

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1444-13T1

HILLSBOROUGH TOWNE CENTER
ASSOCIATES, LLC,

Plaintiff-Appellant,

v.

BOARD OF ADJUSTMENT OF THE
TOWNSHIP OF HILLSBOROUGH,

Defendant-Respondent.

Argued September 16, 2014 – Decided September 15, 2015

Before Judges Messano, Ostrer and Summers.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1667-11.

Alexander G. Fisher argued the cause for appellant (Mauro, Savo, Camerino, Grant & Schalk, P.A., attorneys; Mr. Fisher, on the briefs).

Jolanta Maziarz argued the cause for respondent (Woolson Sutphen Anderson, P.C., attorneys; Ms. Maziarz, on the brief).

PER CURIAM

Hillsborough Towne Center Associates (HTCA) appeals from the trial court's order dismissing its action in lieu of prerogative writ. HTCA challenged the Hillsborough Township Board of Adjustment's denial of variances to enable HTCA to

proceed with its proposed development of a site at the northwest corner of Amwell Road and U.S. Route 206. HTCA proposes to construct mixed use buildings that incorporate retail and/or office uses, along with residential apartments. The ordinance permits mixed use buildings incorporating retail, office and residential uses, simply not in the configuration contemplated by HTCA. Consequently, we are persuaded that the Board of Adjustment (Board) erred in determining that HTCA needed use variances under N.J.S.A. 40:55D-70(d)(1), as opposed to conditional use variances under N.J.S.A. 40:55D-70(d)(3). We therefore reverse the trial court, which agreed with the Board's findings that (d)(1) use variances were required, and HTCA failed to meet its heavy burden to justify granting them.

I.

HTCA's property is located in Hillsborough's "Town Center District" (TCD). HTCA's site consists of slightly over five acres on two lots – block 163.22, lots 33 and 34. Amwell Road approaches Route 206 at an angle from the southwest, and then proceeds perpendicular to Route 206 as it travels eastward. Roughly speaking, lot 33 is a rectangle with its shorter sides facing Route 206 on the east, and on the west, facing greenspace behind which are single family homes. Lot 34 is a misshapen triangle, with its longest, northerly side along the southern

border of lot 33, its southerly side fronting Amwell Road, and its western side forming a border with lot 34a.

The TCD is generally designed to convert a section of the township from an automobile-dependent landscape of strip malls, shopping centers, and gas stations along a regional north-south roadway, into a pedestrian-friendly, mixed use district, along a traffic-calmed local main street. The TCD zoning ordinance anticipates completion of the Route 206 bypass to the east, which will divert regional traffic, and allow redesign of the existing Route 206 roadway through the district. The TCD ordinance states it intends to create a physical design that replicates "the village and town center settlement patterns which were the norm in the United States from colonial times until the 1940s."

The township's master plan for the TCD contemplates six blocks of ten to fifteen acres each along Route 206, between Amwell Road and a new east-west crossroad to the north. An additional road would also be required to provide access to the blocks. The master plan describes the TCD as "a tight, walkable, tree-lined, village of shops, with architectural variety and predominantly sloping roofs." The plan envisions "buildings . . . at or very near the street line with pavement, street trees, streetlights and furniture all designed for

pedestrian comfort." Overall, the purpose of the TCD ordinance is to "encourage mixed land uses" and "ensure the development of land as a traditional neighborhood similar to other existing villages and town centers in New Jersey."

The current streetscape and land use is drastically different from that envisioned by the master plan, and prescribed by the TCD ordinance. According to the record, every business in the area is setback from the highway with a parking lot in front. The two roadways lack continuous sidewalks. North of HTCA's site are retail shops and offices, some located in shopping strip malls, as well as a convenience store and gas station. To the south are a gas station and offices converted from housing. Directly across Route 206 are an elementary school to the north of Amwell Road, and two shopping centers to the south.

The TCD ordinance emphasizes the location of "mixed-use buildings," which we will soon describe at greater length. In addition to mixed use buildings, the ordinance permits – subject to restrictions – numerous principal uses of properties in the zone, including: offices, residences, "live/work dwelling units," retail sales of goods and services, restaurants (excluding drive-thrus), personal service businesses (such as tailors, hair-care, and laundries or cleaners), banks, theatres,

"commercial instructional activities," and public and civic buildings. The ordinance also permits the pre-existing shopping centers on the east side of Route 206, south of Amwell Road. Generally, more than one principal use or structure may be located on a lot.¹

All off-street parking in the district must be located behind existing or proposed buildings. An artist's vision included in the master plan depicts large blocks with structures ringing the outer boundary, flush against sidewalks that border the curbs, and enclosing parking within the block's interior. All buildings in the district must consist of at least two stories of usable area – with the second floor consisting of at least eighty-five percent of the usable area of the first floor. Buildings may be no higher than three stories or forty-five feet, excluding enhancing architectural features.

Only mixed use buildings may front Route 206 or Amwell Road. The ordinance restricts the location of offices and residences. They may be incorporated in a mixed use building, but only if they are located above the first floor. Generally, any other permitted principal use may be located on the ground floor of a mixed use building, including, for example, a retail

¹ The full text of the ordinance's provision on permitted use is included as an appendix to our opinion.

establishment, restaurant, or bank (so long as it is at least 250 feet away from another bank).² As we discuss below, we find no basis in the ordinance's plain language for the Board's conclusion that only retail uses are permitted on the first floor of a mixed use building. Freestanding offices are permitted outside of mixed use buildings, but they "may not be located within 100 feet of existing Route 206 (Main Street) or Amwell Road."³

Aside from "live/work dwelling units," residential units are permitted as a principal use only above the ground floor of a mixed use building.⁴ One residential unit is permitted "for each 1,000 square feet of nonresidential gross floor area" in the same mixed use building. The ordinance also dictates the distribution of various types of residential units, setting

² The ordinance creates an exception for child-care centers, stating that "[c]hild-care centers may not be located on the ground floor of a mixed-use building." Hillsborough, N.J., Land Use and Development Code § 188-133.5(B)(10).

³ "Business services" may be located in the district without the 100-foot restriction governing "freestanding offices." "Business Services" are generally defined as services provided by one business to another. See Hillsborough, N.J., Land Use and Development Code § 188-3.

⁴ The zoning ordinance defines "live/work dwelling units" as "[b]uildings or spaces within buildings that are used jointly for commercial and residential purposes, where residential use of the space is secondary or accessory to the primary use as a place of work." Hillsborough, N.J., Land Use and Development Code § 188-3.

limits of forty-five percent for studio or one-bedroom apartments, fifty-five percent for two-bedroom units, and ten percent for three-bedroom units. Duplex, triplex and townhouse units are also permitted as conditional uses.

HTCA proposed to add three new buildings to its site, which already has two existing non-conforming buildings. An existing building (Building One), apparently located within lot 33, encompasses 18,324 square feet of retail space on the ground floor. One apartment is located on the second floor, which occupies less than fifteen percent of the area on the first floor, although the apartment is situated behind a facade that creates the appearance of a fully built-out second floor equal in size to the first floor. The building is set back 72.1 feet from Route 206. There are two rows of parking spaces between the building and roadway.

The second existing building (Building Two) is smaller, with 7472 square feet of first-floor retail space, and 4633 square feet of second-floor office space. It is apparently located within lot 34, closer to Amwell Road, but it is situated at an angle to the roadway. At its closest point, it is setback 5.7 feet from the roadway. It also has parking between the building and the road.

HTCA proposed to build three structures, with retail or offices on the first floor and residential above. The largest proposed building (Building Three), located in the northwest corner of the site, would include 9420 square feet of retail and/or offices on the first floor, and twenty apartments, distributed equally on two floors above. Situated between that building, and the existing building fronting Route 206, HTCA proposed to erect a smaller building (Building Four) consisting of 3000 square feet of retail and/or office on the first floor, and three apartments on the second floor. A third new building (Building Five) was proposed along the western border of the site, consisting of 3200 square feet of retail and/or offices on the first floor, and three apartments on the second floor.

None of these proposed buildings front Amwell Road or Route 206. HTCA proposed to construct a service road, along the western side of the site, to provide additional access to the buildings. The balance of the site would consist of parking, a stormwater detention basin, landscaping, pedestrian walkways, and a pre-existing small public square with a flagpole. HTCA proposed to convert the roadway-facing parking in front of Building One into parallel parking; construct a sidewalk along the entirety of its property; and remove all front-parking if

and when the bypass is built and the existing Route 206 roadway is converted into a local "main street."

The Board ultimately determined that HTCA needed two use variances under N.J.S.A. 40:55D-70(d)(1) to permit: (1) twenty apartments, instead of nine, above the 9420 square feet of retail or office space in Building Three; and (2) office use, as a possible alternative to retail use, on the ground floor of Buildings Three, Four and Five, where, according to the Board, only retail use was permitted.⁵ The Board decided that HTCA also needed three bulk variances under N.J.S.A. 40:55D-70(c), related to the two existing buildings, to permit: (1) setbacks of Buildings One and Two that exceeded the five-foot maximum; (2) parking in front of those two existing buildings; and (3) insufficient use of the second floor of Building One.

HTCA asserted that (d)(1) variances were not needed, because all the proposed uses – office or retail, and

⁵ In its original development application, filed in September 2010, HTCA acknowledged it needed "(d) variances" under N.J.S.A. 40:55D-70(d) for these two reasons, as well as to permit a higher-than-allowed percentage of two- and three-bedroom apartments. HTCA did not specify whether they were use variances under section (d)(1), conditional use variances under section (d)(3), or density variances under subsection (d)(5). HTCA later decided to comply with the prescribed ratio of apartment sizes. HTCA also identified five "(c) variances" under N.J.S.A. 40:55D. The township's planner asserted in a report to the Board that the twenty apartments above the 9000 square-foot ground floor in Building Three required both a use variance under (d)(1) and a density variance under (d)(5).

residential - were permitted in the TCD, although HTCA concededly did not configure them as the ordinance prescribed. During hearings, Board members referred to the development's alleged failure to satisfy the master plan's and ordinance's goal of bringing buildings close to the sidewalks along the road's edge. They focused on the parking that separated the five buildings, and was located between Buildings One and Two and the two major roads.

HTCA's witnesses responded that the location of Buildings One and Two long preceded the formulation of the goals embodied in the master plan and ordinance, and it would be impractical to relocate (really, demolish and replace) those buildings closer to the roadways - both because it would be expensive, and tenants in the buildings had long-term leases. An architect testified as well that it was not feasible, given the age and design of Building One, to increase the number of apartments on the second floor.

HTCA's witnesses asserted that it was unrealistic to expect private developers to propose buildings along the road, with parking in the rear, while Route 206 remained a regional roadway, and the bypass was unfinished. A retail real estate industry expert testified that retail customers wanted the

convenience of parking in front of stores, and businesses that did not offer it did so at their economic peril.

HTCA highlighted that the architectural design of its proposed buildings – as well as recent renovations of Buildings One and Two – conformed to the ordinance and were an improvement to the district's aesthetics. HTCA noted that it complied with the number of parking spaces required for the site.

HTCA traffic experts also contended that the development would not burden local traffic and improvements; rather, by consolidating access points and the developing of a service road, it would improve traffic and circulation. On the other hand, a Board traffic expert asserted that the development would exacerbate traffic and circulation in the area.

Shirley Yannich, a professional planner and former planner for Hillsborough Township, opined that HTCA's proposal would satisfy many of the goals of the TCD ordinance. She noted that the development would provide mixed use buildings with multiple residential units. The developer proposed "the beginning of the interconnecting roadway" – apparently referring to the service road proposed along the western border of the site. Yannich testified, "[t]he township a long time ago thought about a road to go along the parallel to 206 so that it would connect Amwell with New Amwell, and gives frontage to the elongated lots behind

Parkes, behind the other shopping centers in this particular area." She asserted that the plan complied with parking and overall bulk standards for the size of buildings.

Yannich recognized that the ordinance's drafters disallowed first-floor office space in a mixed use building based on the assumption that office use would not generate as much pedestrian traffic as other allowed uses. She stated that the clustering of residences in Building Three "would be good." She noted that while the plan would provide a total of twenty-seven residential units, the ordinance would permit a total of forty-one units, (assuming Buildings One and Two included the maximum allowed of one unit for non-residential gross area).

She lauded the design of the project, which incorporated pedestrian-friendly elements such as structures, benches, and a sidewalk café. The structures all satisfied the minimum bulk standards; no building would exceed height limits or maximum square footage. Other aspects of the plan also conformed: there was sufficient landscaping, signage, and lighting; a common architectural theme; and no residential units on the first floor.

Yannich opined that the plan would also satisfy the general welfare, because the township had long envisioned a downtown area along Route 206. To that end, Yannich stated:

The development establishes the mixed use of residential and non-residential uses, and promotes and encourages the Town Center district to be realized. The general welfare is satisfied because the site is particularly suited. The site is zoned for the proposed uses. . . . The vision of the Town Center is realized through the renovation of the building that you see. The public green has been put in place, and the historic mission has had influence in the signage and that space being designed the way it is.

Yannich also concluded that demolishing the existing buildings would present a "financial hardship" to HTCA. Thus, she recommended the board approve HTCA's application.

At the conclusion of public comment, the township's planner, Robert Rengelheim, urged the Board to deny HTCA's application. Rengelheim stated: (1) the plan did not meet the TCD concept; (2) the office use on the first floor required a "D variance";⁶ (3) the placement of twenty units in the 9420 square foot building required a "D variance", given the zoning ordinance requirement that "all residential flats or lofts must be provided in the same mixed use building that is used to determine the permitted number of flats or lofts in the Town Center District"; (4) Building One did not meet requirements because it lacked sufficient usable second floor space; (5)

⁶ Rengelheim did not expressly refer to a "(d)(1)" variance, but that apparently was his intent.

converting thirteen spaces into eight parallel parking spaces (at the Board's request) would leave insufficient parking; (6) the existing setbacks were excessive; and (7) the property was not designed in a pedestrian friendly manner.

In its resolution, the Board denied, by a vote of six to one, the (d)(1) variances that it determined were needed. The Board also denied the (c) variances. The Board noted the proposal did not offer access to adjoining properties, and failed to adequately address the potential increase of traffic. It also expressed concern that the plan did not comport with the objectives of the TCD ordinance. Likewise, it found HTCA "offered no real compromise to make the site more pedestrian friendly." The Board's principal findings were:

3. The Applicant's proposed development diverges and detracts from the TC District's town center environment by its lack of conformity with the use, density, and design requirements of the TC District. The Board is concerned that the Applicant's proposal seeks to retain a traditional strip mall atmosphere contrary to the requirements of the TC District.
4. The Board is concerned with the lack of cross access with adjoining properties.
5. The Board is concerned with the potential inherent conflicts between vehicular traffic and pedestrians on the property. The Board notes that the Applicant offered no real compromise to

make the site more pedestrian friendly as required by the TC District.

6. The Board finds that the Applicant did not adequately address increased on-site traffic that would result as a consequence of the proposed additional retail, office, and residential units on the property.
7. The Board notes that the Applicant completed extensive renovations to the existing buildings on the property shortly before it filed this Application to further develop the property.
8. The Board rejects the Applicant's argument that use variances are not necessary.
9. The Board concludes that the Applicant has not presented sufficient evidence to substantiate the need for relief pursuant to N.J.S. 40:55D-70d and N.J.S. 40:55D-70c.
10. Based on evidence presented, the Board is satisfied that the variances sought by the Applicant cannot be granted without substantial detriment to the public good and without impairing the intent and purpose of the Zone Plan and the Zoning Ordinance of the Township of Hillsborough.

HTCA challenged the Board's decision in an action in lieu of prerogative writ. In an extensive written opinion, the trial judge affirmed the Board's resolution. The court concurred that HTCA required (d)(1) relief in order to locate offices on the first floor of its proposed mixed use buildings; and to locate

twenty residential units above 9420 square feet of non-residential space in Building Three. The judge found that the ordinance's prescriptions regarding the location of office space and the limits on residential units were "intertwined" with the permitted uses.

The judge also rejected HTCA's argument that the Board erred in its consideration of the negative and positive criteria. See N.J.S.A. 40:55D-70(d)(1) (stating that a variance may be granted upon a showing of "special reasons" – the positive criteria – and upon a showing that "other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the . . . zoning ordinance."). The judge found that HTCA failed to show it would suffer an "undue hardship" if forced to develop the property in accord with the TCD ordinance, because it had not shown the property was "zoned into inutility." The judge also found that HTCA failed to demonstrate negative criteria, because it made no showing that the proposal would not "substantially alter" the TCD.

The court held that the Board's resolution adequately stated its reasons for disregarding the testimony of plaintiff's experts, and was sufficiently detailed, in compliance with N.J.S.A. 40:55D-10(g).

HTCA's appeal followed. HTCA presents the following points for our consideration:

- I. THE TRIAL COURT ERRED IN HOLDING THAT HTCA WAS REQUIRED TO OBTAIN A USE VARIANCE RATHER THAN A CONDITIONAL USE VARIANCE OR "C" HARDSHIP VARIANCE TO PLACE AN OFFICE USE ON THE FIRST FLOOR.
- II. THE TRIAL COURT ERRED IN HOLDING THAT HTCA WAS REQUIRED TO SEEK A USE VARIANCE RATHER THAN A DENSITY VARIANCE OR "C" HARDSHIP VARIANCE TO PLACE 20 UNITS IN A BUILDING WHERE 9 UNITS WERE PERMITTED.
- III. THE TRIAL COURT ERRED IN HOLDING THAT THE BOARD'S FINDINGS REGARDING THE NEGATIVE AND POSITIVE CRITERIA WERE SUFFICIENTLY SUPPORTED BY THE RECORD.
- IV. THE TRIAL COURT ERRED IN HOLDING THAT THE BOARD PROPERLY REJECTED THE TESTIMONY OF HTCA'S WITNESSES.
- V. TRIAL COURT ERRED IN HOLDING THAT THE MEMORIALIZING RESOLUTION MET THE REQUIREMENTS OF N.J.S.A. 40:55D-10(G).

II.

The principal issue on appeal is whether the Board properly concluded that HTCA required use variances under (d)(1) to permit it to place offices on the first floor of its proposed mixed use buildings, and to place twenty residential units atop Building Three, which is proposed to have 9420 square feet of non-residential space. HTCA argues that the first departure from the TCD ordinance required a (d)(3) variance from a

conditional use; and the second required a (d)(3) variance, and a density variance under (d)(5).

A.

We begin with the standard of review. We apply the same standard as the trial court in reviewing a board of adjustment's determination whether to grant a variance. Bressman v. Gash, 131 N.J. 517, 529 (1993); Fallone Props., L.L.C. v. Bethlehem Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). We generally defer to a zoning board's decision; we determine whether the "board decision is supported by the record and is not so arbitrary, capricious, or unreasonable as to amount to an abuse of discretion." New Brunswick Cellular Tel. Co. v. S. Plainfield Bd. of Adjustment, 160 N.J. 1, 14 (1999) (internal quotation marks and citation omitted). We extend even greater deference to a variance denial than to a grant. Rowatti v. Gonchar, 101 N.J. 46, 52 (1985).

However, we review de novo a board's conclusions of law. Wyzykowski v. Rizas, 132 N.J. 509, 518 (1993). Consequently, we exercise plenary review of a board's interpretation of the Municipal Land Use Law (MLUL) or other statutes. See Russo v. Bd. of Trs., Police and Firemen's Retirement Sys., 206 N.J. 14, 27 (2011) (stating a court is "'in no way bound by an agency's interpretation of a statute'") (quoting Mayflower Sec. Co. v.

Bureau of Sec., 64 N.J. 85, 93 (1973)); Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132, 146 (App. Div.) (reviewing de novo board of adjustment's interpretation of MLUL), certif. denied, 215 N.J. 485 (2013).

We also review de novo a board's interpretation of its ordinance. Wyzykowski, supra, 132 N.J. at 518; see also Columbro v. Lebanon Twp. Zoning Bd. of Adjustment, 424 N.J. Super. 501, 508 (App. Div. 2012) ("[T]he interpretation of an ordinance is primarily a question of law."); Adams v. Delmonte, 309 N.J. Super. 572, 583 (App. Div. 1998) (considering de novo whether a particular service business "qualifie[d] as a home occupation under the ordinance"). Our review is de novo, notwithstanding that "we recognize the board's knowledge of local circumstances and accord deference to its interpretation." Grubbs v. Slothower, 389 N.J. Super. 377, 383 (App. Div. 2007) (internal quotation marks and citation omitted).

B.

We turn to the issue of which form of variance HTCA required. Resolution of this issue dictates the standard that the Board was required to apply. In either case, the statute requires a finding of "special reasons" or positive criteria; and "a showing 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" – negative criteria. N.J.S.A. 40:55D-70(d). However, as applied, the Court has recognized that an applicant must satisfy a more stringent standard to secure a use variance than to obtain a (d)(3) variance for a conditional use that deviates from enacted conditions, Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 287 (1994), or a (d)(5) variance from density restrictions. Price v. Himeji, LLC, 214 N.J. 263, 296-97 (2013); Grubbs, supra, 389 N.J. Super. at 388.

To satisfy the "special reasons," or positive criteria, as a predicate to a grant of a use variance under (d)(1), an applicant must prove: (1) the use "inherently serves the public good"; (2) "the use promotes the general welfare because the proposed site is particularly suitable for the proposed use"; or (3) the applicant would experience "undue hardship," because "the property cannot reasonably be developed with a conforming use." Medici v. BPR Co., 107 N.J. 1, 4, & n.1 (1987). See also Stop & Shop Supermarket Co. v. Bd. of Adjustment of Springfield, 162 N.J. 418, 430-31 (2000); Coventry Square, supra, 138 N.J. at 295-96.

The Court devised a less stringent test for satisfying "special reasons" required for a variance "from one or more

conditions imposed by ordinance in respect of a conditional use": an applicant must submit proof "that the site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance." Id. at 298. This standard assures "that the non-compliance with conditions does not affect the suitability of the site for the conditional use." Id. at 298-99. A less demanding standard for (d)(3) variances than for (d)(1) variances "reflect[s] the significant differences between prohibited uses, on the one hand, and conditional uses that do not comply with one or more of the conditions imposed by an ordinance, on the other hand." Id. at 297. The Court explained:

In the case of prohibited uses, the high standard of proof required to establish special reasons for a use variance is necessary to vindicate the municipality's determination that the use ordinarily should not be allowed in the zoning district. In the case of conditional uses, the underlying municipal decision is quite different. The municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied. As evidenced by this record, a conditional-use applicant's inability to comply with some of the ordinance's conditions need not materially affect the appropriateness of the site for the conditional use. . . . The use-variance proofs attempt to justify the board of adjustment's grant of permission

for a use that the municipality has prohibited. Proofs to support a conditional-use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance.

[Id. at 297-98.]

The Court later held that an applicant for a conditional use variance is subject to a more relaxed standard of proof than the standard applicable to a (d)(1) variance when proving negative criteria. TSI E. Brunswick, LLC v. Zoning Bd. of Adjustment of E. Brunswick, 215 N.J. 26, 43 (2013) (holding that the "enhanced quality of proofs standard" applicable under Medici, supra, does not apply to consideration of negative criteria in an application for a conditional use variance).

We have applied the reasoning in Coventry Square to density variances under (d)(3).

Density variances for permitted uses in the zone should not trigger the application of Medici's more stringent standard for the same reasons expressed in Coventry Square. A density variance seeks a departure from certain regulations applicable to a use the municipality has chosen to permit, not prohibit in the zone.

[Grubbs, supra, 389 N.J. Super. at 388.]

Rather than apply the positive criteria appropriate to use variances, boards considering density variances "should focus their attention on whether the applicant's proofs demonstrate

that the site will accommodate the problems associated with the proposed use with [a greater density] than permitted by the ordinance." Id. at 389 (internal quotation marks and citation omitted). See also Price, supra, 214 N.J. at 296 (stating that if a density variance is "requested in connection with a permitted use, a lower threshold equivalent to the standard applicable to conditional use variances is appropriate").

We must decide whether, notwithstanding the ordinance's nomenclature, the two variances at issue – office use on the first floor of a mixed use building, and more than one residential unit per 1000 square feet of non-residential gross area in a mixed used building – should be treated under (d)(1) or (d)(3). The municipality's allocation of these standards within the subsection entitled "permitted uses," as opposed to "conditional uses," is not dispositive: the township's authority to prescribe uses and conditional uses, and the Board's authority to grant variances, are wholly derived from the MLUL. N.J.S.A. 40:55D-1 to -163. See Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 216, 223 (1994) ("Municipalities possess the power to regulate the use of land through zoning and subdivision only to the extent that the Legislature has granted it to them.").

We begin with the language of the MLUL. A governing body may adopt ordinances "relating to the nature and extent of the uses of land and of buildings and structures thereon." N.J.S.A. 40:55D-62(a) (emphasis added). A municipality may adopt a zoning ordinance that limits buildings and structures to specified districts and "regulate[s] buildings and structures according to their type and the extent of their use, and regulate[s] the nature and extent of the use of land for trade, industry, residence, open space or other purposes." N.J.S.A. 40:55D-65(a) (emphasis added). A (d)(1) variance may "allow departure from regulations pursuant to article 8 [N.J.S.A. 40:55D-62 to -68.6] of this act to permit . . . a use or principal structure in a district restricted against such use or principal structure" N.J.S.A. 40:55D-70(d)(1). The MLUL does not define "use" or "principal structure."

The MLUL does define "conditional use," but it does so by incorporating the undefined term, "use." A "conditional use" is "a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use as contained in the zoning ordinance, and upon the issuance of an authorization therefor by the planning board." N.J.S.A. 40:55D-3. The MLUL allows zoning ordinances to

"provide for conditional uses to be granted by the planning board according to definite specifications and standards which shall be clearly set forth with sufficient certainty and definiteness to enable the developer to know their limit and extent." N.J.S.A. 40:55D-67. Variances from those conditions are authorized by N.J.S.A. 40:55D-70(d)(3), which allows "deviation[s] from a specification or standard" as permitted by N.J.S.A. 40:55D-67. As noted, a (d)(3) variance is subject to different, and less stringent standards than a (d)(1) variance.

The reference to "conditions and standards for the location or operation of such use" in the definition of "conditional use" is instructive. A conditional use is a permitted use, albeit conditioned upon satisfying certain conditions or standards. Deviation from the conditions or standards requires a (d)(3) variance, not a (d)(1) variance.

The Court has distinguished use variances and conditional use variances by noting:

[T]heir focus is different. A use variance allows the applicant to engage in a prohibited use: It is the use that violates the ordinance. A variance for a deviation from a condition allows the applicant to engage in a conditional use despite the applicant's failure to meet one or more of the conditions: It is not the use but the non-compliance with the conditions that violates the ordinance.

[Coventry Square, supra, 138 N.J. at 287
(emphasis added).]

See also Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95, 101 (2011) ("A use variance, as the term implies, permits a use of land that is otherwise prohibited by the zoning ordinance."); TSI E. Brunswick, supra, 215 N.J. at 43 ("[I]f a property owner seeking to devote the property to a conditional use cannot meet one or more of the conditions imposed by the zoning ordinance, the property owner must apply for a (d)(3) conditional use variance."). "The inability to comply with one or more of the conditions does not convert the use into a prohibited one. . . ." Ibid.

We recognize that the line between a use subject to conditions or standards, and a use that is not permitted at all, is sometimes difficult to draw, especially when the ordinance defines the mixture of uses as a use in and of itself. For example, a zone for shopping centers may permit retail stores and shops of various kinds, as well as gas stations, in an integrated development. See, e.g., Fin'l Servs., L.L.C. v. Zoning Bd. of Adjustment of Little Ferry, 326 N.J. Super. 265, 267-68 (App. Div. 1999).⁷ However, one may question whether a

⁷ For example, Hillsborough's zoning ordinance defines a shopping center as:

(continued)

freestanding gas station is a conditional use – notwithstanding that one may say it is permitted in the shopping center zone, conditioned on its inclusion in an integrated development of other retail stores. Consequently, it is debatable whether locating a freestanding gas station would require a conditional use variance, as opposed to a use variance. Arguably, a component use – like a gas station – is an inherently different use from the integrated mix of uses that are identified as a shopping center. Cf. Id. at 274 (stating that where a zone "permits gas stations only as part of regionally oriented shopping centers," location of freestanding gas station was a prohibited use; the ordinance expressly prohibited gas stations in the shopping center zone). On the other hand, if a shopping center ordinance dictated the location of gas stations within a

(continued)

One or more buildings or parts thereof designed as a unit to be occupied by one or more business enterprises for the conduct of business and conducted as an integrated and cohesively planned development. A shopping center usually involves one or more anchor stores and one or more satellite stores in such an integrated and cohesively planned development. The mere existence of one or more business enterprises does not of itself constitute a shopping center.

[Hillsborough, N.J., Land Use and Development Code § 188-3.]

shopping center, we would be inclined to conclude that deviation from the locational standard would not require a use variance.

Many ordinances prohibit more than one principal use in a single lot. The location of two principal uses requires a use variance, not a conditional use variance, notwithstanding that one may argue that the developer seeks only an exception to a condition – that each use be located to the exclusion of others. See, e.g., Ibid.

On the other hand, a municipality may establish "mixed use" – a combination of two uses where one is not accessory to the other – as a separate principal use category in its zoning ordinance. See Wyzykowski, supra, 132 N.J. at 521 ("The governing body clearly has the power to provide mixed-use commercial and residential structures as a primary use"); Sun Co. v. Zoning Bd. of Adjustment of Avalon, 286 N.J. Super. 440, 446 (App. Div.), certif. denied, 144 N.J. 376 (1996).

We need not decide whether a use that is permitted only as a component of a "mixed use" – say a residential use, in a mixed use zone, that allows residential and commercial uses together – would require a use variance, or a conditional use variance, if an applicant sought to build a single-use, residential structure. An applicant might argue that the residential use is

conditional - it is conditioned on its conjunction with a commercial use. On the other hand, "mixed use" may be intended as a use in and of itself. According to that view, residential would not be permitted as a conditional use because no single-use structure would be permitted.

In this case, HTCA does not propose a single-use structure in a zone limited to mixed use structures. First, certain single-use structures are permitted in the TCD, albeit not directly facing Amwell Road or Route 206. Second, HTCA proposes mixed use structures that incorporate three uses - retail or office and residential - that are permitted in mixed use buildings in the TCD; however, HTCA proposes one use - offices - in a configuration that is contrary to the ordinance. Residential uses are permitted on the second or higher floor, and HTCA proposes to comply. Offices are permitted in the TCD as freestanding buildings more than 100 feet from the major roadways of Route 206 and Amwell Road. They are also permitted in a mixed use building conditioned on their location above the first floor.

We are persuaded that office use on the first floor of a mixed use building in the TCD does not require a use variance because HTCA does not propose "to engage in a prohibited use." Coventry Square, supra, 138 N.J. at 287. The proposal does not

run afoul of a "determination that the use ordinarily should not be allowed in the zoning district." Id. at 297. Office use is allowed in the district – in the form of freestanding buildings away from the main roadways, and on second or third floors of mixed use buildings. In other words, Hillsborough "has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied." Id. at 297. HTCA's "inability to comply with one or more of the conditions does not convert the use into a prohibited one[.]" TSI E. Brunswick, supra, 215 N.J. at 43.

We recognize the township's goal to create a walkable, village-type district, and the view, implicit in the ordinance, that mixed use buildings configured as prescribed would satisfy that goal. Nonetheless, the ordinance does not define a "use" when it prescribes a configuration of permitted uses within a permitted building type – a mixed use building. Rather, the ordinance establishes "conditions and standards for the location or operation of such use"; that is, by definition, a conditional use. See N.J.S.A. 40:55D-3 (defining "conditional use").

We likewise reject the Board's conclusion that locating twenty, instead of nine, residential units in Building Three, required a use variance. Residential use is allowed in mixed use buildings – subject to the condition that they are located

on the second or third floor, and subject to the condition that the total number does not exceed the ratio of one unit per 1000 feet of non-residential space. A proposed mixed use building with 9420 square feet of non-residential use on the first floor, and twenty apartments on the floors above, is not an inherently different use from a mixed used building with the same first floor use, but only nine apartments above.⁸ Rather, the proposed building deviates from the conditions and density restrictions in the ordinance. Consequently, (d)(3) and (d)(5) variances were required.

Based on the Board's determination that HTCA required (d)(1) use variances, it applied more stringent standards than those that apply to conditional use and density variances, as we discussed above. Consequently, it is appropriate to remand to the Board for reconsideration of HTCA's application. We decline to address HTCA's argument that it satisfied the negative criteria, as the Board presumably applied the "enhanced quality of proofs" applicable to (d)(1) variances. The Board in the

⁸ We recognize that our law views building type regulations as regulations of "use" – for example, the difference between a single-family and multi-family building is a difference in use, notwithstanding that it also involves a difference in density. However, HTCA does not propose a building type that deviates from that prescribed; it proposes a mixed use building, albeit with a different density.

first instance should apply the correct standard to the variances, once properly categorized.

In sum, we hold: (1) a (d)(3) conditional use variance, not a (d)(1) use variance, was required for HTCA's proposed office use on the ground floor of a mixed use building; and (2) (d)(3) and (d)(5) variances, and not a (d)(1) use variance, were required for HTCA's proposal to build twenty residential units in Building Three.

C.

Although the Board will, consistent with the remand, prepare a new resolution, we respond briefly, for the Board's guidance, to HTCA's argument that the Board's resolution failed to meet the requirements of N.J.S.A. 40:55D-10(g), which commands a board to include "findings of fact and conclusion based thereon" in a written resolution. See Medici, supra, 107 N.J. at 23 (stating that "a conclusory resolution" is not acceptable and a "board's resolution should contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the master plan and zoning ordinance"). If a variance is denied, the factual findings "must demonstrate with reference to facts and testimony on the record . . . that the statutory requisites for the grant of a variance are absent." William M. Cox & Stuart R. Koenig, N.J.

Zoning & Land Use Administration § 19-7.2 (Gann, 2015).

Essentially, the board's resolution must inform the court of the basis for its decision. See New York SMSA v. Bd. of Adjustment of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004).

The resolution, which we found inadequate in New York SMSA, supra, is instructive; it stated

[T]he Board finds that the Applicant has not demonstrated that the application for a use variance and bulk variances to allow antennas on the roof of the Property met the positive criteria required for a use variance and the Applicant has not demonstrated that such relief could be granted without detriment to the community. Moreover, the variance granted could not be given without violating the intent or purpose of the Master Plan and the Zoning Ordinance of the Township of Weehawken, which now includes a specific zone allowing cellular antennas to be placed.

[Id. at 329.]

The resolution summarized the testimony and arguments before the board, but made no other findings of fact or conclusions of law. Ibid. We held the resolution "merely identif[ied] the applicant, describe[d] the proposed site, summarize[d], in a very cursory fashion, the testimony presented . . . and reiterate[d] selected comments" by board members and the public. Id. at 333.

The Board's resolution in this case is likewise deficient. The Board simply incorporated by reference the testimony of

various experts "as more fully set forth on the record." See Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div.), certif. denied, 118 N.J. 216 (1989) (stating "mere recitals of testimony do not satisfy the Board's statutory responsibility to make findings of fact"). The Board implicitly credited the testimony of its planning and traffic experts, but failed to explain which facts it "found to be . . . true . . . based upon the testimony heard." Cox & Koenig, supra, § 28-5.2. Likewise, it presented only a cursory summary of the testimony of HTCA's experts, and did not discuss why it rejected their opinions.

The Board also treated the positive and negative criteria in a conclusory way, stating: "Based on evidence presented, the Board is satisfied that the variances sought by the Applicant cannot be granted without substantial detriment to the public good and without impairing the intent and purpose of the Zone Plan and the Zoning Ordinance of the Township of Hillsborough." Although the Board addressed concerns about perceived impacts and traffic and pedestrian mobility, the Board did not discuss how the location of offices – as opposed to other permitted uses on the first floor of the proposed mixed use buildings situated away from Amwell Road and Route 206 – would "impair the intent and the purpose of the zone plan and zoning ordinance," N.J.S.A. 40:55D-70(d). In its resolution on remand, the Board should

include more extensive findings of fact and conclusions of law, consistent with N.J.S.A. 40:55D-10(g).

D.

As the issue may arise on remand, we also choose to address the Board's finding that only retail uses are permitted in the ground floor of a mixed use building in the TCD. We find no support in the plain language of the ordinance, and the Board provides no basis in extrinsic materials for its interpretation. We conclude that offices and residences are the only uses that are both permitted in the TCD in some form, but barred from the first floor of a mixed use building.

We consider first the language of the ordinance. If the language of an enactment is clear, our task is complete and we need not refer to extrinsic sources. In re Kollman, 210 N.J. 557, 568 (2012) ("If the plain language is clear, the court's task is complete."). First on the list of permitted principal uses in the ordinance is a "[m]ixed use building," which does not refer to retail uses, and only prescribes the configuration of residences and offices within the building, and the location of such buildings within the TCD. The ordinance states: "(1) Mixed-use building with residential and/or office uses permitted only above the first floor. The only permitted use that shall

front onto existing Route 206 (Main Street) and Amwell Road in the TC District is a mixed-use building."

The second-listed permitted principal use is "[r]etail sales of goods and services," but the ordinance does not specify that retail is the only permissible use on the first floor of a mixed use building. Instead, the ordinance states: "(2) Retail sales of goods and services on the ground and second floors only." If the drafters intended retail sales to be the only principal use permitted on the first floor, the word "only" would have appeared at the beginning of the paragraph, as in: "Only retail sales of goods and services on the ground and second floors"; and the provision would need to refer explicitly to mixed use buildings, which are discussed in the separate, preceding paragraph. Moreover, as there is no distinction between ground and second floors in the existing paragraph, it is difficult to justify an interpretation that would require only retail on first floors, but would allow non-retail uses on second floors.

The ordinance identifies numerous other permissible uses in the TCD, without any restrictions as to where they may be located in a mixed use building. On the other hand, the ordinance expressly prohibits child care centers on the first floor of mixed use buildings. If the ordinance elsewhere


provided that retail was the only permitted use on the first floor of mixed use buildings, the child care center provision would have been unnecessary surplusage. Consequently, we conclude that numerous permitted principal uses, such as restaurants, personal service establishments, banks or fiduciary institutions (so long as at least 250 feet from another such use), or art galleries – to identify just a few – would be allowed on the first floor of a mixed use building. See Hillsborough, N.J., Land Use and Development Code § 188-113.5(B)(4), (6), (7), and (21).

Other sections of the TCD ordinance support our interpretation. The provision addressing density of residential units in a mixed use building refers to "one dwelling unit for each 1,000 square feet of nonresidential gross floor area." Hillsborough, N.J., Land Use and Development Code § 188-113.5(B)(20)(d) (emphasis added). Were retail space the only permitted use of the ground floor, the ordinance would have referred to "retail" gross floor area. The definitional section in the article of the TCD ordinance governing an architectural and site design overlay zone, §§ 188-167 to -175, which generally applies to the TCD, see § 188-113.5(G)(2), defines a "mixed-use building" as a "building with two or more uses such as retail and services on the ground floor and office or

residential on upper levels." Id. § 188-169 (emphasis added). The general design requirements for a "town center development" state that "[m]ixed-use buildings may include residential units on the second and third stories above commercial or office uses, with the exception that residential uses shall not be permitted on the same floor as office or commercial space."⁹ Id. § 118-113.5(G)(3)(c) (emphasis added). In sum, we conclude that uses other than retail are permitted on the first floor of mixed use buildings – just not residential or office uses.

Reversed and remanded. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION

⁹ This provision appears to be at odds with § 118-113.5(B)(1), which states that "office uses [are] permitted only above the first floor." However, if harmonized, the provisions allow "commercial" uses on the first floor, and offices on the second or higher.

Appendix

Hillsborough Township Ordinance §
118-113.5 TC Town Center District

A. Purpose . . .

.

B. Permitted principal uses. All uses shall be provided at a scale and size that is appropriate for the District. There may be more than one permitted principal use or structure on a lot subject to compliance with the applicable provisions as contained in Subsections B to H.

- (1) Mixed-use building with residential and/or office uses permitted only above the first floor. The only permitted use that shall front onto existing Route 206 (Main Street) and Amwell Road in the TC District is a mixed-use building.
- (2) Retail sales of goods and services on the ground and second floors only.
- (3) Freestanding offices and medical centers may not be located within 100 feet of existing Route 206 (Main Street) or Amwell Road.
- (4) Banks and fiduciary institutions, which must be located at least 250 feet from any other bank or fiduciary institution.
- (5) Business services.
- (6) Restaurants, including sit-down and carry-out as long as food

and/or drink shall not be served or sold directly to patrons in motor vehicles.

- (7) Personal service establishments, including tailor, barbershop or beauty salon, laundry/cleaners.
- (8) Live/work dwelling units.
- (9) Elder-care centers may not be located within 100 feet of existing Route 206 (Main Street) or Amwell Road.
- (10) Child-care centers may not be located on the ground floor of a mixed-use building.
 - (a) Child-care centers shall be subject to site plan approval as well as a revised site plan approval where the original site plan did not anticipate use of all or a part of the premises as a child-care center but such other use subsequently occurs.
 - (b) No building permit shall be issued for modification of all or part of premises for use as a child-care center until a revised site plan approval has been obtained from the Planning Board.
- (11) Public buildings that are generally designed for public access, including but not limited to post office, community center, fire, emergency and police station facilities. Public facilities shall be permitted only if they are pedestrian-oriented.

- (12) Farm and open-air markets.
- (13) Theaters for motion pictures and live performances.
- (14) Public transportation stations and shelters.
- (15) Civic buildings, including museums, art galleries, and other cultural facilities of a similar nature which may incorporate outside display areas in civic spaces.
- (16) Commercial instructional activities.
- (17) Utilities which are compatibly designed and/or screened, as appropriate, and may not be located within 100 feet of existing Route 206 (Main Street) or Amwell Road.
- (18) Recreational and/or open space facilities, including but not limited to walkways, courtyards, plazas, squares, community gardens and parks.
- (19) Existing shopping centers located south of Amwell Road and east of Route 206.
- (20) Residential uses.
 - (a) Residential flats or lofts, only located above the first floor in a mixed-use building.
 - (b) Affordable units shall be proportionally distributed

among the permitted dwelling types to be provided.

- (c) In any mixed-use building containing residential dwelling units in the TC District, the maximum amount of bedroom types permitted is as follows:

- [1] Studio/one bedroom: 45% of total units.

- [2] Two-bedroom: 55% of total units.

- [3] Three-bedroom: 10% of total units.

- (d) The maximum permitted density for residential flats or lofts, which may only be calculated for an existing building to be converted into a mixed-use building that is fully conforming with all requirements of the Town Center District, or for any fully conforming new mixed-use building to be constructed, and is intended as an incentive to complement and enhance development in Town Center, shall be one dwelling unit for each 1,000 square feet of nonresidential gross floor area. All residential flats or lofts must be provided in the same mixed-use building that is used to determine the permitted density.

[Amended 8-10-2010 by Ord. No. 2010-24]

(21) Art studios, for the creation, assembly or production of works of art including, but not limited to, paintings and sculpture; art education and instruction; and art galleries where works of art are exhibited to the public and sold.