any case, as was the case with changed economic circumstances, it is also unclear how this "comprehensive ban" justifies a use variance in this zone and on this lot.

Perhaps, Respondents intend for this fact to inform the "benefit" prong of the positive criteria. However, a general need for more off-street parking in the City of Newark does not itself justify permitting the Applicant to use the McWhorter property as a parking lot in this formerly industrial, but becoming more residential, S-T District. New Jersey law is clear: The benefit that must be established may not arise from the use itself, but must be directly tied to the development of a site that is particularly appropriate for that use (due to its physical characteristics including its location). See Pls. Br.

[3] This broad assertion also glosses over the fact that parking lots may be a permitted use in one of the many redevelopment

at 29-34. Neither the Applicant nor the Board have said anything new in their response papers that should persuade this Court that the Board made any findings of fact that, as a matter of law, sufficiently support its tacit conclusion that the Applicant satisfied the "particularly well-suited" test as set forth in Price v.Himeji, LLC, 214 N.J. 263 (2013).[4]

III. TRIAL COURT FAILED TO SCRUTINIZE THE BOARD OF ADJUSTMENT'S GRANT OF A d(1) VARIANCE IN THE MANNER REQUIRED BY LAW.

Although it is evident that a reviewing court may not substitute its judgment for that of a zoning board, in the case of a grant of a d(1) variance, it cannot simply rubberstamp a board's decision either. While the court's standard of review

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ordinances governing Newark's wards.

[4] Applicant, however, does present a description of Newark's traffic regulations concerning parking in the area that was not specified before the Board. App. Br. at 19 n.7. It asserts that parking on the south side of McWhorter is prohibited. Review of the ordinance cited, however, indicates that such prohibition may have been repealed. That said, McWhorter runs north/south and so it has no south side. Moreover, when looking at Google street view, there is parking on both sides of the street. Also, Applicant states that there is permit parking on Hamilton and McWhorter so parking cannot in fact still be prohibited on McWhorter. Moreover, permit parking is not limited to businesses, as Applicant also states. It is permitted between 9 and 5 for a car that has a residential permit; a car that parks for 4 or less hours, and a car that is owned by a business. The same ordinance that allegedly prohibits parking on McWhorter does not mention the east side of Union Street as Applicant represents, and with respect to street cleaning, the Applicant seems to be arguing that 8 hours a week of decreased street parking justifies yet another parking lot that operates for 168 hours a week.

is often described as deferential,[5] the court must make sure that the zoning board, "in the guise of a variance proceeding, [does not] usurp the legislative powers reserved to the governing body of the municipality to amend or revise the zoning plan." Price v.Himeji, LLC, 214 N.J. at 285 (quoting Feiler v. Fort Lee Bd. of Adjustment, supra., 240 N.J. Super. at 255).[6] In this case, it is apparent that the trial court failed to do so.

First, Applicant's inclusion of whole passages of the trial court's opinion in its brief in which the court merely repeated statements made by the Applicant's planner (both within and outside of his expertise), without subjecting them to further scrutiny, does not make those statements credible or reasonable.

Second, unlike the situation in Lang v. Zoning Bd. of Adjustment of Borough of North Caldwell, 160 N.J. 41, 61 (1999)(involving a c(1) variance), cited by Applicants, there is

[5] It is generally accepted that the arbitrary and capricious standard of review, applicable to review of municipal action, is analogous to the substantial evidence rule. Klug v. Bridgewater Tp. Planning Bd., 207 N.J. Super. 1, 13 (App. Div. 2009). Pursuant to this standard, the reviewing court must determine whether there is sufficient "competent, relevant and reasonably credible evidence" in the record to support the board's factual findings and legal conclusions, id. at 9. Interpretations of law and the application of law to facts are not entitled to any special deference and are subject to *de novo* review. Ibid.

[6] For this reason, use variances should be the exception (Pls. Bf. at 27), and courts must be "particularly vigilant" when reviewing approvals of use variances for commercial, non-inherently beneficial uses, such as the use herein. Medici v. BPR Co., 107 N.J. 1, 25 (1987).

evidence in the record contradicting the Board's findings regarding the negative criteria. In Lang, the court found that there was no evidence in the record that contracted the board's decision. Here, there were numerous objectors who testified as to several negative impacts (i.e., expected increase in traffic during certain hours, increased pollution and decreased air quality, increased crime on the property, and increased flooding), based on their personal experience with surface parking lots already existing in the neighborhood. The Board completely ignored those concerns, and did consider them in its determination of whether the variance would be a substantial detriment to the public welfare. As will be explained infra. Point VI, the Board should have acknowledged their testimony, and made findings of credibility. It did not do so, and, as a result, its decision with respect to this prong is arbitrary and capricious.

Finally, this is not a case where there is conflicting testimony between two experts and the Board simply exercised its discretion to decide which testimony it will accept, as in Klug v. Bridgewater Tp. Planning Bd. 207 N.J. Super at 13 (conflicting expert testimony with respect to the EIS; where application had to be approved, though board was permitted to impose varying conditions), also cited by the Applicant. Here, the testimony of the Applicant's planner seriously misquoted

certain City land use and planning documents, and thus, the record indicates that it was unreasonable for the Board to accept those statements, without making certain that they were consistent with the referenced documents. This abuse of discretion is underscored by the Board's simultaneous rejection of its own planner's report, which accurately described the vision and goals of those same documents.

In short, if the trail court had exercised the appropriate degree of vigilance, and had applied the correct level of scrutiny, it is difficult to conceive of how it could have concluded that tearing down an existing zone conforming building to construct a non-conforming surface parking lot in an area that already had a dozen other surface parking lots presented "exceptional circumstances" justifying the Board's grant of a use variance. It defies logic that the Board could grant twelve "d" variances, while still retaining any semblance of propriety. See Medici v. BPR Co, supra., 107 N.J. at 18-22(where court held that a large number of nonconforming uses in the vicinity of the same type as the use applied for constitutes a significant reason not to grant the variance). Hopefully, this Court, unlike the trial court, will put an end to this practice, will repair the integrity of Newark's the Zoning Ordinance, Master Plan and planning process, and will finally establish that the Zoning Board is not Newark's Governing Body or its Planning Department.

IV. NEITHER AESTHETIC IMPROVEMENT NOR RELIEF FROM TRAFFIC CONGESTION CONSTITUTES A'SPECIAL REASON' TO JUSTIFY A d(1) VARIANCE FOR A NEW NONCONFORMING USE.

In its brief, Applicant makes the sweeping statement that "each purpose set out in N.J.S.A. 40:55D-2 may support a "d" variance." App. Br. at 28-29. It cites to three cases, but fails to inform the court that each involve a "d" variance authorizing the expansion of a pre-existing, nonconforming use. See Burbridge v. Mine Hill Tp., 117 N.J. 376, 386 (1990)(where reorganization of activities on the property caused the nonconforming auto storage use to be more aesthetically pleasing, court granted permission to expand nonconforming use); New Hope Baptist Church v. Sommerhalter, 363 N.J.Super. 149 (renovation of pre-existing nonconforming use of a bus garage); and O'Donnell v. Koch, 197 N.J. Super. 134 (App. Div. 1984) (funeral home permitted to replace non-conforming two-story garage with accessory parking lot since it would improve flow of traffic in area in which funeral home was located).

Indeed, in Burbridge, the N.J. Supreme Court stated:

> Although concerns of appearance and compatibility have particular relevance in the context of variance applications to expand a pre-existing nonconforming use, they have less relevance compared to the other basic concerns of the MLUL when the question is whether to allow a new use that does not conform to the existing zoning ordinance. . . Favorable consideration is appropriate in those cases only if the variance inherently serves the public good [cases omitted]; or where the nonconforming use is

> particularly suited to the property, [case omitted]; or where the property is not reasonably adapted to a conforming use, see Medici v. BPR Co., supra, 107 N.J. at 17 n. 9.

Id. at 492-493. And, as this Court knows, the power of a zoning board is to adjust the zoning impact on specific pieces of property in individual cases for special reasons only. That means, "[i]f the difficulty is common to other lands in the neighborhood so that the application of the ordinance is general rather than particular," a variance may not be granted. Feiler, supra., 240 N.J. Super. at 257 (quoting Lumund v. Bd. of Adjust. of Rutherford 4 N.J. 577 (1950)(finding of undue hardship "due to conditions special to [an owner's] property is the *sin qua non* to exercise of board authority to grant a variance.")).

As noted earlier, supra. n.5, the determination of whether an applicant has actually established special reasons for its request for a d(1) use variance is a legal one; and thus, neither the Board's conclusion nor that of the trial court deserves any deference. As set forth in their initial brief at length, Objectors assert that the Applicant did not meet its burden to prove special reasons that are specific to the McWhorter property. See Pls. Br. at 29-33. Neither the property's size nor its location makes it particularly suitable for its use as a parking lot, as Applicant asserts. App. Br. at 34. In fact, the property's size as a 1.25 acre site, and its

location, surrounded on three sides by residential buildings near a transit hub, make it particularly suitable for several uses permitted under the Ordinance. It, therefore, follows that the Board's decision with respect to the "special reasons" test is legally insufficient, and thus must be reversed.

V. THE BOARD OF ADJUSTMENT ACTED ARBITRARILY WHEN RELYING ON APPLICANT'S SIGNIFICANT MISREPRESENTATIONS OF NEWARK'S CONTROLLING PLANNING DOCUMENTS.

In their responses, both the Applicant and the Board present the question of whether the use variance at issue would "substantially impair the intent and purpose of [Newark's] Zoning Plan and the Zoning Ordinance," as simply a battle between experts, with the Board "in its discretion [entitled] to decide which expert's testimony it will accept." Bd. Br. at 7-8 (citing Klug); App. Br. at 43-44 (citing Zilinsky v. Bd. of Adjust,, Borough of Verona, 105 N.J. 363 (1987)(validity of a structural design feature of a local zoning ordinance)).

There is little doubt that a board's discretion must be exercised reasonably, and must be grounded in credible, relevant evidence found in the record. In this case, the Board made one factual finding in its Resolution pertaining to Newark's 2004 Master Plan, which was in effect on the date of the hearing. See (Pa145, ¶15)(". . .the Future Land Use Plan of the 2004 Element of the Master Plan acknowledges the need for parking"). Whether

this factual finding is sufficient to support the Board's conclusion that that there was no impairment to the intent and purpose of the Master Plan (Pa146) is a legal question; and given the enhanced standard of proof that is applicable to this prong of the negative criteria, Objectors say it is not.

A review of the transcript of the proceedings before the Board in this matter indicates that the Applicant's Planner made several statements regarding Newark's Master Plan (and reports associated with that Plan) to support his conclusion that the construction of yet another surface parking lot in the zone would not negatively impact the adjacent properties nor impair the intent and purpose of that Plan. Whether the Board accepted Mr. McDonough's statements as accurate descriptions of those documents is unclear from the Resolution and its decision, as set forth in the transcript (Pa122-130), which made no reference to them.

Nonetheless, the trial court accepted those statements as accurate, and found them sufficient to support the Board's Resolution, despite the fact that the Planner's testimony constituted a gross misrepresentation of the very documents to which he referred. From the public's perspective this is the most troubling aspect of this case.

Objectors are a group of citizens who participated in the planning process; they know exactly what the 2004 Master Plan

and the 2012 Mobility Report say about their community, and, in particular, what those documents say about surface parking lots specifically. They accordingly knew, at the time of the hearing, that Mr. McDonough's testimony with respect to those Plans was not credible; and they expected the Board Commissioners, who they assumed were equally familiar with those documents, to come to the same conclusion. To their disappointment that did not happen. However, when the trial judge merely repeated the Planner's misleading statements, apparently without reading the documents, they were simply aghast.

For example, in the portion of the trial court's opinion set forth on p.2 of Applicant's brief, there exist two glaring errors that materially affect whether surface parking lots are posited as a solution to the City's desire to accommodate the parking needs of its businesses, residents and visitors. Beginning on line 8 of the quote, the trial judge states: "Newark's 2004 Land Use Plan set[sic] forth the goal of encourage[ing] current underutilized surface parking lots,'. . ." Alone, this statement indicates an intent to employ surface parking lots. However, the full statement reveals a diametrically opposed intent. The 2004 Master Plan states that intent as follows:

> [T]o reduce the presence of surface parking lots and multi-structured parking garages by providing incentives for developers to locate parking underground . . . [and] to encourage underutilized surface parking lots in the downtown to be developed with higher density development so as to enhance the City's tax base, employment base and to provide services to the City's population. (Pa430)

Stated in full, the Master Plan's intent is certainly not to encourage the utilization of surface parking lots, as concluded by the trial court, but rather to promote development of surface lots with higher density development.

Similarly, the trial court misrepresents the 2012 Mobility Element of the Newark Master Plan. It states that "The Plan further opines that the City must permit 'surface parking as a conditional interim use as properties are assembled for higher development.'" (App. Br. at 2). As Objectors explained in their initial brief, the Mobility Plan does not require the City to authorize surface parking as a conditional use, but rather permits it to do so in some circumstances. Furthermore, the City's discretionary authority extends only to properties in the Downtown area, which, as defined, does not include the Ironbound. Pls. Br. at 24-25. It therefore belies reason to see how the Plan's intent to permit the City to grant a 1-year conditional use to certain properties in the Downtown area sanctions the Board's decision to grant a permanent use variance to a property owner in the Ironbound -- an owner that was not

seeking to assemble more properties, but rather, was seeking to demolish a pre-existing building to create a new surface parking lot on a 1.25 acre lot (that is itself suitable for higher development).

In this way, the Board's legal determination of "no substantial impairment" to the Master Plan is inconsistent, and cannot be reconciled, with the very plan documents in the record. Therefore, as a matter of law, the Board's decision is arbitrary, and cannot be sustained.

VI. APPLICANT DID NOT MEET ITS BURDEN TO ESTABLISH THAT THE PROPOSED SURFACE PARKING LOT WOULD NOT CONSTITUTE A SUBSTANTIAL DETRIMENT TO THE PUBLIC WELFARE.

Although Objectors have the burden of establishing that the Board's decision was arbitrary and capricious, the Applicant had the initial burden of establishing that the proposed surface parking lot would not constitute a substantial detriment to the public. Because Objectors contend that the Applicant did not satisfy this burden, the Board's decision must be reversed.

In support of its application, the Applicant produced an expert planner and architect. Its planner testified that surface parking lots are a "relatively benign use" and, as a general matter, do not "negatively impact public safety," health, or welfare. (Pa57:19-24). A review of his reasoning indicates that it rested on conclusions that went beyond his

expertise. Though as a planner, he is certified to opine about "walkability" and detriment to the character of the neighborhood, he has less, if any, authority to address issues regarding traffic,[7] crime, flooding or air quality. Indeed, his testimony regarding those issues was no more expert than the numerous lay witnesses who testified. Moreover, since Mr. McDonough did not reside in the area, his opinion on such matters should have been given less weight than the residents who spoke based on their first-hand knowledge of, and experience with, the many other surface parking lots in the zone. The Board's decision to ignore their testimony in favor of Mr. McDonough's testimony (outside the scope of his planning license) renders its conclusions regarding negative impact completely unreasonable.

CONCLUSION

For the reasons set forth above and in Caro Plaintiffs' initial brief, Objectors request that this Court reverse the trial court's approval of the Zoning Board's October 11, 2012 Resolution, and declare it void.

Respectfully submitted,

Renée Steinhagen, Esq.

[7] The traffic impact on pedestrians or the impact of the proposed lot on traffic flow or congestion were not even addressed in the hearsay traffic report that Applicant submitted to the Board.