

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0381-11T4

ALI ENTERPRISES, L.L.C.,

Plaintiff-Appellant,

v.

CITY OF SUMMIT ZONING  
BOARD OF ADJUSTMENT,

Defendant-Respondent.

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Argued May 23, 2012 - Decided August 20, 2012

Before Judges Fuentes, Graves, and Koblitiz.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Docket No.  
L-0125-11.

Louis P. Rago 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

Plaintiff Ali Enterprises, L.L.C., appeals from a final judgment entered in the Law Division on August 8, 2011. The judgment affirmed a resolution by defendant City of Summit Zoning Board of Adjustment (the Board) denying plaintiff's application for a prohibited-use variance and other necessary

approvals to maintain an existing gas station and to replace an existing garage with a 7-Eleven convenience store. For the reasons that follow, we affirm.

Plaintiff's property is located at 6 River Road, Summit, in a light industrial zone, which does not permit gas stations and retail stores. However, as plaintiff's land use planner explained, plaintiff's gas station is a legal preexisting non-conforming use:

The property . . . is used as a gas station and in the past has had three repair bays, although they're currently not used, they're blocked off in front, but they're still serviceable inside. There is a long history of a gas station use here. If you look through the resolutions, it [is] clear that it was a gas station for many years and I guess on three different occasions came in for different modifications, in terms of reconstructing the pumps, putting in a canopy and signage, so there was a history not only of having a non-conforming use, but there were modifications that were authorized by the Board of Adjustment over time and in reading the resolutions it was felt that there was a benefit, for example, in terms of aesthetics, to modify the application over time.

. . . .

There are certain improvements that are going to be made with this. There are modifications to the signage . . . . The septic system will be abandoned and replaced with a connection to the public sewers. The turning movements will be restricted to right turn only upon exiting and there will be . . . re-striping of property and some

general aesthetic improvements in terms of the façade.

During three public meetings held on September 7, 2010, October 18, 2010, and November 15, 2010, plaintiff also presented the testimony of the civil engineer who prepared the site plans; the traffic engineer who prepared a traffic impact assessment; the architect who prepared the plans for the 7-Eleven convenience store; and the owner of the property. After plaintiff completed its presentation, plaintiff's attorney urged the Board to approve the application because plaintiff's proposal would "make [the] property look a lot better [and] function a lot better."

Following deliberations, four members of the Board voted in favor of the application and three members voted against the application. Because five votes are required to obtain a use variance under N.J.S.A. 40:55D-70(d), plaintiff's application was denied. The Board's resolution, which was adopted on December 6, 2010, included the following findings:

15. The Board finds that the Zone in question does not permit retail uses, and that the applicant has failed to show that the site is particularly suited for this purpose. In fact the Board finds that a 7-Eleven will increase traffic in an undesirable manner at this location, thus making this site unsuitable for this purpose.

16. The Board gave the applicant every reasonable opportunity to assuage its concern about the traffic impact of this proposal. Even with the applicant's best efforts, it seems apparent to the Board that the traffic calming devices would be insufficient to resolve their concerns.

17. The Board acknowledges that the applicant's proposal offered special reasons, but those advantages did not outweigh the applicant['s] failure to reconcile this deviation from the master plan or the negative impacts arising from this proposal.

18. The Board recognizes the existing use is a pre-existing non-conforming use. It finds that the 7-Eleven is not an expansion of that use, but a wholly new use which is not permitted in the Zone.

19. The Board finds that it would represent poor planning to compound the existing non-conforming use [by] introducing an entirely new non-conforming use.

20. The Board also finds that the 7-Eleven will be a traffic generator and that if it approved this application with the proposed traffic limitations, that either some patrons would break the law or would drive into neighboring Chatham and turn around on someone else's property, which would not represent sound zoning.

21. The Board finds the benefits of this proposal do not outweigh its detriments.

In addition, the Board concluded: (1) plaintiff failed to provide "sufficient special reasons" for the variance and failed to show that the site was particularly suitable for the proposed

use; (2) the conditions proposed for traffic safety "would either be ineffective or [would] contribute to other zoning and planning issues off site"; (3) the 7-Eleven store would "increase the intensity of this non-conforming site"; (4) the relief sought would "have a negative impact on traffic safety and the neighboring properties"; and (5) the proposed use would impair "the intent and purpose of the Master Plan or Zoning Ordinance of the City of Summit."

On appeal to the Law Division, plaintiff argued that its application should have been approved because the proposed use would have resulted in "significant improvements" to the property without any negative consequences. In response, the Board's attorney argued that plaintiff failed to satisfy the restrictive standards for a use variance set forth in Medici v. BPR Co., 107 N.J. 1 (1987).

In a comprehensive oral decision, Judge Karen Cassidy concluded that plaintiff failed to sustain its burden of proof before the Board, and she affirmed the Board's resolution. On appeal to this court, plaintiff contends the decisions by the Board and the trial court should be reversed because they are "arbitrary, unreasonable, capricious and contrary to the established facts and law." We have considered these arguments in light of the record and the briefs and have concluded they

are clearly without merit. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated by Judge Cassidy, Rule 2:11-3(e)(1)(A), with only the following comments.

To obtain a use variance, an applicant must satisfy both the positive and the negative criteria set forth in N.J.S.A. 40:55D-70(d). To satisfy the positive criteria, an applicant must prove that the proposed use will promote "the general welfare" because the site "is particularly suitable for the proposed use." Medici, supra, 107 N.J. at 4. In addition, the negative criteria require proof that the variance can be granted "without substantial detriment to the public good," id. at 22 n.12, and the variance "is not inconsistent with the intent and purpose of the master plan and zoning ordinance." Id. at 21.

In the present matter, the Board determined that plaintiff failed to establish both the positive and the negative criteria, and Judge Cassidy ruled that the decision to deny plaintiff's application was not arbitrary, capricious, or unreasonable because there was substantial credible evidence to support the Board's decision. Based on our independent review of the record, we have reached the same conclusion.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION