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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3815-04T1
A-3896-04T1

LEVIN PROPERTIES, L.P.,

Plaintiff-Respondent,

v.

HAMILTON TOWNSHIP PLANNING
BOARD,

Defendant-Appellant,

and

SAVE HAMILTON OPEN SPACE,

Intervenor-Appellant.

Argued May 15, 2006 – Decided July 12, 2006

Before Judges Lintner, Parrillo and Holston, Jr.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1762-04.

Michael W. Herbert argued the cause for appellant (Herbert, VanNess, Cayci & Goodell, attorneys; Mr. Herbert, of counsel, and Rachel U. Doobrajh, on the brief.)

Bruce Samuels argued the cause for respondent (Frizell & Samuels, attorneys; Mr. Samuels, of counsel and on the brief.)

Mara Epstein argued the cause for intervenor (Lieberman & Blecher, attorneys; Stuart J. Lieberman, of counsel; Ms. Epstein, on the brief.)

PER CURIAM

This is a land use appeal by Hamilton Township Planning Board (Board) and Save Hamilton Open Space (appellants) from a final judgment of the Law Division reversing the Board's resolution denying Levin Properties, L.P.'s (Levin) preliminary and final site plan approval and request for sign variances for a proposed commercial shopping complex. We affirm in part, and reverse and remand in part.

The 29.9 acre property in question is situated on undeveloped, flat land zoned HC, Highway Commercial, and fronts Nottingham Way for 469.85 feet and Klockner Road for 1199 feet. Nottingham Way is an arterial highway, falls under New Jersey's jurisdiction and runs along the south side of the parcel. Klockner Road is under Hamilton Township jurisdiction and runs along the east side. Suburban Plaza, a substantially vacant shopping center that formerly housed a supermarket, fronts Nottingham and abuts the Levin parcel on the west. East of the Levin property, across Klockner, the land is zoned R-10 and is primarily residential. Also to the east is located a church and an elementary school.

Levin proposed to construct a shopping center on this site. The shopping center, as drawn in the current site plan, would be primarily located on the western portion of the parcel. The proposed ShopRite occupies the northern portion, while the other nine stores would lie to the south. The ShopRite would include a pharmacy, a garden center, as well as four interior subtenants, namely a bank, a Dunkin' Donuts, a cleaners, and another yet-to-be-determined tenant. These subtenants are only accessible through the ShopRite. The center would be accessed via four new driveways, two along Nottingham and two along Klockner. There would be 931 parking spaces, and it would have a unified architectural design with a facade.

As to the sign variance, Levin requested nine facade signs, five of which relate to the ShopRite. Each subtenant would also have its own sign, which would measure forty feet and be placed within the ShopRite to designate its location. The nine signs total 544 square feet, while the local ordinance permits only one sign, which can be no larger than 1163 square feet. Levin also proposed three free standing monument signs, one of which would be situated within the three-hundred foot buffer zone lying within the residential and commercial areas. The ordinance allows only one free standing monument. Apart from

the variances associated with signage, the site is variance free.

The Board unanimously denied Levin's application to construct a shopping center, basing its decision on inadequate storm water drainage; improper orientation of shopping center frontage; increased traffic flow; an adverse impact on surrounding neighborhood, school and church; an increase in noise; the failure to prove no negative impact on surrounding community; and that the site development did not reflect sound development. Levin subsequently challenged the denial in an action in the Law Division in lieu of prerogative writs. The trial judge reversed on all matters, thereby allowing the site plan to proceed as Levin proposed.

On appeal, appellant Board raises the following issues:

I. THE PLANNNING BOARD'S DECISION WAS NOT ARBITRARY CAPRICIOUS OR UNREASONABLE.

A. Standard of Review of Planning Board Decisions.

B. Expert Testimony Presented to the Board During the Public Hearings.

C. The Board's Decision to Deny Plaintiff's Application Is Supported by Substantial Evidence Contained in the Record.

II. THE COURT IMPROPERLY TOOK JUDICIAL NOTICE THAT THERE WAS NO DISTINCTION BETWEEN KLOCKNER AVENUE AND KLOCKNER ROAD.

III. THE APPLICANT FAILED TO ADDRESS THE BOARD'S CONCERNS ON WHETHER PROPER DRAINAGE COULD BE ACHIEVED ON THE PROPERTY.

IV. THE APPLICANT FAILED TO COMPLY WITH THE TOWNSHIP ORDINANCES REGARDING ORIENTATION, AESTHETIC CONCERNS AND COMMUNITY IMPACT.

V. THE APPLICANT'S PROPOSED SITE PLAN DOES NOT REPRESENT SMART GROWTH.

VI. THE APPLICANT FAILED TO ADDRESS AND SATISFY THE BOARD'S CONCERNS REGARDING TRAFFIC – INGRESS AND EGRESS AND NOISE.

VII. THE APPLICANT FAILED TO COMPLY WITH THE TOWNSHIP'S ORDINANCE REGULATING SIGNAGE AND FAILED TO SATISFY THE CRITERIA FOR A VARIANCE.

Appellant, Save Hamilton Open Space, raises essentially the same issues.

(i)

Appellants argue that there was adequate evidence in the record to support the findings of the Board that the site plan did not adequately address issues of drainage, noise and traffic. We disagree, and affirm the trial court's determination in this regard that the Board's conclusions were arbitrary, capricious and unreasonable.

In reviewing a determination by a local agency, courts accord due deference to the local agency's broad discretion in planning and zoning matters, and we reverse a local agency's

decision only if "arbitrary, capricious or unreasonable." Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965); Nunziato v. Planning Bd. of Edgewater, 225 N.J. Super. 124, 133 (App. Div. 1988). "A court should sustain a local zoning board's determination to grant a zoning variance if that board's decision comports with the statutory criteria and is founded on adequate evidence." Burbridge v. Governing Body of Mine Hill, 117 N.J. 376, 385 (1990). "If there is such support in the record, approval will not be deemed arbitrary or capricious." Ibid. The actions of municipal boards are presumed valid, and we do not interfere absent a clear showing that the ordinance or action of the agency is arbitrary or unreasonable. See Manalapan Builders Alliance, Inc. v. Tp. Comm. of Manalapan, 256 N.J. Super. 295, 304 (App. Div. 1992); N.J. Shore Builders Ass'n. v. Tp. of Ocean, 128 N.J. Super. 135, 137 (App. Div.), certif. denied, 65 N.J. 292 (1974). We also recognize that "[l]ocal officials . . . are thoroughly familiar with their community's characteristics and interests" and are best suited to make judgments concerning local zoning regulations. Ward v. Scott, 16 N.J. 16, 23 (1954); see also Bellington v. Tp. of E. Windsor, 32 N.J. Super. 243, 249 (App. Div. 1954), aff'd, 17 N.J. 558 (1955).

In regards to site plans, however, a "planning board shall, if the proposed development complies with the ordinance and this act, grant preliminary site plan approval." N.J.S.A. 40:55D-46b. "The object of site plan review is to assure compliance with the standards under the municipality's site plan and land use ordinances." Shim v. Wash. Tp. Planning Bd., 298 N.J. Super. 395, 411 (App. Div. 1997). Keeping with that principle, "a board's role in considering a site plan application is circumscribed." Meridian Quality Care, Inc. v. Bd. of Adjustment of Wall, 355 N.J. Super. 328, 344 (App. Div. 2002). "[A] planning board's authority in reviewing a site plan application is limited to determining whether the plan conforms with the municipality's zoning and site plan ordinances." Sartoga v. Borough of W. Paterson, 346 N.J. Super. 569, 581 (App. Div.), certif. denied, 172 N.J. 357 (2002); accord Pizzo Mantin Group v. Tp. of Randolph, 137 N.J. 216, 230 (1994) ("a municipal planning board in determining the validity of a subdivision [is] required to apply only the standards provided in the municipal subdivision ordinance"). "[O]rdinarily, the denial of a site plan application would be a 'drastic action' when the pertinent ordinance standards are met." Shim, supra, 298 N.J. Super. at 411 (quoting William M. Cox, New Jersey

Zoning and Land Use Administration § 15-10 at 289 (15th ed. 1996)).

While it is true that the Board has "wide discretion to insure compliance with the objectives and requirements of the site plan ordinance," this discretion "'was never intended to include the legislative or quasi-judicial power to prohibit a permitted use.'" PRB Enter., Inc. v. S. Brunswick Planning Bd., 105 N.J. 1, 7 (1987) (quoting Lionel's Appliance Ctr., Inc. v. Citta, 156 N.J. Super. 257, 264 (Law Div. 1978)). Although the Board is limited insofar as it must peg the rejection of a site plan to the project's failure to comply with an ordinance, we do not suggest that the Board is forced "to grant an application merely because the lot conforms to bulk and size requirements . . . ." Kaplan v. City of Linwood, 252 N.J. Super. 538, 545 (Law Div. 1991). Indeed, in at least one instance, we have found that the board was not forced to approve a proposal simply because it satisfied the relevant bulk requirements found in the zoning ordinance. This was so because the board has an implied, inherent power to reject subdivisions that pose a danger to the public welfare. El Shaer v. Planning Bd. of Lawrence, 249 N.J. Super. 323, 327-28 (App. Div.), certif. denied, 127 N.J. 546 (1991).

(a)

That said, we now turn to the Board's contention that the site plan failed to adequately address drainage concerns. It is well established under the Municipal Planning Act, Hamlin v. Matarazzo, 120 N.J. Super. 164, 172 (Law Div. 1972), as well as the Municipal Land Use Law (MLUL), Nigro v. Planning Bd. of Saddle River, 122 N.J. 270, 286 (1991), that the Board is vested with the police power "to regulate land use," Pizzo Mantin Group, supra, 137 N.J. at 223; accord Zilinsky v. Zoning Bd. of Adjustment of Verona, 105 N.J. 363, 367 (1987). The Board is enabled "to take such actions 'as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants.'" Holmdel Builders Ass'n v. Tp. of Holmdel, 121 N.J. 550, 568 (1990) (quoting N.J.S.A. 40:48-2); see also Pizzo Mantin Group, supra, 137 N.J. at 223 ("local planning boards, historically, . . . have the authority to consider the general welfare in determining the validity of subdivisions") (citing Levin v. Tp. of Livingston, 35 N.J. 500 (1961); Ardolino v. Bd. of Adjustment of Florham Park, 24 N.J. 94, 110 (1957)).

Issues concerning drainage, water supply and sewerage disposal, are precisely those factors that "may have such a

pervasive impact on the public health and welfare in the community . . . [and] must be resolved at least as to feasibility of specific proposals or solutions before preliminary approval is granted." Field v. Mayor of Franklin, 190 N.J. Super. 326, 332-33 (App. Div.) (citing Hilton Acres v. Klein, 35 N.J. 570, 586 (1961)); Hamlin, supra, 120 N.J. Super. at 174), certif. denied, 95 N.J. 183 (1983). "[T]hese matters are the subjects of general conditions and must be considered and resolved before tentative approval is conferred." Hamlin, supra, 120 N.J. Super. at 172. "If the applicant fails to provide sufficient information on [these] fundamental elements of his plan, preliminary approval should be denied." Field, supra, 190 N.J. Super. at 333.

The record in this case demonstrated that drainage would be handled by hydraulically interconnected infiltration basins. The storm water runoff generated would primarily be collected by inlets within the parking lot and drive aisles, which would convey the water through eighteen inch pipes into the infiltration basins hydraulically connected. Impervious coverage would be less than the allowable maximum of 60%. Although the site is flat, water would be channeled into designated properties such as Hamilton Lakes, and not onto neighboring properties. The storm water management plan was

intended to be consistent with the township, county, and state environmental protection requirements.

However, the township engineer, Thomas Dunn, raised certain concerns as to the adequacy of the proposed drainage system given the high water table. He explained that the proposed drainage system with its flat pipes would have minimal carrying capacity causing debris, silt, and trash to collect in the pipes. This buildup would necessitate routine maintenance. He testified further:

> We are concerned, even if approved, that the basins ultimately may not function as designed. Construction operations, and even the maintenance operations after construction, may have the effect of compacting the soils within the basin, this reducing the ability of the basins to absorb the groundwater.

While the Board relied on Dunn's testimony in questioning whether the plan achieved adequate property drainage, the trial court, in reversing the Board, found that ultimate site plan approval should be conditioned upon "an obligation to perform periodic maintenance and service of its drainage pipes to ensure proper removal of water from its property."

We find no error in the Law Division's determination. In our view, Dunn's testimony provides inadequate support for a finding that Levin's drainage system is inadequate. Dunn failed to provide evidence that the system would be insufficient. At

most, Dunn surmises that the system "may" fail; however, he refers only to avoidable concerns associated with a system that not only conforms to the ordinance, but also is in working order. He admitted that maintaining the system can alleviate the buildup problems, and it follows that the concerns he identified may be averted with regular upkeep. On this score, Levin offered to provide a maintenance plan. It is, therefore, proper for the trial court to have found that the site plan approval should include those measures necessary to ensure compliance with local ordinances. Dunkin' Donuts of N.J., Inc. v. Tp. of N. Brunswick Planning Bd., 193 N.J. Super. 513, 515 (App. Div. 1984) (conditioning site plan approval upon a contribution to necessary off-site street improvements).

(b)

Next, we turn to traffic flow. "A planning board should consider off-site traffic flow and safety in reviewing proposals for vehicular ingress to and egress from a site, N.J.S.A. 40:55D-7, 41(b)." Dunkin' Donuts of N.J., Inc., supra, 193 N.J. Super. at 515. The municipal body is vested with the power "to prohibit or limit uses generating traffic into already congested streets . . . ." Ibid. It "may . . . deny a site plan application if the ingress and egress proposed by the plan creates unsafe and inefficient vehicular circulation." Shim,

supra, 298 N.J. Super. at 411. However, "a planning board under [MLUL] . . . is without authority to deny site plan approval because of off-site traffic conditions." Dunkin' Donuts of N.J., Inc., supra, 193 N.J. Super. at 515 (citing Lionel's Appliance Center, Inc., supra, 156 N.J. Super. at 257). Thus, it is given the option of "condition[ing] site plan approval upon a contribution to necessary off-site street improvements, N.J.S.A. 40:55D-42." Ibid. Throughout, this process, the Board is required to provide reasons or explanations as to why it found some expert traffic flow estimates persuasive and others objectionable. Exxon Co. v. Bd. of Adjustment of Bernardsville, 196 N.J. Super. 183, 194 (Law Div. 1984).

Here, the testimony presented to the Board wholly supported the trial judge's determination that the Board's rejection of Levin's site plan because of its impact on traffic conditions was arbitrary and unreasonable.

Levin presented testimony by Elizabeth Dolan, a traffic expert. After evaluating site access, circulation and parking, she concluded that the proposed center would operate efficiently and safely. She stated, "overall the on-site circulation has been developed to promote the appropriate two-way flow and will allow for the safe entering and exiting movements." This led her "to conclude that this is a well-designed site in terms of

traffic flow not just for the passenger vehicles but also the trucks, and we have also taken into consideration the needs of the pedestrians and tried to really address that along the site frontage and internally as well."

Dolan also evaluated the increased traffic flow on Klockner, as well as the existing traffic light controlling the Klockner-Nottingham intersection. Specifically, she noted that during the weekday evening peak hour there would be about 985 trips in and out of the site, and during the Saturday peak hour there would be about 1359 trips. Klockner is currently used by 9800 cars each day, and if the proposed ingress-egress to and from the site was permitted, the sum would be augmented to 12,000 each day. She concluded that Klockner would not suffer from adverse effects. The Nottingham traffic signal would operate in accordance with State degradation criteria by reallocating green time to different movements and allowing for better phasing. The impact on the traffic light would be part of the review conducted by the New Jersey Department of Transportation.

The Board offered Maurice Rached, its traffic consultant. Rached noted that only two issues remained unresolved concerning Levin's proposal. First, the Township Master Plan called for widening Klockner to achieve a seventy-foot wide right-of-way.

Levin thought, and Rached agreed, that widening the road would be disadvantageous because a wider road could encourage traffic to move at a higher speed. Levin's plans permit the widening, as Levin is dedicating the necessary right-of-way. Rached concluded that the resolution of the issue fell under the Board's aegis.

Second, Rached mentioned that a geometric revision of the island could be located at the eastern Nottingham driveway opposite Chewalla Boulevard. Rached suggested that the Board place a condition on the application that the township staff remain involved in the DOT process. This was consistent with Levin's comment that it would be difficult to comply with the suggestion as the driveway fell under DOT jurisdiction.

Significantly, Rached denied any potential problems regarding fire trucks on Klockner, and he stated that he was not aware of any issue that Levin either left unresolved or did not promise to comply with as needed. With regard to queries relating to trucks traveling past the Klockner elementary school, Rached responded that he examined the traffic circulation and that only a few trucks used the front of the school from Nottingham to Armour Avenue. Also, when asked about the potential for turning the building to face Nottingham, he replied that another traffic signal would be needed, and the DOT

had already stated that it would not approve another signal at that location. Rached concluded, however, that "basically these are the relevant issues that I felt should be placed on the record. All the other issues have been resolved to the satisfaction of the township."

Thus, the Board's own expert belied the Board's contrary conclusions as to traffic conditions.

(c)

As to noise, clearly a municipal governing body has the right "to secure and maintain 'the blessings of quiet seclusion' and to make available to its inhabitants the refreshment of repose and the tranquillity of solitude." Berger v. State, 71 N.J. 206, 223 (1976) (quoting Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9, 94 S. Ct. 1536, 1541, 39 L. Ed. 2d 797, 804 (1974)). The issue here is whether the Board had sufficient evidence in the record to conclude that the noise issue was not adequately addressed. See Meridian Quality Care, supra, 355 N.J. Super. at 349 (reversing denial of site plan approval because the noise issue was adequately addressed when an engineer testified that the noise would be "de minimus" and a report indicated that the equipment's projected noise "fell far below" levels deemed acceptable under State and local law).

Our review of the record in this case indicates that there is no competent expert testimony supporting the Board's position that the noise standard was not met. On the contrary, Levin provided extensive and undisputed testimony that the noise level would not fall outside of the parameters outlined in the ordinance.

Specifically, Norman Dotti performed statistical modeling of over 400 sounds in various combinations. He explained that even if all the equipment was operating at the same time, which would be unlikely, the total noise level would be five decibels over the ordinance allowance. This could be easily mitigated by implementing a sound screen. As to the motor vehicle noise emissions, he indicated that berms would lessen the impact by seven or eight decibels. He further indicated that the trucks would not cause "a discernable vibration." Overall, he explained: "From a design perspective, what's proposed can, and in fact must, meet the state noise regulation, and it does. And it does quite handily." We accordingly find no reason to disturb the Law Division's findings on this issue.

(ii)

In rejecting Levin's proposal, the Board also cited to the fact that the proposal fails to meet the ordinance requirements because 85% of the building fronts on Klockner Road, rather than

Nottingham Way. In this regard, the Board contends that the purpose of LDC § 160-78 is to preserve community aesthetics, and to do so, commercial construction on the parcel must face an arterial roadway. We disagree with the Board's interpretation of the ordinance. Therefore, we conclude that the shopping center was not required to face Nottingham, but in any event, faces an arterial road as prescribed by the ordinance.

We review this issue de novo because "the interpretation of an ordinance is a judicial function, [and] a court is not required to extend any deference to a board of adjustment's interpretation." James R. Ientile, Inc. v. Zoning Bd. of Adjustment of Colts Neck, 271 N.J. Super. 326, 333 (App. Div. 1994) (citing Jantausch v. Borough of Verona, 41 N.J. Super. 89, 96 (Law Div. 1956), aff'd, 24 N.J. 326 (1957); Grancagnola v. Planning Bd. of Verona, 221 N.J. Super. 71, 75 (App. Div. 1987)); see also Terner v. Spyco, Inc., 226 N.J. Super. 532, 539 (App. Div. 1988) (The "[i]nterpretation of a zoning ordinance . . . involves a question of law and a court is not bound by a planning board's interpretation.").

The relevant ordinance states:

> HC highway commercial zones are intended to provide locations in the township where highway-oriented businesses servicing the needs of highway users and encompassing a broader service area than GC zones may be located. No parcel of land

> shall be considered in the highway commercial zone unless said parcel abuts the major arteries listed in section 160-44(A) of this chapter.
>
> [LDC § 160-78 (1)a.]

Section 160-44(a) lists these major arterial roadways:

> (a) No parcel shall be considered in the highway commercial zone unless said parcel abuts the following arteries:
>
> Cedar Lane
> Chambers Street
> East State Street Extension
> Flock Road
> George Dye Road
> Hamilton Avenue
> Hellyer Avenue
> Kirby Avenue
> Klockner Road
> Mercerville-Quakerbridge Road
> Nottingham Way
> Route 33
> Route 130
> Sloan Road
> South Broad Street
> South Olden Avenue
> White Horse Avenue
> White Horse-Hamilton Square Road
> White Horse-Mercerville Road
> Young's Road
>
> [LDC § 160-44(a) (emphasis added).]

First of all, we deem it significant that the provision in issue is situated in the "purpose" section, and therefore logical that the drafters intended the language to be read with the intended users in mind. Consistent with that sentiment, the

"purpose" clause omits any mention of the specific technical requirements, bulk or otherwise, needed for the construction of a commercial business, which are detailed elsewhere in the ordinance. Thus, placement of the phrase "highway-oriented businesses" in the "purpose" section of the ordinance demonstrates that it is simply a description of intended uses rather than a substantive requirement of the direction a building must face.

Turning now to the specific language of the ordinance at issue, it is true that neither the ordinance itself nor the Municipal Land Use Law defines either the phrase "highway oriented business" or the word "orientation". However, the phrase "highway oriented business" must be read in its full context. Specifically, the phrase "highway oriented business" is followed by the phrase "servicing the needs of highway users and encompassing a broader service area than GC zones may be located." This language clearly suggests that it was drafted with highway users in mind, and describes a broad use classification, focusing as it does on the use of the property in the zone, rather than on the direction a building must face. Furthermore, the fact that the HZ area is juxtaposed with the GC zone is significant as it calls attention to the broadness of the HZ zone. The HZ zone was intended to accommodate a "broader

service area" and greater activity associated with highway access than the GC zone, and to construe the phrase "highway oriented business" as synonymous with something as specific as "faces" would run counter to this intention. Such a narrow interpretation would place a limitation on the buildings available to highways users, instead of encouraging the services and uses available via the highway. Moreover, the parcel does abut Nottingham, an enumerated arterial road, thus satisfying an explicit requirement of the ordinance.

In sum, we agree with the trial court's determination that the language "highway oriented business" "describes a broad type of use classification that recognizes the motor vehicle and traveling public on the highway, not the direction that the building faces." We also agree that the ordinance "emphasizes the use of the property in the zone, not . . . the way a building might face."

(iii)

Even assuming the Board's interpretation of LDC § 160-78(1)a to require frontage on a major arterial roadway, it appears that Levin's proposal satisfies this mandate. The major arteries are listed in § 160-44a and include Klockner Road. On this score, appellants contend that the shopping center fronts Klockner Avenue, which is not a listed major arterial road, and

that because there is a difference between Klockner Road and Klockner Avenue, the trial court should not have taken judicial notice of the fact that the site was located on Klockner Road. We disagree.

"Judicial notice is the cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them." James Mitchell, Inc. v. Unknown Ex'rs, 10 N.J. Misc. 1176, 1179 (Cir. Ct. 1932). In other words, judicial notice is appropriate for "such facts as are so generally known or are of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute . . . ." N.J.R.E. 201(b)(2).

"Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence, generally known within the limits of their jurisdiction." James Mitchell, Inc., supra, 10 N.J. Misc. at 1179-80; accord State v. Flowers, 328 N.J. Super. 205, 214 (App. Div. 2000). "It is necessary that the community throughout which a fact is supposed to be known should be one whose extent bears some reasonable relation to the territorial jurisdiction of the court itself." James Mitchell, Inc., supra, 10 N.J. Misc. at 1180.

Here, the trial judge considered the property to front Klockner Road, however, this designation had no bearing on her ultimate decision because her construction of the ordinance did not require frontage on a major arterial road, and, therefore, any distinction between Klockner Road and Klockner Avenue was irrelevant to the judge's analysis. Regardless, however, of the propriety of taking judicial notice of this fact in the instant case, at oral argument, the Board conceded that the tax map portraying the portion of the street in question did not state "Klockner Avenue". In fact, Board counsel explained that the tax map designated the street leading up to the parcel as Klockner Road, and that there was no demarcation indicating that Klockner Road became Klockner Avenue upon reaching the Levin parcel. It would be reasonable to infer from this representation, and irrespective of any judicial notice taken by the trial judge, that the designation "Road" extends to the area in front of the parcel, and as such, Levin's proposal complies even with the Board's construction of the ordinance in issue.

(iv)

The Board also found that the construction of the shopping center does not embody smart growth principles espoused in the State Plan. Rejection for this reason was error.

"Smart growth" is "well-planned, well-managed growth that adds new homes, creates new jobs, and promotes redevelopment and urban revitalization, while preserving open space, farmland, and environmental resources . . . ." N.J.A.C. 5:36-1.2. A "[s]mart growth area[]" is a "location[] that will provide for much of the State's future development and redevelopment." N.J.A.C. 5:80-33.2. "Smart growth areas promote growth in compact forms and protect the character of existing stable communities." Ibid. The need for smart growth resulted in the implementation of the State plan, which is intended to "encourage development, redevelopment and economic growth in locations that are well situated with respect to present or anticipated public services or facilities and to discourage development where it may impair or destroy natural resources or environmental qualities." N.J. Cmty Affairs, Office of Smart Growth, http://www.nj.gov/dca/osg/plan/stateplan.shtml.

We do not discern a violation of these goals in this case. The parcel in question is situated in a Planning Area 1, and it is designated to be a Metropolitan Planning Area. See N.J.A.C. 5:21-3.5. Consistent with this designation, the property is zoned HZ, Highway Commercial. While it is understandable that the Board may have preferred Levin to rebuild Suburban Plaza instead of developing a nearby open space, this preference

cannot overcome the fact that the Levin parcel is being used for its intended commercial purpose.

Furthermore, although we acknowledge the importance of smart growth, there is no mandate that the State Plan carry the full force of the law. While it is true that the State Plan clearly articulates smart growth goals, the Plan itself is not a regulation. It is "a statement of State policy . . . [intended] to guide State, regional and local agencies in the exercise of their statutory authority." N.J.A.C. 5:80-33.2; see N.J. Builders Ass'n v. N.J. Dep't of Envtl. Prot., 306 N.J. Super. 93, 97 (App. Div. 1997) ("The State Plan is not designed to prescribe or proscribe specific local action; rather, it provides 'the ends to which governments at all levels should aspire in their planning and decision-making.'"). Thus, we find no basis to conclude that the construction of the shopping center on the Levin parcel is violative of smart growth.

(v)

Lastly, the Board contends that its denial of Levin's request for sign variances should not have been reversed by the trial court because Levin failed to prove that the benefits would outweigh the detriments, and that the trial court should have deferred to the Board's findings. We agree.

"Local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people, are undoubtedly the best equipped to pass initially on such applications for variance." Ward, supra, 16 N.J. at 23. Consistent with that mandate, "[v]ariance questions are entrusted to the sound discretion of the municipal zoning board hearing the application." Med. Ctr. at Princeton v. Tp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 198 (App. Div. 2001). As for the c(2) variance, we duly note that "[t]he Legislature undoubtedly intended . . . to vest a larger measure of discretion in local boards in a limited area of cases." Kaufmann v. Planning Bd. for Tp. of Warren, 110 N.J. 551, 566 (1988). As we "are obliged to respect that grant of power," ibid., it is well settled that we are charged with determining if the decision was "arbitrary, capricious or unreasonable." Kramer, supra, 45 N.J. at 296. Moreover, we afford "greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning." Med. Ctr. at Princeton, supra, 343 N.J. Super. at 199 (citing Cerdel Constr. Co. v. Tp. Comm. of E. Hanover, 86 N.J. 303, 307 (1981); Mahler v. Bd. of Adjustment of Fair Lawn, 94 N.J. Super. 173, 186 (App. Div. 1967), aff'd o.b., 55 N.J. 1 (1969)).

We will "sustain a local zoning board's determination to grant a zoning variance if that board's decision comports with the statutory criteria and is founded on adequate evidence." Burbridge, supra, 117 N.J. at 385. It is well-settled that the Board must exercise its power cautiously, and "[p]rudence dictates that zoning boards root their findings in substantiated proofs rather than unsupported allegations." Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor, 172 N.J. 75, 88 (2002); see Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 123 (App. Div. 2000) (explaining board's grant of c(2) variance cannot be upheld because "the resolution does not specify the characteristics of the land or structure that present an opportunity for improved zoning under c(2)" and an "enigmatic reference to 'providing additional space,' as an appropriate zoning objective" is "too nebulous a finding").

The variance statute at issue states:

> [W]here in an application or appeal relating to a specific piece of property the purposes of this act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow departure from regulations pursuant to article 8 of this act . . . .
>
> [N.J.S.A. 40:55D-70c(2).]

"No variance or other relief may be granted . . . without a showing that [it] 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." N.J.S.A. 40:55D-70. "A c(2) variance stands if, after adequate proofs are presented, the board without arbitrariness concludes that the harms, if any, are substantially outweighed by the benefits." Kaufmann, supra, 110 N.J. at 565; accord Pullen v. Tp. of S. Plainfield Planning Bd., 291 N.J. Super. 1, 8 (App. Div. 1996); Wawa Food Mkt. v. Planning Bd. of Ship Bottom, 227 N.J. Super. 29, 40 (App. Div.), certif. denied, 114 N.J. 299 (1988). "The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property." Kaufmann, supra, 110 N.J. at 563. The inquiry involved in a c(2) variance case does not implicate "the characteristics of the land that, in light of current zoning requirements, create a 'hardship' on the owner warranting a relaxation of standards, [however, it does involve] . . . the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community." Ibid. A "c(2) variance [will not] be granted when merely the purposes of the owner will be advanced." Ibid.

The flexible c, or c(2) variance, should "be considered in context and in terms of [its] functional and aesthetic impact on the surrounding area." Valenti v. Planning Bd. of Absecon, 244 N.J. Super. 77, 85 (App. Div. 1990); accord Bressman v. Gash, 131 N.J. 517, 530 (1993) (upholding board's grant of c(2) variance and allowing a garage with side entry to be built because not only did it allow the property to be consistent with the character of the area, but also it promoted "'a desirable visual environment'" (quoting N.J.S.A. 40:55D-2i)); Kaufmann, supra, 110 N.J. at 565 (explaining that "the benefits of zoning (more harmonious lot sizes) could be seen as substantially outweighing any detriment" and that the "two lots conforming in respect of area, but marginally insufficient in respect of the frontage and side-yard requirements" complies with statutory objective); Hawrylo v. Bd. of Adjustment, 249 N.J. Super. 568, 584 (App. Div. 1991) (explaining that the grant of a c(2) variance was arguably appropriate because it was in historic area with an "open meadow look," there were environmental benefits accruing from the conservation of existing resources, and it would remove two "unsightly existing structures"); Valenti, supra, 244 N.J. Super. at 85 (deferring to the board, which concluded that longer buildings and reduced lot coverage that did not do "any violence to the zone plan" coupled with

"the unified development of" the land "would promote the intent of the zone plan and would confer upon the community the benefit implicit in a single-vision, integrated land use"). Clearly, "aesthetic value plays an important role in modern-day zoning legislation." Piscitelli v. Tp. Comm. of Scotch Plains, 103 N.J. Super. 589, 597 (Law Div. 1968). "There is a growing tendency in New Jersey to give more weight to aesthetic considerations in cases challenging the validity of ordinances prohibiting or regulating billboards, signs and connected activities." Farrell v. Tp. of Teaneck, 126 N.J. Super. 460, 463 (Law Div. 1974). "In the context of zoning . . . '[c]onsideration of aesthetics in municipal land use and planning is no longer a matter of luxury or indulgence.'" Town of Morristown v. Women's Club of Morristown, 124 N.J. 605, 617 (1991) (alteration in original) (quoting State v. Miller, 83 N.J. 402, 409 (1980)). This is so because "'[t]he development and preservation of natural resources and clean, salubrious neighborhoods contribute to psychological and emotional stability and well-being as well as stimulate a sense of civic pride.'" Ibid. (alteration in original) (quoting Miller, supra, 83 N.J. at 409). For example, they "are relevant to zoning when they bear in a substantial way upon land utilization, or where an ordinance is designed primarily to conserve property

. . . . " Piscitelli, supra, 103 N.J. Super. at 597.

However, while aesthetics are fully "recognized as a legitimate aim of zoning," in New Jersey "zoning power may not be exercised for purely aesthetic considerations." Id. at 597-98. Essentially, we accommodate aesthetics and acknowledge their importance, while simultaneously realizing that they must be considered in tandem with other factors. Farrell, supra, 126 N.J. Super. at 463.

The ordinance in question permits one sign, which can be no larger than 10% of the facade. LDC § 160-124(f)(3)(c). Here, Levin seeks nine façade signs on the ShopRite building, as well as three freestanding monument signs, one of which will be situated within the three hundred foot buffer zone lying between the residential and commercial areas. Five of the nine façade signs would be for ShopRite, and the remaining four would be for the four subtenants. The nine signs would cover 544 square feet, less than the 1163 feet permitted by ordinance. As for the monument signs, only one is permitted, and it must not be within three hundred feet of a residential district. The resolution adopted by the Board indicated: "The applicant failed to show that the requested variances will not have a negative impact on the surrounding community and that they will have a positive impact on the community and township." Indeed "[i]t is

the applicants' burden to prove that the borough's zoning plan will not be substantially impaired." Loscalzo v. Pini, 228 N.J. Super. 291, 304 (App. Div. 1988), certif. denied, 118 N.J. 216 (1989).

The Board, with its local knowledge, is granted ample deference, and the decision to deny flexible c variance is vested with the Board, unless its decision was arbitrary, capricious and unreasonable. Here, faced with the denial of a sign variance, we accord the Board even greater deference.

Ordinance violations having been clearly established, it was incumbent on Levin to establish that the positive criteria outweighed the negative. The record, however, is sparse in this regard and the applicant's proofs consisted mainly of vague, general references to the ease of traffic flow and consumer convenience. Specifically, Robert Ignarri listed the requested signage and concluded that the facade signs were "very similar to the Shop-Rites . . . all over the region." He further explained how the monument signs would be constructed, and by way of conferred benefits, simply mentioned that "the signage along the roadway is important again to bring cars safely into the center." Craig McAteer, the director of grocery merchandising, store layout and procurement for ShopRite, corroborated Ignarri's testimony that the signs on the facade

were "pretty much the same" as those installed elsewhere. He neglected to discuss, however, any specific benefits accruing therefrom. Finally, Charles Guttenpman, an urban and regional planner testifying for Levin, explained that from a "safety standpoint" all the signage was necessary for "identification and for the traveling public to know were to turn into the center and know where to access the various occupants." Furthermore, Guttenplan agreed with the conclusion that the signage variances can "be granted without substantial detriment to the public good".

Such evidence is conclusionary at best. Indeed, even the trial judge, who disagreed with the Board, acknowledged the need to make these signs compliant. As to the free standing monument sign, the judge concluded:

> However, the court is also aware of the concerns raised by the neighborhood regarding the distance between the residential areas and the signs. During oral argument, Levin represented that efforts could be made to make these signs compliant. While the court finds that the positive criteria, to permit safe and efficient ingress and egress and provide notice to the motoring public outweigh the negative criteria, the Township and Levin should work cooperatively in an effort to place the signs within view of the motoring public while at the same time locating these signs as far from the residential area as feasible.

Moreover, even if some positive attributes may be associated with their installation, five of the nine signs proposed were for Levin's tenant ShopRite — a ShopRite roundel, a ShopRite typeface sign and a ShopRite World Class sign, as well as a pharmacy and home garden center sign — which would convey duplicative information and benefit ShopRite alone.

And finally, in its ultimate rejection of the variance requests, the Board is entitled to account for aesthetics. On this score, the ordinance provides that "Signs shall be designed to be aesthetically pleasing, harmonious with other signs on the site and located so as to achieve their intended purpose without constituting a hazard to vehicles and pedestrians." LDC § 160-120(6). The fact that the total surface area covered by the nine facade signs would be less than the one permitted sign is not dispositive. Rather, the evidence clearly indicates that the nine facade signs and the three free standing monument signs, one of which was within the 300-foot buffer area, reflect a significant departure from the aesthetic scheme advanced in the ordinance. We are satisfied, therefore, that the Board's rejection of the variance requests was neither arbitrary nor unreasonable.

Accordingly, we affirm that part of the Law Division's March 21, 2005 order granting final site plan approval. We

reverse that part of the order granting a variance pursuant to N.J.S.A. 40:55D-70(c)(2).

Affirmed in part; reversed and remanded in part.