SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

RECEIVED AUG 31 2011

CHAMBERS OF
HECTOR R. VELAZQUEZ
JUDGE

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August 29, 2011

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RE: BELUCH V. 829 GARDEN CONDOMINUIM et.
DKT. NO.: HUD-L-667-11

Dear Counsels:

Please find enclosed the Court's opinion in the above referenced matter.

The Court requests that the prevailing party submit a form of Judgment reflecting the Court's findings.

Sincerely,

Hon. Hector R. Velazquez, JSC

HRV/da
Encs.

NOT FOR PUBLICATION WITHOUT APPROVAL OF THE APPELLATE DIVISION COMMITTEE ON PUBLICATION .

CATHY BELUCH,

Plaintiff,

v.

829 GARDEN CONDOMINIUMS, LLC, and HOBOKEN BOARD OF ADJUSTMENT,

Defendants

And

822 HUDSON STREET CONDOMINIUM ASSOCIATION, Inc.,

Intervenor-Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY
DOCKET NO. HUD-L-667-11

OPINION

FILED

AUG 29 2011

HECTOR R. VELAZQUEZ, J.S.C.

Decided on : August 29, 2011

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HECTOR R. VELAZQUEZ, J.S.C.

Plaintiff Cathy Beluch has filed this prerogative writ seeking to set aside the Hoboken Zoning Board of Adjustment's approval of a variance permitting a 584 % increase in the maximum roof top coverage for 3 roof decks at 822 Hudson Street in Hoboken.

FINDINGS OF FACTS

1. The defendant Hoboken Zoning Board of Adjustment is the municipal board with primary variance responsibility for the City of Hoboken.

2. The intervener-defendant 822 Hudson Street Condominium Association is the current owner of 822 Hudson Street in Hoboken, NJ. The prior owner/developer rehabilitated the property transforming it into a 4 unit condominium building.

3. In 2010 the defendant owner applied for a (c) variance to add 3 roof top decks to the property. The defendants want to cover the existing roof-top space with a series of three decks. The proposed decks range in size, but are approximately 350 square feet each. The current rooftops are covered with black tar. The proposed roof decks will overlay the blacktop and will be bordered by planters filled with shrubs to add privacy to the roof deck.

4. The plaintiff objector lives directly south of and next door to the subject property. One of her windows is literally ten feet from the second story roof.

5. Public hearings were conducted on April 20, 2010, June 15, 2010, July 20 2010 and September 21, 2010. The plaintiff appeared at these hearings and objected to the application. She complained that the roof decks would result in an invasion of her privacy, loss of light and air, and would subject her to unpleasant odors and noise.

6. The Board after hearing from the various witnesses, including lay as well as experts, approved the variance. The Board found that the decks would enhance the neighborhood scheme, add to the family oriented environment, and complimented the purpose of the Master Plan. The Board also found that the roof decks, with the restrictions imposed, would have minimal detrimental impact upon the neighborhood.

7. On February 2, 2011the plaintiff filed this prerogative writ action seeking to overturn the decision of the board.

The Contentions of the Plaintiff

1. The evidence before the Board was insufficient to support the granting of the variance sought by the applicant.
2. The resolution adopted by the Board was not supported by the evidence and was insufficient to support the variance granted.

The Contentions of the defendants

1. The applicant met its burden of proof for a c (2) variance and also met both prongs of the negative criteria.
2. The board correctly applied the legal standard for a c (2) variance and fairly balanced the benefits of the roof decks with the potential negative impact on adjacent property owners or to the public.
3. The decision of the board and the adoption of the resolution were well supported by the evidence.

CONCLUSIONS OF LAW:

This court begins its analysis by considering the standard by which a trial court reviews the decisions of a municipal board. As our appellate court stated in Nextel of New York, Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 824 A.2d 198 (App. Div. 2003), "a municipal zoning board is entrusted with the sound discretion to determine whether an applicant has met the statutory criteria to obtain a variance. It is not the role of a reviewing court to determine if the decision was wise or unwise. The reviewing court's role is limited to determining whether the board's decision was reasonably supported by the record. A board of adjustment's action is presumed to be valid, and the party attacking it has the burden of proving otherwise. A board's decision will not be set aside by a court unless it is arbitrary, capricious, and unreasonable."

Public bodies, such as municipal zoning boards, are allowed wide latitude in their delegated discretion because of their particular knowledge of local conditions. Jock v. Zoning Bd. of Adjustment of Wall, 184 N.J. 562, 597, 878 A.2d 785 (2005). The scope of judicial review is limited to determining whether a zoning board could reasonably have reached its decision on the record, not whether a better decision could have been made by that board. *Ibid.* Neither the trial court nor this court may substitute its judgment for that of the zoning board. Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 561, 849 A.2d 1117 (App. Div. 2004). There is a presumption that there was an adequate basis in the record for the zoning board's conclusions, Lang v. Zoning Board of Adjustment of North Caldwell, 160 N.J. 41, 58, 733 A.2d 464 (1999), although greater deference is given to **variance** denials because **variances** tend to impair sound zoning. Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 199, 778 A.2d 482 (App. Div. 2001). Thus, in reviewing the decision of the Hoboken Zoning Board of Adjustment this court must give deference to the board's decision to grant a c(2) variance, and such decision should not be overturned unless proven arbitrary, capricious or a manifest abuse of statutory authority. Jock, supra, 184 N.J. at 597; Fallone Props., supra, 369 N.J. Super. at 560

After a careful review of the record below, and after applying the aforementioned standard of review, this court cannot rule as a matter of law that the boards decision to grant the applicant a c(2) was arbitrary, capricious or a manifest abuse of its statutory authority. Accordingly, this court discerns no basis to set aside the c (2) variance permitting the applicant to construct roof top decks at 822 Hudson Street. The complaint is therefore dismissed and judgment is hereby entered in favor of the defendants.

I

The property owner's application for a variance was founded on N.J.S.A. 40:55D-70c (2) which grants municipal boards of adjustment the power to grant variances to zoning ordinances. This provision gives a municipal board of adjustment the power to grant a c (2) variance where the purposes of the Municipal Land Use Law would be advanced, and the benefits of the deviation from the zoning ordinance requirements would substantially outweigh any detriment to the public good. Kaufman v. Planning Bd. For Warren Tp. 110 NJ 551 (1988).Our courts have consistently held that before granting a c(2) variance, a board must make sure that the variance can be granted "without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." Kaufman v. Planning Bd. For Warren Tp. 110 NJ 551 (1988) Wilson v Brick TWP. Zoning Bd. 405 NJ Super 189 (App. Div. 2009). 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 Municipal Land Use Law 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;(4) that the benefits of the deviation would substantially outweigh any detriment and;(5) that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance. See: William M. Cox, New Jersey Zoning and Land Use Administration, Section 6-3.3 at 160 (Gann 2011) (citing Wilson v Brick TWP. Zoning Bd. 405 NJ Super 189 (App. Div. 2009); Kaufman v. Planning Bd. For Warren Tp. 110 NJ 551 (1988)

In *Kaufman,* the Supreme Court made clear that "no c(2) variance should be granted when merely the purpose 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...on the characteristics of the land that presents an opportunity for improved zoning and planning that will benefit the community." Kaufman v. Planning Bd. For Warren Tp. 110 NJ 551; 563 (1988).

In this case, the applicant sought variance approval for the construction of roof decks on an existing 4 unit building located at 822 Hudson Street in Hoboken. The Board approved the variance upon a finding that "the application met the requirements of NJSA 40:55D-70 in that it provides a sufficient space in appropriate locations for residential use and provides a desirable visual environment because instead of black top roof decks there will be well designed and well built rooftop decks as described in NJSA 40:55D-2(g)." The Board also found that the variance could be granted "without a substantial negative impact" and "would not impair the intent and purpose of the Master Plan or Zoning ordinance." In this prerogative writ action, plaintiff contends that the Hoboken Zoning Board of Adjustment did not properly apply the legal standard for a c(2) variance and The Board's decision was arbitrary, capricious and unreasonable.

As previously stated, an application for a c(2)variance requires (1) that it relates to a specific piece of property;(2) that the purposes of the Municipal Land Use Law 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;(4) that the benefits of the deviation would substantially outweigh any detriment and;(5) that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance. The court will address each element.

II

As to the first element, the parties all agree that the application relates to a specific piece of property and thus no further discussion is warranted.

As to the second element, plaintiff contends that no evidence was presented that any of the purposes of the MLUL as set forth in NJSA 40:55D-2 would be advanced. In support of this contention Plaintiff argues that the planner for the applicant failed to cite a single purpose of the Act that would be advanced. While it is true that the planner did not specifically mention any of the fifteen purposes listed at NJSA 40:55D-2, the record is replete with references to such purposes and it is clear that the Board considered this important element in rendering its decision. Moreover, the fact that the planner did not specifically reference any of the enumerated purposes does not mean that there was insufficient evidence from which the Board could reasonably conclude that the application advanced the general purpose of the Act. This court agrees with the intervener-defendant when it assert that the Board's planner "specifically referred to the furtherance of the local municipal master plan and that the master plan is the document by which the MLUL's goals and purposes are effectuated within a community."

Mr. Kolling, the Board's planner, testified in great detail on how the variance complied with the master plan and how the construction of the roof decks would further the general welfare by providing outdoor living spaces in an urban environment. The record further reveals that even in the absence of the expert's specific reference to same, the Board members understood the need to satisfy this element and did in fact identify the goals of the MLUL that were advanced by the application. Both, in the verbal comments made during the hearings and in it's final resolution, the Board identified at least two goals of the MLUL that would be advanced. The Board identified section (g) to provide a sufficient space for a variety of...recreational...and open space and section (i) to promote a desirable visual environment. With regard to subsection (i) the Vice Chairman of the Board stated, "it is going to benefit the entire donut because instead of residents looking down on basically blacktop decks, there is going to be . . . a well-designed, well

built, and very beautiful roof decks [*sic*] for everybody to see as part of the open space." Similarly, Board Member Joseph Crimmins stated "I think when you look at the alternative of what is there and what is proposed. . .what is proposed is a better line of sight for everyone involved. Chairman Soares said in a similar vein, "in Manhattan and Brooklyn and in other cities, all over Hoboken, there are roof decks, and they are featured in home shows and magazines, and they improve the neighborhood."

Thus, the record reveals that the Board had ample evidence from which to reasonably conclude that the goals of the MLUL would indeed be advanced by granting the c (2) variance. Contrary to the plaintiff's contention, expert testimony was not needed to establish this element. The individual Board members had every right to rely on their daily life experiences and their knowledge of the Hoboken community to make this determination. As the appellate division stated in Reinauer Realty Corp v. Nucera 59NJ Super 189, 201-203 (1960):

> "The Board is not obligated to function in a vacuum. It may and should bring to bear in its deliberations the general information and experience of its individual member"

As to the third element, the plaintiff contends that the Board failed to consider evidence that there would be substantial detriment to the public good if the variance was granted. Stated different, plaintiff argues that the testimony regarding detriment to the public was unrebutted, and the Board improperly chose to ignore it. A review of the record however clearly reveals that there was ample evidence to justify the Boards findings that there would be no substantial detriment to the public good if the variance was granted.

In evaluating this element, the court must consider that variances to some degree will always have a negative impact on adjacent properties or on the public. That is why our courts have consistently held that a zoning board of adjustment should only be concerned with any "substantial "detriment to the public good.

Yahnel v. Bd.of Adjustment of Jamesburg 79 NJ super 509, 519 (app. Div.). In this case the only detriment identified by the plaintiff relates to the objector's complaints that the construction of roof decks on this property will result in loss of privacy, loss of light and air, and would subject adjacent property owners to unpleasant odors and noises. Many of the witnesses that testified in support of the application disagreed. The record supports the Board's conclusion any detriment to adjacent property owners would be minimal and not unlike what would be expected to occur in any large urban city. The record reveals that the Board listened to a number of witnesses on this issue and notwithstanding their finding that there was no substantial detriment to the public good; they included a number of conditions in the resolution to address the concerns voiced by the objectors. The Board imposed significant restrictions on use of the roof decks. To maintain privacy they required that the borders of the deck be lined with shrubbery. To prevent noise, they prohibited the installation of a sound system and the use of the decks before 10AM or after 10PM. Thus it appears from the record that the Board addressed almost every complaint raised by the objectors.

Under the circumstances and viewing the record as a whole this court is satisfied that the Board had sufficient facts from which it could reasonably conclude that there would be no substantial detriment to the adjacent property owners or to the public good if the variance was granted.

As to the fourth element, the plaintiff contends that there was insufficient evidence for the Board to conclude that the benefits to be derived from the variance substantially outweighed the detriment. Although the record does not reflect a specific weighing of the benefits against the detriments, this finding is implicit in the evidence reviewed by the Board.. In assessing the benefits and detriments of the proposed variance, the Board had both lay and expert testimony that provided adequate support for its conclusion that benefits to be derived from the variance substantially outweighed the detriment. Most compelling was the

testimony of Mr. Kollings who described in detail how the approval of the variance would benefit the community with minimal detriment to the public good. Discussing the criteria for a c (2) variance Mr. Kolling stated:

"Going back to a C variance situation, I feel that because we are advancing the purposes of the master plan to help create these family-sized units and to provide this accessory outdoor-living space to the family-sized units, we are promoting therefore the general welfare and promoting spaces for the existing residential units. That tome is substantial benefit, not simply to the occupants, but in general in terms of advancing the purposes of the master plan.

"There is, in my opinion, no substantial detriment. As I just mentioned, there is... a provision allowing for roof appurtenances. "There's also a provision for h eight requirements, which we are less than, so therefore, I don't see how we would be in – have a substantial detriment to the intent and purpose of the zone plan,.because we are beneath the height requirement, and we are in fact advancing the other purposes of the zone plan to reinforce the residential character of the area. "In terms of having a substantial detriment to the public good, each space is accessible only through the units. They have no substantial impact on the neighborhood in general. They are contained within the roof area that is there today, so I don't see how they would have any substantial detriment to the public good either. "So, when you look at the C-2 test in terms of the benefits outweighing the detriment, I think that would be the case in this case." (t2, p 121, line 19 to p. 122, line 25).

When asked to describe the impact on neighbors, Mr. Kollings stated:

"...we are within the height requirements for that zone, so it is – and a building couldn't be built on that lot line to a height of 40 feet. So, whether or not there was a roof deck there or a screen there, we would be permitted to have a wall at that location." (T2, p 137, lines 7-13).

On cross-examination by the objector Mr. Kollings was asked if having roof decks in close proximity to a neighbor's window be a detriment to the public welfare. Mr. Lollings answered:

"I don't think that is the result that is unique to the --- to the grant of this or any other variance.

"In this particular instance, there are terrace or patio spaces on the property next door, where those same functions could occur.

"Noise could occur in the spaces between the buildings. Noise can occur on the street at any time of the day or night.

"I don't think that the things you are raising as detriments are a unique result that can be said to be a result of this particular proposal. (T2, p 159, lines 5-25).

The Board also heard from other witnesses, including the developer of the project, all of whom extolled the beauty and substantial visual improvement that the decks will have over the current blacktop roofs. While it is true that the objectors offered contrary testimony on this issue, ultimately the Board chose to accept Kolling's testimony, a choice which under the circumstances this court deems reasonable. After a careful review of the record, it once again appears that the Board had ample evidence from which it could reasonably conclude that any detriment to the public good, by the granting of the variance, would be *de minimis*. Moreover, as previously indicated any detriment to adjacent property owners would be significantly mitigated by the restrictions imposed by the Board. Thus, by including a number of conditions in the resolution the Board took appropriate measures to insure that the benefits of the roof decks would substantially outweigh the detriments to the plaintiff and other adjacent property owners.

Finally as to the fifth element, plaintiff contends that the Board could not have reasonably concluded that the variance would not substantially impair the

intent and purpose of the zone plan and zoning ordinance because the planner did not directly address this element. However, a review of Mr. Koller's testimony reveals that he did in fact address this requirement. When discussing the c (2) variance the applicant's expert testified that:

"There is a provision allowing for roof appurtenance. There is also a provision for height requirements which we are less than", so therefore I don't see how we would be in-have a substantial detriment to the intent and purpose of the zone plan...and we are in fact advancing the other purposes of the zone plan to reinforce the residential character of the area." the variance would not impair the intent and purpose of the Residential Zone.

The expert further noted that the activities that *"would take place on the deck are incidental to residential life, might happen on the roofs even without the decks, and would likely happen on the ground behind the building anyway. In these ways, the decks do not impair the purpose of the classification of the block as a residential zone."*

It is undisputed that the current zoning ordinance permits roof decks throughout the city of Hoboken. The only restriction imposed is that they do not cover more than 10% of the roof itself. This court agrees with the defendant's contention that given this permissive use under the zoning ordinance "it would be hard to argue that a *de minimis* construction of a deck over an existing roof is a substantial detriment to the zone plan." The record reveals that the activities that would occur on the roof decks would not be significantly different from what is occurring without them and frankly what occurs throughout the city of Hoboken. Again, this court must find that the Board's conclusion regarding this element is well supported by the record as well as its own knowledge and understanding of the Hoboken zoning plan.

SUMMARY

In this case the applicant sought variance approval to construct roof decks on an existing 4 unit building located at 822 Hudson Street. The Hoboken Zoning Board of Adjustment found that approving the application with specific conditions, inured to the benefit of the community, and had only minimal impact on adjacent property owners.

Our courts have consistently held that "a municipal zoning board is entrusted with the sound discretion to determine whether an applicant has met the statutory criteria to obtain a variance." Nextel of New York, Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 824 A.2d 198 (App. Div. 2003). Because the Board's action is presumed to be valid, this court's scope of review is limited to determining whether it acted reasonably in reaching its decision on the record.

This court has carefully reviewed the criteria for granting a c (2) variance and hereby finds that the Board properly balanced the positive and negative criteria in reaching its decision. It heard from a number of witnesses, weighed the evidence, and relying on it knowledge and understanding of the nature and character of the city, determined that the variance could be granted without a substantial negative impact to the community. On balance the Board made a rational decision based on competent credible evidence and in all respects acted reasonably in reaching that decision

DECISION

After a careful review of the record below and applying the principles of law relevant to the issues raised, this court finds that the Board's decision was reasonably supported by the record and was not arbitrary, capricious or a manifest abuse of its statutory authority. Accordingly, the court will deny the plaintiff's request for relief and judgment is hereby entered in favor of the defendants.