

2016 WL 4410100

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Ada Caro, Carolina Cisneros, Jennifer Girardier,
Stefanie Gomes, Evelyn Kalka, Lisa Dewey-Mattia,
Bennett A. Medoff, Scott Michalczyk, Michael
Panzer, Mateo Pinto, Jason Steffener, and Anker
West, Plaintiffs-Appellants,

v.

28 McWhorter Street, LLC, The Zoning Board of
Adjustment of the City of Newark, and The City of
Newark, Defendants-Respondents.

Argued November 30, 2015

Decided August 19, 2016

On appeal from Superior Court of New Jersey, Law
Division, Essex County, Docket No. L-8484-12.

Attorneys and Law Firms

Renée Steinhagen argued the cause for appellants (New
Jersey Applesed Public Interest Law Center, attorneys;
Ms. Steinhagen, on the briefs).

[Frank J. Petrino](#) argued the cause for respondent 28
McWhorter Street, LLC (Eckert Seamans Cherin &
Mellott, LLC, attorneys; Mr. Petrino and [Michael R.
Butler](#), of counsel and on the brief).

[Angelo Cifelli, Jr.](#), argued the cause for respondent The
Zoning Board of Adjustment of the City of Newark (Piro
Zinna Cifelli Paris & Genitempo, attorneys; Mr. Cifelli,
on the brief).

Steven F. Olivo, Assistant Corporation Counsel, argued
the cause for respondent City of Newark ([Karen Brown](#),
Corporation Counsel, attorney; Ms. Brown, of counsel;
Mr. Olivo, on the brief).

Eastern Environmental Law Center, attorneys for amici
curiae Professor Darius Sollohub, AIA; Professor
Anthony W. Schuman, RA; Professor [Brian McGrath](#),
RA; Professor Ana Baptista, PhD.; Ironbound Community
Corporation; and Greater Newark Conservancy (Aaron
Kleinbaum, on the brief).

Before Judges [Fasciale](#), [Nugent](#) and [Higbee](#).

Opinion

PER CURIAM

*1 Plaintiffs Ada Caro, Carolina Cisneros, Jennifer
Girardier, Stefanie Gomes, Evelyn Kalka, Lisa
Dewey-Mattia, Bennett A. Medoff, Scott Michalczyk,
Michael Panzer, Mateo Pinto, Jason Steffener, and Anker
West appeal from a March 5, 2014 Law Division order
dismissing their amended complaint in lieu of prerogative
writs. In dismissing the complaint, the Law Division
judge upheld defendant City of Newark Zoning Board of
Adjustment's (the Board) grant of variances and site plan
approval to defendant 28 McWhorter Street, LLC
(McWhorter LLC), to build a surface parking lot. On
appeal, plaintiffs argue McWhorter LLC failed to prove
the criteria necessary to obtain the variances needed to
build the parking lot. We agree, reverse the trial court's
order, and vacate the resolution of the Board granting the
variances and site plan approval.

The property at issue (the property) is located in the First
Industrial District in the City of Newark's North
Ironbound neighborhood. The property is bordered by
McWhorter, Union, and Hamilton Streets and is
approximately eight blocks from the Prudential Center.
Approximately 1.25 acres in size, the property is
surrounded by residential, commercial, and industrial use
properties. Public parking is not permitted in the First
Industrial District.

In January 2006, the Newark Central Planning Board
(Planning Board) granted McWhorter LLC approval to
demolish the existing single-story industrial building on
the property and construct a mixed-use seven-story
building, which was to include a two-deck parking garage
with 266 spaces, commercial and retail space, and
residential units. Due to the economic recession,
McWhorter LLC did not develop the project. Six years
after receiving the Board approval, on May 30, 2012,
McWhorter LLC filed an application with the Board
seeking to demolish the existing building, retain the
existing forty-three parking spaces, and construct a "new
paid public parking lot ... of 158 parking spaces and a
control booth." The proposed surface parking lot would
have ingress and egress on McWhorter Street and Union
Street. Individuals would be able to park their cars "by
the hour or by day, or by month." The lot would be in
operation Monday through Friday from 7:00 a.m. to 9:00
p.m. and on weekends from 8:00 a.m. to 5:00 p.m. Three

employees would be on site at night and on weekends.

McWhorter LLC submitted with its application a parking assessment prepared by Dynamic Traffic, LLC (Dynamic Report). The Dynamic Report stated, “the site has been designed [with access from both McWhorter Street and Union Street] to provide for safe and efficient access and circulation.” The Dynamic Report also stated that “[b]usinesses in the area have very limited on-site parking, specifically the industrial uses in the area, the commercial uses on Ferry Street and Lafayette Street, the night club opposite the subject property on Union Street and potentially the now closed night club on Bruen Street at Lafayette Street.” Lastly, the report noted that area residents relied largely on on-street parking.

*2 On September 3, 2012, Nancy Gould, AICP, Acting Principal Planner for the City of Newark, submitted a memorandum to the Board in which she declined to recommend the variance. Gould noted the project required a use variance as well as “ ‘c’ variances for parking lot landscaping, illumination standards, fence height, and signage.” She also noted the Future Land Use Plan of the 2004 Land Use Element of the Master Plan designated the site as S-T Transitional, “which is intended to encourage the redevelopment and revitalization of areas within the City that are adjacent to the Central Business District.” She pointed out,

[w]hile the Future Land Use Plan acknowledges the need for parking to accommodate the demand from potential new residents and guests, it recommends below-grade garages and off-site locations, where appropriate. Moreover, the provision of parking garages at street level is strongly discouraged. As such, this site does not appear to be an appropriate location for a surface parking lot. The establishment of a surface parking lot at this location is not consistent with the City’s vision and goals for the redevelopment of this area, as demonstrated by its position set forth in the 2004 Future Land Use Plan.

Gould further explained it was “the City’s position to discourage such uses in this area and, instead, build upon the walkable, mixed use nature of the neighborhood, as laid out in the Future Land Use Plan.” Acknowledging a demand for additional convenient parking in the Dynamic

Report, Gould commented,

these conditions are not unexpected in a thriving urban area. Furthermore, it is important that the demand for parking be balanced with the vision and goals for the area in the Future Land Use Plan and the overall good of the neighborhood. It is the opinion of the City that a surface parking lot in this location would detract from the walkability of the neighborhood, create a hazard to pedestrians, and otherwise negatively impact the quality of life for residential and institutional uses ... in the vicinity of the site.

Gould observed that it was unclear how McWhorter LLC could state there would be “no increase in traffic volume” by changing the use of the property from a building to a surface parking lot, and directed McWhorter LLC to “provide testimony in support of [that] statement.” Gould did “not recommend this project because, per [the] analysis, it appears to be detrimental to the neighborhood and the zone plan.”

On September 6, 2012, the Zoning Board conducted a public hearing on McWhorter LLC’s application. McWhorter LLC presented three witnesses: its principal, an architect, and a planner.

Manual Lopez, 28 McWhorter LLC’s principal, testified he owned quite a few parking lots throughout the City as well as public buildings, stores, offices, and warehousing. He purchased the property from Goldbar Electric, a company that used the property as a former electric warehouse. After purchasing the property, he obtained approvals to construct 150 apartments, 10,000 square feet of retail space, and 10,000 square feet of office space. When the economy took a downward turn, he decided not to construct the project.

Lopez testified that McWhorter LLC rented the property to a church for five years. During that time, he attempted, unsuccessfully, to lease the property to public entities. In response to a leading question, namely, “So it’s safe to say you’ve made every effort to ... develop this property in other fashions,” Lopez responded, “That is correct.”

Lopez described the past history of the property and how he had maintained it since purchasing it. He also described the operation of the proposed parking lot.

*3 Daniel Roman, the architect, described the site plan for the property and explained the layout of the parking lot and the dimensions of the 158 parking spaces. He also explained the lighting and fencing around the property, and opined that a fence six inches higher than permitted would “definitely not” be out of character with the rest of the neighborhood. Lastly, the architect described the proposed landscaping. The architect did not perform any traffic studies. He was also unaware of any environmental studies performed to gauge the impact, if any, that the additional 158 cars would have on the air quality in the area.

McWhorter LLC relied principally on its Planner, John McDonough, LA, PP, AICP, to establish the positive and negative criteria required for a use variance. McDonough based his opinions on his site visit and his review of the “surroundings” several times. He also considered the Master Plan, Zoning Ordinance, the City Planner’s memorandum and McWhorter LLC’s application.

The property fell within a one-half mile radius of Penn Station. Twelve other pay parking areas were located within the radius. McDonough opined that in view of the twelve other parking areas, McWhorter LLC’s proposed lot was “a land use that has ... establish[ed] itself in the area and it’s not foreign to the area. And we’re also looking at a land use that is arguably popular in the area.”

McDonough noted that twelve parking lots “have manifested themselves in a cluster ... within proximity of that half-mile radius of Penn Station.” The parking areas around Penn Station had “established themselves as predominantly a commuter parking land use.” McDonough described the “ripple effect” as putting pressure on the roadways that surround that half-mile radius which puts “pressure on the local businesses, institution[s] and establishments in the vicinity.” McDonough explained that the applicant was “looking ... to establish ... a relief valve from a parking standpoint to neighborly local businesses, institutions and [the] like that do have a heavy parking demand but yet no parking supply on their particular properties.”

McDonough next explained that the deteriorating warehouse on the site was “[f]unctionally and visually ... an underproductive site which is in complete contradiction to your Master Plan that [en]visions the City as a progressive City and certainly an economic development oriented City.” Further, the proposed parking lot had full circulation around it which, according to McDonough, does not lend itself very well to a full commuter type of land use, but “rather somebody who

wants to do the downtown ... in the Ironbound part leaving the vehicle for a little bit and come back.” McDonough opined, “to the extent that this is providing that relief valve for the neighboring local businesses in the area that does represent good cause from a planning standpoint.” McDonough also pointed out that paid parking lots are not a permitted use anywhere in Newark.

Addressing the positive statutory criteria concerning a use variance, McDonough testified the general welfare would be promoted because the parking lot responds to demand. When McDonough walked the neighborhood, he saw “at least a dozen institutional type uses and commercial uses such as bars and taverns and [the] like that had absolutely no parking associated with them.” He also “saw a school in the area that actually had a playground taken away from the kids and is now used for parking for the teachers.”

Additionally, McDonough opined the variance would promote efficient use of land as well as a desirable visual environment, at least when one compared the “before and after of what’s there now against what [McWhorter LLC] is looking to [pro]pose, not only the decorative fence but the preservation of mature trees which are around the perimeter of the property.” McDonough further opined the site was particularly suitable for the use by virtue of its condition, that is, it was “[c]leared, flat, ideally suited for this type of a land use, we don’t [have] retaining walls or anything of that [e]ffect.” McDonough reiterated the property was “near many institutional uses and commercial uses that have no parking.”

*4 Concerning the negative criteria, McDonough testified “this is not an unsafe land use it’s in fact [a] relatively benign form of land use.” With respect to crime and security, the site would be monitored by staff and by cameras. Because the facility was lighted and gated, he believed “concerns about public safety are adequately addressed by this Application.”

According to McDonough, the proposed use was not unhealthy, but rather a very mild form of land use in terms of pollution generation, that is, emissions. Further, no refuse would be generated by the use. The proposed use was not noisy, and because “it is shutting down at night ... we’re not looking at that round-the-clock population.” McDonough also noted the visual impact was “not going to be substantially negative, but certainly an improvement over the existing condition.”

McDonough acknowledged “the Governing Body still has said, ‘This Land Use shall not go here or elsewhere in the community.’ ” He reconciled the proposed use’s

incompatibility with the Master Plan because of changed circumstances. According to McDonough, the “Master Plan goes back to 2004 and I think we’ve had a substantial change since 2004 given our economic crash back in 2007.” McDonough recalled the applicant had an approval “for [a] beautiful lustrous building” which could not be completed because “the funding [was] not there and certainly the market is not there in this economy.” He explained, as a planner, “we need to find practical solutions to ... difficult problems. And I think [the applicant] in his Application has come up with a creative and effective solution [for] what is a continuing problem in this area.”

For those reasons, McDonough thought “the reconciliation with the Master Plan has been met [by] virtue of that substantial change[d] circumstance in 2007 that continues to this day.”

Seventeen local residents appeared as objectors. The objectors testified the project would result in harm based on the effect of other surface parking lots in the area. These harms included flooding, reduced air quality, increased crime, increased traffic, and destruction of the residential fabric of their community. One objector asserted McDonough’s testimony showed he was somewhat uninformed:

[T]his planner does not know how many cars are going to be coming and going during the day, the noise, the exhaust, the car alarms we are ... going to be bombarded with it. Why do we have to be the armpit of America, I [am] putting it in a nice way.

The objector also asserted the project would bring to the neighborhood crime and litter, and create a pedestrian hazard with people rushing to get out by 5:00 p.m. He characterized the lot as a “park and ride” for New York commuters.

Another objector, an architect and urban designer, focused on the walkability of the neighborhood and stressed the issues raised in the Gould memorandum that had not been addressed by the applicant. Three others testified about the likely increases in crime and pollution. One of the three noted “this whole area has the highest [asthma](#) rate ... in this City because of the pollution,” and the project would make the pollution worse, because cars on Union Street would back up waiting for the traffic light on Ferry Street. Other objectors raised similar concerns.

A single citizen spoke in support of the application. The pastor of a local church noted the need for parking and stated the lot would be needed for those who wanted to drive to Newark and get to New York. He disclosed that McWhorter LLC had been allowing his parishioners to park for free in a different parking lot.

*5 The Board approved the application. On October 11, 2012, five Board members adopted a written resolution of approval. The resolution set forth information about the property, the surrounding area, and variances that would have to be made for fence height surrounding the lot, landscaping, and signage. The resolution noted:

12. The project will eliminate an unsightly light industrial building in which other uses may be permitted as part of zoning, along with the negative impacts associated with those types of uses, including noise, truck traffic, and lengthy hours of operation.

13. The property is situated in close proximity to major transit hubs and attractions, such as Newark Penn Station, the Prudential Center, and Ferry Street[,] making this location particularly suited for the proposed use.

14. Permit parking for residents in the adjacent streets eliminates the availability of on-street parking in the area for nonresidents.

15. There is a significant shortage of parking in the area and the Future Land Use Plan of the 2004 Element of the Master Plan acknowledges the need for parking.

16. The applicant’s testimony discloses that there will be no increase in traffic volume on the premises. The project will draw from existing traffic in the area to alleviate the parking shortage.

17. Applicant’s planning testimony demonstrates that the proposed use will be less intrusive than many of the uses permitted in the first industrial district, which permitted uses would have a far more detrimental effect on nearby residential residences than proposed parking lot.

18. Testimony discloses that ... businesses in the Ferry Street commercial corridor require more parking to insure their continued viability.

On October 15, plaintiffs filed a notice of appeal with the City of Newark Municipal Council (Council) requesting review of the resolution. The Council failed to hold a hearing within the statutory time period. Consequently, under [N.J.S.A. 40:55D-17](#), Council’s failure to act constituted a decision affirming the Board’s resolution.

On November 9, Hartz Raymond Boulevard Limited (Hartz) filed a complaint in lieu of prerogative writs against McWhorter LLC and the Board, seeking a judgment vacating the Board's resolution. On November 21, plaintiffs filed a separate complaint in lieu of prerogative writs. Plaintiffs amended the complaint to include the City of Newark. The actions were consolidated.

In early 2013, McWhorter LLC obtained a construction permit to demolish the building on the property and to construct the parking lot. Construction began in the summer of 2013. In August 2013, plaintiffs filed an application for relief by order to show cause seeking a stay of the construction and operation of the parking facility. The Law Division judge denied the application. Hartz settled with McWhorter LLC in January 2014.

In a March 5, 2014 order, the Law Division judge upheld the Board's decision, concluding "the Board did not act arbitrarily, capriciously or unreasonably when it granted a use variance to [McWhorter LLC] to build the surface parking lot." Plaintiffs appealed.

Plaintiffs contend the Board's action in granting the use variance was arbitrary and capricious because: McWhorter LLC failed to prove the positive and negative criteria needed to obtain a use variance; the Board's resolution was deficient because it was conclusory and unsupported by the evidence; and the Board's action constituted zoning by variance. Amici argue surface parking lots are not a solution to a City's need for parking, are detrimental to the public welfare, and impair Newark's Master Plan and zoning ordinance. Amici contend surface parking lots inhibit walkability, facilitate street-crime activity, have a detrimental impact on the environment, discourage development, and negatively impact land values.

*6 McWhorter LLC responds that it established the positive and negative criteria necessary for the use variance, the Board's resolution was legally sufficient, and the Board did not engage in de facto zoning by variance, as evidenced by the Governing Body's election not to exercise its opportunity to review the variance.

The Board argues its grant of the variance is entitled to a presumption of validity, which has not been overcome. The City of Newark argues its Zoning Board's decision was fully supported by the evidence and there is no basis for upsetting the use variance.

We apply the same standard as the Law Division when

reviewing a zoning board's decision to grant or deny a variance. *Bressman v. Gash*, 131 N.J. 517, 529 (1993); *D. Lobi Enters., Inc. v. Planning/Zoning Bd. of Sea Bright*, 408 N.J. Super. 345, 360 (App. Div. 2009). We will uphold a board's decision to grant a use variance if the "board's decision comports with the statutory criteria and is founded on adequate evidence." *Burbridge v. Mine Hill*, 117 N.J. 376, 385 (1990) (citation omitted).

Our review of a zoning board's decision to grant or deny a variance is deferential. *Price v. Himeji, LLC*, 214 N.J. 263, 285 (2013). This is so because zoning boards have "peculiar knowledge of local conditions [and] must be allowed wide latitude in their delegated discretion." *Jock v. Zoning Bd. of Adjustment*, 184 N.J. 562, 597 (2005).

Nevertheless, "[v]ariations to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound zoning." *Burbridge, supra*, 117 N.J. at 385 (alteration in original) (quoting *Kohl v. Mayor & Council of Fair Lawn*, 50 N.J. 268, 275 (1967)). Thus, though deference is given to a zoning board's decision, "a reviewing court gives less deference to a grant than to a denial of a use variance." *Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment*, 388 N.J. Super. 67, 75 (App. Div. 2006) (citing *Funeral Home Mgmt., Inc. v. Basralian*, 319 N.J. Super. 200, 208 (App. Div. 1999)). When "reviewing the grant of a use variance, a court must consider whether a zoning board of adjustment 'in the guise of a variance proceeding, [has] usurp[ed] the legislative power reserved to the governing body of the municipality to amend or revise the [zoning] plan.'" *Ibid.* (alterations in original) (quoting *Vidal v. Lisanti Foods, Inc.*, 292 N.J. Super. 555, 561 (App. Div. 1996)).

Zoning boards of adjustment are delegated the power to grant a variance "[i]n particular cases and for special reasons"—commonly referred to as the positive criteria—provided an applicant shows that "such variance or other relief 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"—commonly referred to as the negative criteria. *N.J.S.A. 40:55D-70(d)*. Concerning the positive criteria,

[o]ur case law recognizes three categories of circumstances in which the "special reasons" required for a use variance 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, [Inc. v. Borough of Fair Lawn Bd. of Adjustment.]* 152 N.J. [309,] 323 [(1998)] (quoting *Medici, supra*, 107 N.J. at 4).

*7 [*Saddle Brook Realty, supra*, 388 N.J. Super. at 76.]

A zoning board of adjustment’s “[d]etailed factual findings that distinguish the property from surrounding sites and demonstrate a need for the proposed use may help to establish that the property is ‘particularly suitable’ for the proposed use and a lack of such findings may be fatal when tested on review.” *Price, supra*, 214 N.J. at 288.

To satisfy the “negative criteria,” an applicant must demonstrate the variance “can be granted without substantial detriment to the public good,” and “the variance will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.” *Id.* at 286 (citing *N.J.S.A. 40:55D-70*). The first question “focuses on the effect that granting the variance would have on the surrounding properties.” *Ibid.* The second question asks whether it is possible to “reconcile the grant of the variance for the specific project at the designated site with the municipality’s contrary determination about the permitted uses as expressed through its zoning ordinance.” *Ibid.* (citing *Medici, supra*, 107 N.J. at 21). This requires, “in addition to proof of special reasons, 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.” *Medici, supra*, 107 N.J. at 21.

Here, the proofs McWhorter LLC produced at the hearing on its application satisfied neither the positive nor the negative criteria. McWhorter LLC does not contend the property’s proposed use inherently serves the public good or that it will suffer undue hardship if compelled to use the property in conformity with the permitted uses in the zone.¹ Rather, McWhorter LLC argues the use will serve the general welfare because it responds to a demand for parking in the area. According to McWhorter LLC’s planner, the public welfare would be served because the proposed use was an efficient use of land; would produce a desirable visual environment, especially compared to what currently exists; and was suitable by virtue of its condition, namely, it was cleared, flat, and ideally suited for this type of land use.²

The property’s characteristics cited by McDonough and the Board—for example, its proximity to major transit

hubs and attractions, such as Newark Penn Station, the Prudential Center and Ferry Street—are characteristics common to all properties in the relevant zone, rather than being a particular feature of the McWhorter LLC property. See *Medici, supra*, 107 N.J. at 24; *Vidal, supra*, 292 N.J. Super. at 565. “Therefore, these characteristics would be appropriate for the governing body to consider in determining whether to continue the current zoning but do not provide a basis for the Board to grant use variances.” *Vidal, supra*, 292 N.J. Super. at 565.

*8 We fail to discern anything in McDonough’s testimony or in the record demonstrating the property is distinct from other properties in the zone, or particularly suitable for a surface parking lot, other than its location. See *Price, supra*, 214 N.J. at 293. Accordingly, we conclude the Board’s finding that McWhorter LLC satisfied the positive criteria is unsupported by the record.

More importantly, McWhorter LLC failed to satisfy the negative criteria. McWhorter LLC generally, and its planner specifically, failed to demonstrate the variance could be granted without substantial detriment to the public good, and that the variance would not substantially impair the intent and the purpose of the zone plan and zoning ordinance. *Id.* at 286.

Preliminarily, we note with respect to the first prong of the negative criteria,

the statutory focus is on the variance’s effect on the surrounding properties. The board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute “substantial detriment to the public good.”

[*Medici, supra*, 172 N.J. at 22 n.12 (citing *Yahnel v. Jamesburg*, 79 N.J. Super. 509, 519 (App. Div. 1963)).]

Here, other than a general conclusory statement that the application can be granted “without substantial detriment to the public good,” the Board’s resolution does not address the impact of the variance’s effect on the surrounding properties. More importantly, however, other than conclusory assertions, McDonough provided no competent testimony that the proposed use of the property as a surface parking lot would not substantially impair the intent and purpose of the zone plan and zoning ordinance. As the City’s planner pointed out, the primary focus for the area was on mid-rise residential, mixed use, office and retail uses. While the Future Land Use Plan acknowledged the need for parking, it recommended below-grade garages and off site locations and strongly

discouraged street-level parking; facts McDonough did not comment on when he discussed the need for parking in the area.³ Indeed, the 2004 land use element of the Master Plan for the City of Newark expressly stated, as one of its goals, “[t]o reduce the presence of surface parking lots and multi-structured parking garages by providing incentives for developers to locate parking underground to the extent possible.” The variance sought by McWhorter LLC was directly contrary to that goal.

McDonough acknowledged the need to reconcile the variance with Newark’s “zone plan.” Claiming “the Statute says, that a reconciliation may be found by virtue of changed circumstances,” McDonough testified the economic downturn in 2007, which had continued through the present, constituted such changed circumstances. His opinion is legally unsound and unsupported by the record.

To be sure, undue hardship resulting from the economic inutility of a parcel of land, resulting from the parcel not being reasonably adapted to a conforming use, can constitute grounds for a variance. *Medici, supra, 107 N.J. at 17 n.9*. However, McWhorter LLC has cited no precedent for the proposition that an economic downturn which affects development generally can satisfy the

negative criteria for a use variance.

*9 McWhorter LLC’s principal made a personal decision not to pursue financing for the project previously approved for the property. McWhorter LLC had leased the property to a church for five years. The record is devoid of any evidence concerning the property’s suitability, economic or otherwise, for any of the conforming uses in the zone.

In short, the record is devoid of “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.” *Medici, supra, 107 N.J. at 21*. Accordingly, we reverse the Law Division order and vacate the Board’s resolution granting the variances.

Reversed.

All Citations

Not Reported in A.3d, 2016 WL 4410100

Footnotes

- ¹ McWhorter LLC’s planner suggested the downturn in the economy was a change in circumstances satisfying the negative criteria. That testimony will be discussed below in the context of an analysis of the negative criteria.
- ² The lot was not “cleared.” There was an existing building on this site which McWhorter LLC sought to demolish. This was not the only mistake in McDonough’s testimony. For example, McDonough opined during the hearing that based on the Dynamic Report, the lot would not present unsafe traffic movements or impact pedestrian use of the area. The Dynamic report did not address the impact the parking lot would have on pedestrian traffic.
- ³ On September 24, 2012, following the Board’s approval of McWhorter LLC’s application but before adopting the final resolution, the Newark Central Planning Board adopted a 2012 Master Plan. The 2012 Master Plan also discourages surface parking lots in the downtown area.