PREPARED BY THE COURT

BRUCE A. PATERSON, ILEEN CUCCARO, HORACE CORBIN and DAVID CORBIN

Plaintiffs,

v.

THE COMBINED PLANNING BOARD/ZONING BOARD OF ADJUSTMENT OF THE BOROUGH OF GARWOOD, and ANGELA VILLARAUT AND SANDRO VILLARAUT

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION – UNION COUNTY

DOCKET NO.: UNN-L-3224-14

Civil Action

ORDER

THIS MATTER having come before the Court, the Honorable Karen M. Cassidy, A.J.S.C., by John DeNoia, Esq., of Kochanski, Baron & Galfy, P.C., attorney for plaintiffs, Bruce A. Paterson, Ileen Cuccaro, Horace Corbin and David Corbin, by a complaint in lieu of prerogative writs filed on September 8, 2014; and the Court having considered the submissions of the parties; including the submissions of Stephen F. Hehl, Esq., of Hehl & Hehl, P.C., attorney for defendants Angela Villaraut and Sandro Villaraut (the "Villaraut's"), and the submissions of Donald B. Fraser, Jr., Esq., of Perrotta, Fraser, & Forrester, LLC, attorney for defendant the Combined Planning Board/Zoning Board of Adjustment of the Borough of Garwood (the "Board"); and a hearing having been held on October 14, 2015, with counsel for plaintiffs and defendants appearing; and the court finding that the actions of the Board in granting a use variance for the development of age-restricted fifty-five and over townhomes to the Villaraut's was invalid as notice provided

to the public and to affected property owners was legally deficient, as outlined in the attached Statement of Reasons;

IT IS on this **4th** day of **November, 2015,** hereby:

1. **ORDERED** that the Resolution memorialized by the Board on July 23, 2014, regarding the above captioned matter is hereby reversed; and
2. **ORDERED** this matter is remanded in its entirety to the Board; and it is further
3. **ORDERED** that as the notice issue is dispositive, the remaining issues plead in the Complaint will not be addressed.

A copy of this Order has been provided to all parties by the Court on this date.

K. M. Cassidy

KAREN M. CASSIDY, A.J.S.C.

Statement of Reasons

Bruce A. Paterson, Ileen Cuccaro, Horace Corbin and David Corbin
v.
The Combined Planning Board/Zoning Board of Adjustment of the Borough of Garwood, and Angela Villaraut and Sandro Villaraut

UNN-L-3224-14

Action in Lieu of Prerogative Writs
Hearing Date October 14, 2015

This matter is before the court on plaintiffs' Bruce A. Paterson's, Ileen Cuccaro's, Horace Corbin's, and David Corbin's, Action in Lieu of Prerogative Writs, challenging the validity of the actions of defendant Combined Planning Board/Zoning Board of Adjustment of the Borough of Garwood (the "Board") in granting a use variance for the development of age-restricted fifty-five and over multifamily townhomes to defendants Angela Villaraut and Sandro Villaraut (the "Villaraut's") for property located at 484 Fourth Avenue in the Borough of Garwood.

By consent of the parties, the issue of whether Mr. Paterson, a named plaintiff, and also a member of the Board, is permitted to prosecute this matter is not being addressed by the court at this time.

Facts and Procedural History:

The property at issue is identified as Lot 10 in Block 102 on the official Tax Map of the Borough of Garwood, also known 484 Fourth Avenue. The property is zoned for single-family use and specifically prohibits multifamily use. The property previously contained a catering business, which was a non-conforming mixed commercial use.

On March 4, 2014, defendant Villaraut's filed a bifurcated application (the "Application") with the Board for a use variance to permit a multifamily development consisting of nine townhomes on the property. The Villaraut's requested that the Board only consider the application

for the use variance; a site plan application would follow at a later date contingent on approval of the use variance. The proposed development would consist of four three-bedroom townhomes, and five two-bedroom townhomes. In the Villaraut's application to the Board, no mention was made of an age restriction for the proposed development.

To be approved, the application needed: relief from the Code's density limitation for the property of 8.21 units per acre (9 units per acre proposed), relief from the maximum allowable floor area of 3,500 feet per home for single-family (projected total floor area would be 27,020 square feet), and relief from the maximum allowable building height of 30 feet (proposed townhomes would be 36 feet in height). The application thus sought a "C1" variance for hardship and bulk and a "C2" variance for the number of stories. The application also sought a "D1" variance for attached one-family homes; a "D4" variance for an increase in permitted floor area ratio; a "D5" variance for an increase in the permitted density; and a "D6" variance for height of the principal structure which exceeds 10 feet or 10% of the maximum permitted height in the district.

On May 28, 2014, the Board held a hearing for the application. Prior to the hearing, notice was given pursuant to N.J.S.A. 40:55D-11 and N.J.S.A. 40:55D-12(a). Neither plaintiffs nor defendants have submitted proof of notice to the court. However, all parties agree that notice was given to the correct individuals, and that it stated the date, time and place of the hearing, the location of the property at issue, and the place and time where maps or documents seeking approval were available. They also agree that the issue of the proposed development being age restricted was not part of this original notice.

At the beginning of the hearing, the Villaraut's stipulated through counsel during his opening statement that they would agree to commit that the residences would be age-restricted to

persons fifty-five and over. May 28, 2014 Transcript, 5:1-4. This had not been stated in the application to the Board prior to the hearing, nor was it mentioned in the notice given in the newspaper or to surrounding property owners.

Four experts testified at the hearing on behalf of the Villaraut's. This included a professional engineer (Thomas Quinn, P.E.), a traffic engineer (Joseph Staiger), an architect (Glenn Potter), and a professional planner (John McDonough). Quinn discussed the proposed height of the buildings, which were to be thirty-six feet, six feet over the thirty feet limit, the density and the floor area ratio. Plaintiffs Brief, pg. 2, citing T 11:14-16 and pg. 3, citing T 12:8-9. He stated, that the proposed residential use would eliminate the current non-conforming use, moving the site more into conformity with the intent of the zoning ordinance. He also discussed the plan for parking and the driveway and means of ingress and egress. Quinn opined that the property could accommodate the proposed development.

Staiger discussed traffic counts, the level of service for the existing roadways, his projection of the traffic to be generated by the proposed development, and the proposed improvements. He prepared a traffic impact study of the potential impact on traffic conditions. He also discussed his method of analysis. When questioned by the Board's attorney, he stated he did not believe there would be any negative impact on traffic caused by the proposed development. Plaintiffs' Brief, pg. 3, citing T 36:18-21. He also testified that the age-restriction element "is a lessor intensity than a non-age-restricted." Defendant's Brief, pg. 6, citing T 27:2-5. He also discussed the safety aspect of the site plan for entering and exiting the property and referred to a letter from Garwood's Police Chief, Bruce Underhill, regarding updates to warning signs on street and school crossing signs.

Potter testified about the proposed building's size and interior configuration. When asked by the Board attorney why the buildings would be thirty-five feet in height, he responded because they were going to be three stories high. Plaintiffs' Brief, pg. 3, citing T 58:3-12.

Finally, McDonough, the professional planner testified that the application needed to find a nexus between the application and the Municipal Land Use Law, the local Master Plan, and the zoning ordinance. Plaintiffs' Brief, pg. 3, citing T 66: 7-14. He presented an exhibit that he stated gave a sense of the pattern of the neighborhood. Plaintiffs' Brief, pg. 3, citing T 68:1-2. He spoke about the location of the property, the nature of Fourth Avenue, and the fact the property is at what he described as the "confluence" of Westfield, Cranford, and Garwood, the proximity to the train station all implying a higher density of use. Plaintiffs' Brief, pg. 3-4, citing T 68:20-25. He spoke about the purposes of zoning in an effort to reconcile the application with those purposes, and stated why he felt the application advanced some of those purposes.

Following this testimony, the hearing was opened to the public for comment. Four residents of the Borough of Garwood spoke in opposition.[1] No expert testimony was presented by anyone in opposition to the application. The Board ultimately made findings crediting the testimony of the Villaraut's expert witnesses. The Board found special reasons existed for the proposed use variance, that the proposed use is not inconsistent with the Borough's master plan, that there will be improvements to the aesthetics of the Subject Property, that there will be little if any negative impact upon surrounding properties or the zone plan or zoning ordinance, and finally that a hardship to the Villaraut's would result from the strict application of the zoning ordinance.

[1] The Board's Resolution states that plaintiff Ileen Cuccaro objected to the project saying she believed a three-house subdivision was positive, she doubted the traffic studies, and she believed the project is against the master plan of the Borough. Plaintiff Horace Corbin said there had been clearcutting in the rear of the property and that the water from the project will add to the presently-existing mud-hole. Two non-parties also spoke against the project, one expressed concern about traffic, privacy, and the project fit with the area; the other objected saying the project is not at all in conformance with the neighborhood character.

Plaintiff's Brief, Ex. A, pgs. 2-8. The Board granted the Application for a use variance subject to a full site plan approval by a five-to-two vote. This decision was memorialized in a resolution adopted on July 23, 2014 ("Resolution"), however, the Resolution was devoid of specifics in support of the Board's conclusions.

Plaintiffs filed this complaint on September 8, 2014, alleging that the Board failed to make the necessary findings of fact or set forth any of the special reasons required to sustain the grant of the application, and that it acted in an arbitrary, capricious, and unreasonable manner. They also contend that the notice provided was defective.

Plaintiffs in their trial brief argue that decision of the Board on matters of law are not entitled to the presumption of validity and that the finding and conclusions of the resolution by the Board are insufficient and cannot be supported by the record made at the hearing. Plaintiffs also argue the amendment of the application from one seeking approval on non-age restricted multiple family housing to an age restricted housing stock renders the notice to the public invalid.

Defendants, the Villaraut's, argue that the Board's decision should be analyzed under the "arbitrary, capricious or unreasonable" standard of review, and that the Board did not make any "legal" conclusions which would warrant *de novo* review. Defendants argue the court should affirm the decision of the Board because it was adequately supported by the record and thus not "arbitrary, capricious, or unreasonable." They argue the application was properly supported by expert testimony, and that plaintiffs failed to submit any opposition at the hearing sufficient to cause a reasonable decision-maker to question the expert testimony provided by defendants. Defendants argue that notice of the hearing complied with the MLUL, as they provided a common sense description of their application sufficient for a lay-person to understand its impact. Defendants argue plaintiffs waived their right to challenge this notice because they did not object

to it at the hearing and that the age restriction element is irrelevant to the Board's consideration of the proposed use.

Defendant, the Board, adopts all arguments submitted in defendant Villaraut's trial brief. The Board also argues that from a density standpoint, the variance is *de minimus* in that 8.8 units would be permitted on the property and 9 units were approved. The Board argues the notice issue is disingenuous as notice was given for a use variance to allow townhouses, that was what was approved, and no one objected at the hearing when the Villaraut's agreed to an age restriction. The Board further argues that the age restriction in no way harms plaintiffs, and plaintiffs fail to explain how they were prejudiced by the Villaraut's decision to limit the occupancy of the townhouses to ages fifty-five and over.

Plaintiffs filed a reply brief and argue that waiver for failure to object at the hearing is legally impossible in that notice of the hearing and the nature of the application is a jurisdictional predicate for the Board to act and cannot be waived. The plaintiffs argue that notice must appraise the public as to the nature of the relief sought or else the Board cannot act on the application. Plaintiffs did not address any other arguments in their reply.

Legal Analysis:

Plaintiffs' complaint seeks reversal of the Board's decision on procedural grounds, arguing that defendant Villaraut's notice prior to the hearing was defective. This court will address this dispositive issue first.

Notice

The general rule with respect to development applications is that "strict compliance with statutory notice requirements is mandatory and jurisdictional, and non-conformity renders the governing body's resultant action a nullity." Rockaway Shoprite Assocs. v. City of Linden, 424

N.J. Super. 337, 352 (App. Div. 2011), see also Shakoor Supermarkets, Inc. v. Old Bridge Twp. Planning Bd., 420 N.J. Super. 193, 201 (App. Div. 2011) ("[f]ailure to provide proper notice deprives a municipal zoning board of jurisdiction and renders null any subsequent action."). The court in Perlmart of Lacey, Inc. v. Lacey Twp. Planning Bd., 295 N.J. Super. 234 (App. Div. 1996) addressed the issue of notice and stated "proper notice is a jurisdictional prerequisite, and a failure to so provide is fatal to the Planning Board's approval[.]" Id. at 236.

N.J.S.A. 40:55D-12(a) states that "public notice of a hearing shall be given" by an applicant "at least 10 days prior to the date of the hearing" for any "application for development." Id. The notice must also comply with N.J.S.A. 40:55D-11, which states:

> Notices pursuant to section 7.1 and 7.2 of this act shall state the date, time and place of the hearing, **the nature of the matters to be considered** and, in the case of notices pursuant to 7.1 of this act, an identification of the proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office, and the location and times at which any maps and documents for which approval is sought are available pursuant to subsection 6b.

Id.

The critical element of notice is an accurate description of what the property will be used for under the application. Perlmart, at 238. The MLUL requires "a common sense description of the nature of an application, such that the ordinary layperson could understand its potential impact upon him or her. Id. at 239. The purpose of notice is to provide sufficient detail of what is projected to inform the interested public whether to participate or object. Rockaway, at 348.

In Pond Run Watershed Ass'n v. Twp. of Hamilton Zoning Bd. of Adjustment, 397 N.J. Super. 335 (App. Div. 2008), a public notice under N.J.S.A. 40:55D-11 advised the developer's application was for a "use variance for two non-permitted uses...age-restricted rental units and retail/office units" together with various other variances. Id. at 346. The court found this notice

defective because the general allusion to "retail/office" units did not mention the proposed 168-seat, 5,000 square foot restaurant, which would have been of heightened concern to neighbors and other members of the public, particularly as to issues of traffic, parking, noise and the possible consumption of alcohol on site. Id. at 354-55. The court emphasized that applying N.J.S.A. 40:55D-11 as construed in Perlmart, the notice was legally deficient for failing to include any reference to such a restaurant. Id. at 355.

Here, both parties agree that the notice provided the required elements of date, time and place of hearing, identification of the property, and the location and time when maps and documents for which approval is sought would be available for review. At issue is whether the "nature of the proposed use" was duly provided.

In support of this procedural challenge, plaintiffs maintain that the notice should have identified that the proposed use variance was for age-restricted multi-family residences. Plaintiffs argue notice was deficient in that it failed to properly explain "the nature of the matters to be considered," pursuant to N.J.S.A. 40:55D-11, by failing to indicate that the application was for age-restricted housing. Plaintiffs argue that the public and the affected property owners had a right to this key piece of information.

Defendants argue notice was sufficient in that it identified the property by name and by block and lot number, and informed the public that the permitted use of the property would be multi-family residences. Defendants' assert that the age restriction element is irrelevant to the Board's inquiry on whether to grant the requested use variance, and that the notice clearly provided a common sense description of the nature of the proposed use, understandable to lay persons, sufficient to enable both plaintiffs and the public to make a decision as to whether to participate in the hearing or investigate further. Defendants also argue that the age restriction element is

irrelevant to consideration of whether to grant a use variance since the age restriction affects only ownership and not use.

Defendants argue the facts of this case are similar to Shakoor, where the Appellate Division affirmed the trial court's judgment upholding board approval of an application and holding that notice which identified proposed use "as a main retail store of 150,000 s.f." was legally sufficient despite not specifically identifying the retailer because it "adequately informed laypersons that a major 'big box' store was proposed for the site and alerted them to the possible concerns, such as traffic, commonly associated with those stores." Id. at 203. Defendants also argue that the facts of this matter are more similar to Scerbo v. Bd. of Adjustment, 121 N.J. Super. 378, 389-90 (Law Div. 1972), which held sufficient notice was provided to neighboring property owners regarding the proposed usage where the application and notice sought approval "for a residential treatment center" and set forth a brief description of the premises, which was sufficient to alert neighboring property owners of the proposed use as a residential treatment center for drug dependent persons and provide them with adequate notice of the purpose and subject of the hearing. Ibid.

Here, the notice only advised that a use variance was being sought to allow for the development of multi-family townhomes. The age-restriction on the townhomes was not mentioned at any point in the notice to the public or to the nearby property owners. The application, when filed, was not seeking approval of an age-restricted project. It was only at the commencement of the hearing that counsel for the Villaraut's indicated to the Board that they would be willing to commit to making the project a fifty-five and over age-restricted project.

This court finds the facts of this case most comparable to the facts of Pond Run, in that the general reference to multi-family townhomes was not specific enough to apprise the public and affected property owners of the proposed use, when in fact a use variance for age-restricted multi-

family townhomes was being considered. Like in Pond Run, specific knowledge of the use is central to providing adequate notice, where such use can affect the level of concern of the neighbors and general public. There is a different demographic targeted with this type of development and different factors to be considered when determining the impact on the surrounding area.

This court agrees with plaintiffs that notice in this case was legally deficient in apprising the public of the substantive changes to the property's use. The notice's failure to identify the proposed use variance as age-restricted fifty-five and over rendered it legally deficient. Failing to include the age-restriction resulted in failing to provide a "common sense description of the nature of the application" such that the ordinary layperson could understand its potential impact on him or her. To adequately inform the public, the notice should have included a provision stating the age-restriction. If the public and nearby property owners had been properly apprised, it is reasonable to believe that additional individuals may have attended this meeting to object to the use. As it were, they were denied the opportunity to do so. In addition, perhaps those who did attend would have prepared differently for the meeting. Counsel advised at oral argument that their experts were able to tailor their testimony to this change in circumstance, however, without notice and the opportunity to appear, members of the public were not afforded this same opportunity. As stated above, the purpose of notice is to provide sufficient detail of what is projected to inform the interested public whether to participate or object. The notice here failed to provide this detail, and thus, it was legally deficient.

Waiver of Notice

In Rockaway, the defendants contended, as did the defendants in this case, that because plaintiff's representative attended the public hearing and did not object to the lack of proper notice,

plaintiff "waived" its right to challenge the ordinances on that basis. Id. at 351. The court disagreed and found that, "[w]hile a few jurisdictions have found a 'waiver' of defective notice if the landowner appeared, participated and voiced objection to the proposed zoning ordinance, see, e.g., Schumacher v. Town of Jupiter, 643 So.2d 8, 9 (Fla. Dist. Ct. App. 1994), review denied, 654 So.2d 919 (Fla. 1995); Hansen v. City of Norfolk, 201 Neb. 352 (1978), others, in reaching a contrary result, have predicated their invalidating action 'on the premise that the *public in general* has a right to know that quasi-legislative action is imminent with jurisdictions varying only on the necessity of clarity of the notice.' Rohan, 8-52 Zoning and Land Use Control, supra, §52.08[2] (footnotes omitted) (emphasis added)." Id. at 353.

Defendants' argue that even if notice was legally deficient, plaintiffs' waived their right to this argument by attending the hearing and failing to object to notice at that time. Defendants also argue that there is no indication from the hearing transcript that plaintiffs were prevented from raising any type of objection or concern to plaintiffs, and this evidenced their voluntary waiver. Plaintiffs' argue in reply that waiver is legally impossible, as notice of the hearing and nature of an application is a jurisdictional predicate for the Board to act and cannot be waived.

This court disagrees with defendants' argument that plaintiffs voluntarily waived their right to object to the form of notice given. It is clear from the case law stated above that attendance at the meeting and failure to object to notice at the meeting in and of itself is not waiver. The goal of notice is not so much to apprise those that attend of the change, but those who did not attend who may have otherwise attended. Thus, plaintiffs' attendance at the meeting and failure to object to the lack of proper notice at that time, does not waive their right to argue defective notice at this time.

Thus, this court finds that the failure to provide proper notice is a sufficient basis to reverse the Board's decision and remand the matter.

Resolution:

Even though the court has reversed and remanded this matter to the Board, the issue of the sufficiency of the Resolution will now be discussed so that if the matter is presented again, the deficiencies can be corrected.

Plaintiffs have raised the issue of the sufficiency of the Resolution. They argue the Resolution does not provide the necessary analysis to support any conclusions of the Board. Plaintiffs point out the Resolution also fails to contain any comments specifically about the proposed age-restricted use of the property.

Defendants point to the fact that the memorializing Resolution contained 94 specific points and, when reviewed in their totality, adequately support the Board's findings. At oral argument, however, counsel for the Board acknowledged that the conclusions at the end of the Resolution were sparse, but reviewing them in their totality does provide legally sufficient conclusions. The factual findings and conclusions in the Resolution are as follows:

1. The Board credits the testimony of Mr. Quinn, Mr. Staiger, Mr. Potter and Mr. McDonough.
2. The Board finds to be fact, each and every of the statements set forth in the above-described "Whereas" clauses and sub-clauses, and the 94 specific points of testimony.
3. Special reasons exist for the proposed use variance.
4. The propose use is not inconsistent with the master plan of Garwood.
5. There will be improvements to the aesthetics of the property.

6. There will be little if any negative impact upon surrounding properties, or upon the zone plan or the zoning ordinance.
7. A hardship to Applicant would result from the strict application of the zoning ordinance.

The grant of a use variance under N.J.S.A. 40:55D-70(d), requires proof of both "positive and negative criteria." Sica v. Bd. of Adjustment, 127 N.J. 152, 156 (1992). Under N.J.S.A. 40:55D-70(d), where the proposed use is not inherently beneficial to the general welfare, the positive criteria requires a showing that the applicant's proofs demonstrate that "special reasons" exist to grant the use variance. Id. The negative criteria under N.J.S.A. 40:55D-70(d), requires a showing that the proposed use of the property will not cause "substantial detriment to the public good" as well as a showing that the proposed use "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Id.

In Medici v. BPR Co., 107 N.J. 1 (1987), the court set forth the requirements for a Resolution to be found legally sufficient. It specifically held that, in addition to proof of special reasons, a use variance requires "an enhanced quality of proof and 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." Id. at 21. The court noted that the applicant's proofs and the board's findings must reconcile the proposed use variance with the zoning ordinance's omissions of the use from those permitted in the zoning district. Ibid. The court gave the example that "proof that the character of a community has changed substantially since the adoption of the master plan and zoning ordinance may demonstrate that a variance for a use omitted from the ordinance is not incompatible with the intent and purpose of the governing body when the ordinance was passed." Ibid.

The Medici court found that "in 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." Id. at 23. Conclusory recitations in the board's resolution of approval that "the applicant has demonstrated that the relief requested can be granted without substantial detriment to the intent and purpose of the Zoning Ordinance" does not constitute the deliberative and specific determinations that is required to satisfy the negative criteria. Id. at 25. The court found that the nature of the proofs offered to achieve reconciliation of the proposed variance with a zoning ordinance depend on the specific facts of each case. Id. at 21, n. 11.

Here, the Resolution states special reasons exist for the proposed use variance. While the Resolution incorporates 94 points of testimony, this conclusory statement alone regarding special uses is insufficient. The Resolution also states in a conclusory fashion that: the proposed use is not inconsistent with the master plan of Garwood, there will be improvements to the aesthetics of the property, little if any negative impact upon surrounding properties, or upon the zone plan or the zoning ordinance, and a hardship to applicant would result from the strict application of the zoning ordinance. While these statements may be supported by the record before the Board, the Resolution's conclusions should specify which findings of fact apply to the positive and negative criteria for the variance and explain the rationale behind these conclusions. As stated in Medici, a conclusory statement that merely recites the statutory language is vulnerable to the contention that the criteria have not been adequately establish.

Conclusion:

For the foregoing reasons explained above, this court finds in favor of plaintiffs, as the notice provided prior to the hearing was insufficient. Because this issue is dispositive, the court

has not made any additional findings in this matter, except to comment on the resolution as should this matter be represented, the resolution for any new application should comply with the case law as noted above.

An order reflecting this determination is attached.