NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5744-10T4

IRON MOUNTAIN PROPERTIES, LLC,

Plaintiff-Appellant,

v.

TOWNSHIP OF FREEHOLD ZONING
BOARD OF ADJUSTMENT,

Defendant-Respondent.

Argued March 28, 2012 - Decided April 11, 2012

Before Judges Fuentes, Graves and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-5904-10.

Ronald J. Troppoli argued the cause for appellant.

Dennis M. Galvin argued the cause for respondent (The Galvin Law Firm, attorneys; Mr. Galvin, on the brief).

PER CURIAM

This is an appeal by plaintiff Iron Mountain Properties, LLC, from an order of the Law Division affirming the decision of defendant Township of Freehold Zoning Board of Adjustment (the Board) to deny a use variance to permit plaintiff to convert a home located in the Residential R-25 Zone into a single-story dental office. Plaintiff challenges the action of the Board as

well as the judgment entered by Judge Lawrence M. Lawson. After reviewing the record in light of the contentions advanced on appeal, we conclude that plaintiff's arguments are without merit, and we affirm substantially for the reasons set forth in Judge Lawson's comprehensive thirty-page written opinion of June 28, 2011.

I.

The subject property is in an R-25 residential zone and consists of a single-story residential dwelling. Plaintiff submitted its application for a use variance to demolish the existing dwelling and construct a 3,000 square foot dental office. This is not a permitted use in an R-25 residential zone.

The Board held public hearings on the application and plaintiff submitted its plans and proofs. Plaintiff's president, Dr. Adam Eisenberg, D.D.S., testified that he operated a 2,500 square foot dental office at another location in Freehold. He sought to build the new facility in order to give him more room to conduct his business. The office would house one dentist, three assistants, two front desk staff and an office manager. Eisenberg anticipated that there would be twenty-five to thirty patients per day.

Plaintiff's engineer, William Kurtz, P.E., testified that there was sufficient space to address stormwater retention,

refuse storage and buffering. There was also enough room for a twenty-three space parking lot. Plaintiff's professional planner, Christine Cofone, testified that the property is bordered by a pediatrician's office, which was a prior non-conforming use, a school parking lot, and another residence owned by plaintiff, which was not part of the application. In Cofone's opinion, the proposed dental office would serve as a "transitional" area to some of the more intensive uses in the area, including the school and some offices.

Plaintiff also presented the testimony of a traffic expert, Gary Dean, who opined that the proposed use "was unquestionably a low traffic generator." Two residents testified in opposition to the application. They were concerned about the commercial nature of plaintiff's proposal and its potential impact on the residential neighborhood.

In a six-to-one vote, the Board denied the application. Its memorializing resolution found that plaintiff had failed to satisfy the affirmative and negative criteria embodied in N.J.S.A. 40:55D-70(d). In particular, the Board concluded that "the property is particularly suited as a residence and that its conversion to a commercial use would undermine the Zoning Ordinance and Master Plan." The Board further found that plaintiff's application "cannot be granted without a substantial negative impact on surrounding property owners;" that plaintiff

had "failed to show that the property could not be sold as a home[] and so no hardship exists;" and that there were "sufficient [other] locations throughout the Township which would permit this use."

Judge Lawson thoroughly canvassed the record and accurately applied the legal principles governing the action in lieu of prerogative writs. He ultimately dismissed plaintiff's complaint, holding that the Board's findings and conclusions were supported by the evidence and were not arbitrary, capricious, or unreasonable. This appeal followed.

II.

"[W]hen reviewing the decision of a trial court that has reviewed municipal action, we are bound by the same standards as was the trial court." Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). Thus, our review of the Board's action is limited. See Bressman v. Gash, 131 N.J. 517, 529 (1993) (holding that appellate courts are bound by the same scope of review as the Law Division and should defer to the local land-use agency's broad discretion).

It is a cardinal principle of land use law that "a decision of a zoning board may be set aside only when it is 'arbitrary, capricious or unreasonable.'" Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor, 172 N.J. 75, 81 (2002) (quoting Medici v. BPR Co., 107 N.J. 1, 15 (1987)). "[P]ublic bodies,

because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. of Adjustment of Wall, 184 N.J. 562, 597 (2005). Therefore, "[t]he proper scope of judicial review is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Ibid.

Furthermore, it is uniformly recognized that use variances should be granted sparingly and with great caution. Kinderkamack Rd. Assocs. v. Mayor of Oradell, 421 N.J. Super. 8, 21 (App. Div. 2011) (citing N.Y. SMSA, L.P. v. Bd. of Adjustment of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004)). "Because of the legislative preference for municipal land use planning by ordinance rather than variance, use variances may be granted only in exceptional circumstances." Id. at 12. Accordingly, our 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). Moreover, courts have been admonished for almost twenty-five years to be particularly vigilant in their review of use variance applications for commercial uses that are not inherently beneficial. Medici, supra, 107 N.J. at 3-5.

To obtain a use variance, an applicant must satisfy both the so-called affirmative and negative criteria of the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 to -112. See New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 160 N.J. 1, 6 (1999). Under the affirmative criteria, an applicant must show special reasons meriting a use variance. N.J.S.A. 40:55D-70(d)(1). As the New Jersey Supreme Court has stated, "'special reasons' takes its definition and meaning from the general purposes of the zoning laws" enumerated in N.J.S.A. 40:55D-2. Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 386 (1990). There are three circumstances in which such special reasons may be found:

> (1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility, see Sica v. Bd. of Adjustment of Wall, 127 N.J. 152, 159-60, (1992); (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone, see Medici v. BPR Co., 107 N.J. 1, 17 n.9, (1987); and (3) where the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use." [Smart SMR v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998)] (quoting Medici, supra, 107 N.J. at 4).
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> [Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95, 102 (2011) (quoting Saddle Brook Realty, L.L.C. v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 76 (App. Div. 2006)).]

In contrast, the negative criteria require an applicant to prove that the variance "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(d).

A proponent of a non-inherently beneficial commercial use must surmount an additional threshold. Since 1987, such an applicant is obliged to satisfy "an enhanced quality of proof" by securing "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." Medici, supra, 107 N.J. at 21. This enhanced quality of proof must "reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district." Ibid. It is a formidable obstacle for any applicant. Particular suitability for a use variance can be shown where (1) "the use is one that would fill a need in the general community," (2) "there is no other viable location," or (3) "the property itself is particularly well fitted for the use either in terms of its location, topography or shape." Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 210 (App. Div. 1999).

In light of the stringent Medici standards, the Board's reasons for denial of plaintiff's application find ample support

in the MLUL. Nothing that plaintiff presented remotely demonstrated that (1) the construction of a dental office would fill an unmet need in the general community; (2) there was no other viable location for such use; or (3) the land's topography, location, or shape were well fitted for such uses. Regardless of whether the project could be made compatible with its residential setting, or even profitable to the community or its owners, plaintiff failed to demonstrate that "'the particular site . . . must be the location for the variance.'" Funeral Home Mgmt., supra, 319 N.J. Super. at 209 (alteration in original) (quoting Fobe Assocs. v. Mayor of Demarest, 74 N.J. 519, 534 (1977)).

We conclude that the Law Division properly held that plaintiff failed to establish the affirmative criteria that special reasons existed under N.J.S.A. 40:55D-70(d)(1) and thus it did not sustain the requisite burden of proof before the Board.

Affirmed.