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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6120-97T5

SUNRISE DEVELOPMENT, INC.,

Plaintiff-Appellant,

v.

ZONING BOARD OF ADJUSTMENT OF THE
BOROUGH OF MADISON and BOROUGH OF
MADISON,

Defendants-Respondents.

FILING DATE
APPELLATE DIVISION

JUL 8 1999

R. Smaller
Clark

Argued: May 26, 1999 - Decided: JUL 8 1999

Before Judges Wallace, Newman and Fall.

On appeal from the Superior Court of New Jersey,
Law Division, Civil Part, Morris County.

Robert L. Podvey argued the cause for appellant
(Podvey, Sachs, Meanor, Catenacci, Hildner &
Cocoziello, attorneys; Mr. Podvey, of counsel;
Marianne C. Tolomeo, on the brief).

Gary T. Hall argued the cause for respondent
Zoning Board of Adjustment of the Borough of Madison
(McCarter & English, attorneys; Mr. Hall, of counsel
and on the brief).

Joseph Mezzacca, Jr. argued the cause for respondent
Borough of Madison and joins in the brief of respondent
Zoning Board of Adjustment of the Borough of Madison.

PER CURIAM

Plaintiff, Sunrise Development, Inc. (Sunrise), appeals from
a judgment of the Law Division upholding the denial by defendant,
Zoning Board of Adjustment of the Borough of Madison (Board), of
its application for a use variance pursuant to N.J.S.A. 40:55D-

70(d) to build a seventy-five unit assisted-living residence facility. We reverse the Board's denial of the requested use variance, direct it be granted subject to all other required municipal, county and State approvals, and remand the matter to the Board for consideration of the remaining applications of Sunrise concerning the proposed assisted-living residence facility.

I

A. Background:

Sunrise is a for-profit corporation that develops and operates assisted-living facilities. At the time of the hearings before the Board, Sunrise had numerous facilities operating or under construction across the United States, with a facility operating in Woodbury, New Jersey and facilities planned or in the process of development in Morris Plains, Mt. Laurel, Westfield, Old Tappan, and Wayne, New Jersey.

Assisted-living facilities are housing for senior citizens who do not require the assistance level of a nursing home but are not able to live completely independently. There are two parallel procedures for licensing. Operators may seek a "certificate of need" from the Department of Health or may pursue a Class C "boarding house license" from the Department of Community Affairs. Sunrise has received the latter for its facilities in New Jersey. However, at argument, counsel for Sunrise advised Sunrise's application for an assisted-living facility at this site will be made to the Department of Health to obtain the required certificate of need.

Sunrise seeks to build a 54,000 square-foot assisted-living facility containing seventy-five units on a portion of a 30.6-acre lot presently improved with buildings, athletic fields, parking, and other improvements for Bayley Ellard High School, a parochial school. The property is owned by the Roman Catholic Diocese of Paterson ("Diocese") and is zoned R-3, which allows single-family detached residences on 9,375 square-foot lots.

Sunrise proposed to subdivide approximately four acres currently with a carriage house located on it, demolish the 32,000 square-foot carriage house, and build a two-story assisted living facility. This facility would have small units with an efficiency kitchen and private bath, the units ranging in size from 350 to 550 square feet. Most would be single-occupancy units. The final proposal before the Board called for seventy-seven units in a two-story building with a footprint of 27,500 square feet. Although earlier proposals included extensive sharing of driveways with the high school, the final application called for elimination of most of the shared access.

The final application for minor subdivision approval called for two variances: (1) a "use variance" pursuant to N.J.S.A. 40:55D-70d(1) to allow an assisted-living facility in an R-3 residential zone, a use not permitted in that zone; and (2) a variance pursuant to N.J.S.A. 40:55D-70d(3) to allow departure from the conditional use requirement applicable to the existing high school, which requires a fifty-foot landscaped buffer.

The current carriage house is 18.6 feet from Danforth Road and only 80 feet from the nearest residence. Under the Sunrise proposal, the facility would be at least 80 feet from Danforth Road and approximately 275 feet from the nearest residence on Danforth Road. Most of the residences located on properties along Danforth Road actually front on Ferndale Road, with their rear-yard areas adjacent to Danforth Road. Additionally, there is no access to Ferndale Road from Danforth Road.

Because the carriage house is in a state of disrepair, some residents called it visually unattractive and a hazard to the community. Others called it historically significant, but Joseph F. McElwee, Vice President of Development for Sunrise's Northeast Region, claimed it has never been listed on an historic register or otherwise officially designated as an historically-significant structure.

In October 1992, the Borough of Madison adopted a master plan. Addressing the Bayley Ellard High School site, the master plan states:

Bayley Ellard is currently operating a parochial school on Madison Avenue (Route 24). The purpose of this land use proposal is to provide for comprehensive and appropriate adaptive reuse of the existing school facilities should Bayley Ellard cease to operate as a school. Piecemeal redevelopment of the 33 acre tract is discouraged At least two buildings on the site, the mansion and the carriage house, have historical significance as indicated by the Morris County Historic Survey. At present, the site is zoned R-3, single family detached residences on 9,375 square foot lots.

Recommendations for this parcel are residential cluster development with a gross density based on 25,000 square foot lots as a permitted use . . . and a 50 percent open space requirement. The development of senior housing is proposed as a conditional use, provided existing structures with historical significance are reused.

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The conditional use proposed involves a number of options to address community-based housing for the elderly. A minimum of 32 acres would be required to develop elderly housing. A combination of congregate care facilities, senior citizen housing, shared housing and nursing homes could be provided, while utilizing and preserving existing structures on the site that have historical significance. Since there is a total of approximately 100,000 square feet of building area on the site, adequate space is available for a senior housing complex with a combination of existing and new structures as conditionally permitted. Standards for the conditional use, including FAR, building setback, buffers and coverage should ensure that the development of the site is sensitive to the surrounding neighborhood and natural features of the tract. New structures should be clustered to the rear of the existing buildings on the site and vegetation should be maintained along the site's perimeter.

Michael Kauker, a professional planner, submitted written reports and testified in support of Sunrise's application. He testified Sunrise's proposal did not impact on the future balance of the Diocese's property and was compatible with the goals set forth in the master plan because it would serve the public interest and need for senior housing in Madison. Kauker noted another goal of the master plan - preservation of the existing single-family residential nature of Madison while providing a mix of housing

types - would also be accomplished, because the Sunrise facility would achieve greater balance in the housing stock without detracting from the existing single-family homes.

Kauker believed still another goal of the master plan - the preservation of open space - would be achieved by the proposal, because fifty-seven percent of the total site would be retained for open space. Since the distance between the proposed facility and residences across Danforth Road would be greater than the current distance from the carriage house to those residences, Kauker claimed those residences would experience an improvement due to the development. Kauker testified all homes in the area would benefit from the Sunrise proposal because the setbacks in Sunrise's application would increase significantly from the existing setbacks of the carriage house.

Addressing negative criteria, Kauker contended any perceived negatives would be mitigated by the building's design and the site's layout, noting the proposed development was not piecemeal and thus not inconsistent with the master plan. He stated the Sunrise facility would provide a "blocking influence" between the high school and the residential neighborhood, and represented a better transition than the carriage house.

Numerous Sunrise witnesses testified concerning the limited amount of truck traffic to the proposed facility and the lack of traffic problems. Sunrise submitted various proposals to mitigate traffic on the site, such as wide turnarounds. Kauker prepared a feasibility study plan as to future possible use of the remaining

high school site, and testified that thirty-five single-family homes could be built.

Lawrence Bozik, a Sunrise expert and the engineer who prepared boundary and topographic surveys of the site, testified demolition of the carriage house would benefit the neighborhood by eliminating setback variations and a community eyesore. Bozik and David Shropshire, an expert in traffic engineering hired by Sunrise, testified there would be ample parking on the site and improved parking for Bayley Ellard.

Regarding impervious coverage, Sunrise's revised plan called for 35.8%, while the maximum impervious coverage under the ordinance was 30%. However, this was a decrease from the 38% coverage currently on the carriage house site. Bozik testified he could design a plot plan that met the 30% limitation.

John Brody, an expert real estate appraiser hired by Sunrise, testified based on his experience and an analysis he completed of comparable sales of single-family homes near senior citizen housing together with Madison's assessed ratio for tax valuation purposes, that there would be no detrimental impact on the value of the surrounding single-family homes as a result of Sunrise's facility.

Susan Gruel, the planner for the Borough of Madison, submitted two reports and testified before the Board. She noted five "impacts" associated with the proposed use that were identified by Sunrise, Board members, experts, and the public: (1) visual; (2) density; (3) traffic and parking; (4) circulation and access; and (5) relationship to the master plan.

Addressing visual impact, Gruel stated height was not an issue, but the scale and massing of the proposed building created the greatest visual impact. However, she noted setbacks, height, building configuration, architectural detail, and landscaping all assisted in mitigating the proposed massing. Concerning density, Gruel rejected the units-per-acre approach as inappropriate for evaluating this application, and instead used a floor-area ratio (FAR) that compared a .3 for multi-family housing in the R-5 zone with .287 for the Sunrise proposal as it existed on November 13, 1996.

Gruel reviewed Shropshire's traffic report where he found Sunrise's proposal to generate traffic comparable to twenty single-family homes. She concluded Sunrise's plan had sufficient parking spaces. Regarding circulation and access, Gruel suggested changes to the shared driveway and to the location of high school parking. In her second report, dated January 6, 1997, Gruel stated separate circulation patterns were created, and driveway systems could be addressed at the site-plan review stage. Thus, Sunrise had adequately addressed this issue.

Gruel's report states the master plan lists senior housing as a conditional use for the Bayley Ellard site, and she questioned whether it was still feasible, as anticipated in the master plan, to renovate the carriage house. If the high school remained in operation, she felt the school use was compatible with the proposed assisted-living facility. However, if cluster housing were built on the remaining portion of the school lot, she could

not make a determination as to adverse impact. Gruel suggested Sunrise address this scenario in more detail. In her second report Gruel noted Sunrise had examined this issue and prepared a development feasibility study that adequately addressed this problem.

Gruel concluded there was no inherent incompatibility between an assisted-living facility and single-family residential development. She also found no incompatibility between the proposed assisted-living facility and the present high school use. Gruel also testified Sunrise's development plan did not constitute piecemeal development of the site.

P. David Zimmerman, a professional planner, presented testimony on behalf of two neighbors objecting to Sunrise's application. He testified Sunrise needed variances for exceeding Madison's zoning provisions governing buffering, setbacks, parking, and landscaping. Zimmerman stated Sunrise's facility would be obtrusive to adjacent residents and the community. He noted that in the event the school shut down, Sunrise's facility would have a negative impact on any new homes built on the remainder of the site. Zimmerman testified development of Sunrise's facility was at odds with development as envisioned in the master plan and that the proposal presented a substantial detriment to the master plan because it was piecemeal development and failed to preserve the historic carriage house. Zimmerman stated Sunrise's facility would create parking problems, as evidenced by current problems on Thanksgiving Day. He noted there was no way to design the site

with an assisted-living facility "so that it works." Zimmerman claimed the original plan Sunrise presented was superior to the alternate plans presented later.

Zimmerman stated Sunrise's application failed the balancing test set forth in Sica v. Zoning Board of Adjustment of Township of Wall, 127 N.J. 152 (1992) because it would impact the utility of the remainder of the school site, inhibit use of that remainder for residential development, and hinder any future expansion of the school.

James Kraft, an attorney and real estate broker, who would earn a commission if the property is ultimately sold by the Diocese to Sunrise, testified the facility would be a home for the handicapped and that denial of the application would be a violation of the Federal Fair Housing Act, the Americans With Disabilities Act, the New Jersey Constitution, and the Municipal Land Use Law.

Victor Czarnecki, a retired former design engineer, took photographs and testified about parking problems, including 390 cars on the high school site for a Thanksgiving football game. Numerous Madison residents testified against the Sunrise proposal, claiming the facility would cause visual disruption, traffic and parking problems; it was too large for the lot; would compromise the zoning ordinance and the master plan; and would call for demolition of the historic carriage house. Two local residents testified in support of the application.

In response to a request by the Board, William H. Hinkes, the Diocese's financial officer, testified the Diocese planned to

continue using the Bayley Ellard property for educational purposes. He stated the Diocese sought to sell the parcel containing the carriage house for three purposes: (1) to relieve the Diocese of the responsibility of maintaining the carriage house; (2) to earn a fair return for the property to benefit Bayley Ellard High School; and (3) provide a use for the property that would benefit the community.

The hearings concluded on February 18, 1997, the Board voting five to two to deny the application for a use variance. On March 17, 1997 the Board adopted a resolution memorializing the denial. On May 12, 1997, the Borough adopted and approved Ordinance No. 14-97, addressing assisted-living residences. The ordinance allows assisted-living residences in any zone subject to conditions, including a minimum lot area of five acres and location on a collector road, and defines them, as follows:

A facility which is licensed by the New Jersey State Department of Health to provide apartment-style housing and congregate dining and to assure that assisted living services are available when needed for four or more adult persons unrelated to the proprietor. Apartment units offer, at a minimum, one unfurnished room, a private bathroom, a kitchenette and a lockable door on the unit entrance. A coordinated array of supportive personal and health services available 24 hours a day are usually provided.

This ordinance only permits the type of assisted-living residences approved by the Department of Health. As noted, Sunrise will seek approval from the Department of Health for its proposed assisted-living facility.

B. The Board's Decision:

The Board determined the proposed assisted-living facility was an inherently beneficial use. It concluded the decision on whether Sunrise demonstrated satisfaction of the negative criteria was governed by Sica, 127 N.J. at 154-68. In its resolution, the Board explained: "Under Sica, the Board is required to weigh the positive and negative criteria and determine whether on balance the grant of the use variance would cause substantial detriment to the public good or substantial impairment of the zone plan."

The Board found Sunrise did not carry its burden of demonstrating satisfaction of the negative criteria under the Sica balancing test. While the Board considered assisting-living facilities a beneficial use, it found the public interest at stake to be less compelling than for various other beneficial uses "such as unique facilities providing specialized medical, therapeutic or educational services." The Board concluded the record established assisted-living facilities are more like multi-family residential uses than health-care facilities. The Board stated this use was also not unique, because numerous similar facilities were under development or construction in the surrounding area and assisted-living facilities do not represent one of the more compelling types of inherently beneficial uses.

Pursuant to the second step of the Sica analysis, the Board identified the following detrimental effects that would follow from the grant of the use variance: (a) negative impacts on adjacent single-family homes; (b) conflicts with continued high school use

on the remainder of the tract; (c) impairment of the future redevelopment of the remainder of this tract for single-family homes in accordance with the present zoning; and (d) impairment of the future redevelopment of the tract in accordance with the specific recommendations in the master plan.

Addressing negative impacts on adjacent single-family homes, the Board determined this would be substantial and could not be adequately mitigated. The Board emphasized the massive size of the proposed building relative to the nearby residences. The Board found Kauker's opinion that there would not be a significant negative impact "not particularly persuasive," because Kauker believed there would be no such negative impacts even with Sunrise's initial proposal for a three-story facility and shared driveways.

The Board rejected as "unpersuasive and essentially irrelevant" Brody's testimony there would not be any adverse impact on the value of nearby homes. The Board explained "[t]he 'ratio analysis' used by Mr. Brody was directed at most at establishing the abstract proposition that a negative property value impact would not automatically result from proximity of single-family homes to a nursing home." However, the Board concluded Brody did not even establish that general hypothesis because he relied on a very limited number of sales and acknowledged the imprecision of property tax assessments. The Board rejected the Brody analysis, concluding none of the sites used bore any meaningful similarities to this proposal and the surrounding neighborhood.

Based on testimony and the evidence in the record, the Board concluded there would be a substantial negative impact on surrounding properties due to the significant size and mass of the proposed building. The Board found this would produce a negative visual impact and impair the residential character of the neighborhood. The Board stated this negative impact would be compounded by significant additional paving for parking and driveways on both the proposed assisted-living lot and the adjacent portions of the remaining Bayley Ellard property. The Board concluded the net effect would be a substantial change in the character of this portion of the site that would appear as "over-development." The Board compared this proposal with the Giralda Farms office complex across Madison Avenue, "which has very substantial setback areas which have remained largely vegetated and unimproved, thus providing an openness which is compatible with adjacent residential development." The Board stated required additional landscaping would not sufficiently mitigate the negative impact.

The Board also determined Sunrise did not demonstrate its proposal would be compatible with the continuing operation of the high school, particularly if enrollment were to increase. Although it recognized elimination of shared access addressed a major problem, the Board found Sunrise did not adequately consider the accommodation of overflow parking and the impact on the potential for expansion of activities at the school. The Board concluded, "[g]iven the applicant's limited attention to these issues, the

Board cannot conclude that the impact would not be substantial or that such impact could be mitigated."

In addition, the Board found the proposal would have a significant negative impact on the future development of the remainder of the Bayley Ellard property for conventional single-family homes in accordance with the present R-3 zoning. Although the Diocese had a present intention to continue operation of the school, the Board noted circumstances could change. The Board stated Kauker gave only passing attention to the subject, and it was concerned with the "significant caveat" Kauker had made to his opinion that single-family development would not be impaired. The Board concluded that caveat - "the need to use oversized lots, reverse frontage and other measures to provide necessary separation between the assisted living facility and any new homes" - demonstrated the substantial inadequacy in size of the proposed lot for the assisted-living facility. Since the assisted-living facility would not provide necessary buffering and use separation from the remaining Bayley Ellard parcel, the Board concluded resulting subdivision design would be impacted, creating "an incentive for other more intensive forms of development."

The Board found this conclusion was not inconsistent with Gruel's opinion that focused on compatibility of the proposed assisted-living facility with residential development under the clustering approach recommended in the master plan. However, the Board determined the goal of cluster development would be substantially impaired, the planning recommendation for cluster

development had not yet been implemented, and current zoning regulations for the tract limited it to conventional single-family lots.

Addressing the master plan, the Board determined the Sunrise proposal was "substantially inconsistent with and would materially impair implementation of the specific Master Plan recommendations for future redevelopment of this property." The Board found the possible development or redevelopment of this site, exceeding thirty acres and with a highly visible location, was "a matter of great public importance" because Madison was essentially a fully-developed community. The Board stated this explained the master plan's objective to discourage piecemeal redevelopment of this tract.

The Board concluded this proposal unquestionably represented disfavored piecemeal redevelopment, since it was not part of a comprehensive plan for the future use of the entire tract. The Board found "[t]his direct inconsistency with the Master Plan [to be] very significant," since it would substantially impair implementation of the overall master plan goal for the site.

In addition, the Board explained the master plan recommendation for development of senior housing on the site contemplated potential reuse of the existing high school buildings, with new buildings being placed on the rear of the property. "[T]he overriding goal is to preserve the special character and openness of this property by avoiding the placement of large new

buildings near the perimeter of the property along Madison Avenue or Danforth Road."

The Board found that although Sunrise would use only a limited portion of the tract, its very large size and visible location would directly preclude future execution of the master plan goal for the property. The Board rejected Kauker's claim the Sunrise proposal was consistent with the goal for the property because this was only a superficial consistency far outweighed by the fundamental inconsistency with the overall planning vision of the master plan for this tract.

The Board concluded if residential cluster development were used for the remainder of the site, the Sunrise proposal would impair the overriding goal of that planning recommendation. Under Kauker's concept plan, the open space would be sited so as to provide necessary separation between the assisted-living facility and residential development, instead of being sited to serve the community goal of preserving the open character of the property. In addition, the Board determined that goal would be further impaired by the visible location of the assisted living facility.

The Board concluded the Sunrise "proposal would result in substantial impairment of the very specific Master Plan goals and objectives for this unique property." The Board noted this was not merely an inconsistency with abstract planning goals, because "it involves direct impairment of the manner in which this entire property can be developed in the future." Thus, the Board concluded this represents a substantial detriment to the public

good. The Board found this detriment could only be mitigated by relocating the proposed building to the rear of the Bayley Ellard tract.

Addressing the final step in the Sica analysis, the Board weighed and balanced the positive and negative factors. The Board concluded:

[T]he significant size of the proposed assisted living building, the significant additional paving of this corner of the Bayley Ellard property for driveways and additional parking lots for the assisted living facility and high school, the proposed reduction in size of the land for the existing high school, the significant reduction of open space and the open character of this property, the resulting significant impairment of the future redevelopment of the property in accordance with both existing single-family zoning and the Master Plan recommendations and the substantial impairment of the specific Master Plan goals for this unique property all represent substantial detriment to the surrounding properties and to the public good. These substantial detriments clearly outweigh the somewhat limited inherently beneficial aspect of the proposed assisted living facility.

The Board closed its resolution by stating denial of the use variance rendered moot Sunrise's request for a "d" variance for deviation from the conditional use requirement for the high school, minor subdivision approval, and other required approvals, and it therefore denied all other requested approvals without prejudice.

C. Judge's Decision:

In his August 25, 1997, oral decision, the trial judge first determined an assisted-living residence is an inherently beneficial

use, applying the standard set forth in Sica, 127 N.J. at 154-68. The judge added "this is an inherently beneficial use of a rather high caliber, of a high order of need and priority and importance," because of the dramatic increase in the number of elderly. The judge found there is an important social objective in encouraging options for elderly people to have autonomy, independence, and dignity, consistent with the actual needs of each elderly person involved. This conclusion is fully supported by the record. The judge disagreed with the Board's characterization of this inherently beneficial use as having relatively low importance. We also disagree with the Board's characterization of the value of this inherently beneficial use.

The judge noted Sunrise bifurcated its use variance application from its anticipated site plan application. A use variance was required because the subject property falls within the R-3 residential zone where the primary use is single-family residences. Variances were also required because of a number of dimensional and bulk specifications of the ordinance and because there would be an impact on some of the conditional use approvals in force regarding Bayley Ellard High School.

The judge stated the application posed a challenge to the Board. The entire site, including the high school, was a problem and had a potential for future development. The judge noted it is a large site in a fully-developed community, the largest that conceivably might be developed, stating the zoning ordinance only dealt with this parcel by placing it in the R-3 zone. The most

recent 1992 master plan expressed a concern that this tract be developed in a comprehensive, coordinated manner, and not in a piecemeal manner.

The judge noted this project might be piecemeal, uncoordinated development incompatible with the rest of the tract if it remained a high school, or if the rest of the tract were developed. The judge found there was a risk that this was an ad hoc expedient.

The judge reviewed the Board's twenty-five page resolution and noted some inherent aesthetic drawbacks to the facility, such as inconsistency with the zoning plan and the actual development along Danforth Road. The judge stated many of the objectors live on Danforth Road, where the facility would have its biggest impact.

[The judge noted, however, the impact was mitigated because the facility would sit back from the road, providing considerable buffering. We add as a mitigating factor that almost all of the homes on the properties along Danforth Road actually front on Ferndale Road, with their rear yards facing Danforth Road. Further, there is no vehicular access from Danforth Road onto Ferndale Road.]

The judge found "some point" to the Board's conclusion that there would be a significant reduction in open space and the character of open space because the facility would be placed on the periphery of the property abutting an existing residential neighborhood. The judge stated if the facility was placed deeper into the tract, the entire tract would seem more open.

The judge stated the facility is a structure of significant size, even when making allowance for the setback, the buffer, the landscape, and the "quiet, soothing attractive architectural style." The judge noted the significant additional paving of the corner of the property would exceed the impervious coverage requirements of the ordinance, but stated this could perhaps be remediated at the site plan stage.

The judge addressed the concern about the proposed reduction in the size of the land for the existing high school. The judge found if the high school remains a viable entity and indeed prospers and expands, then selling off the corner for a temporary goal of raising immediate cash could be an impediment. However, the judge noted the operator of the school, the Diocese, did not think it needed the land, so perhaps this aspect was not terribly significant.

Addressing the Board's reference to the resulting significant impairment of the future development of the property in accordance with both existing single-family zoning and the master plan recommendations, and the substantial impairment of specific master plan goals, the judge stated under existing zoning requirements, approximately thirty-five upscale houses could be built on the entire site. The judge concluded placing the facility on the corner could interfere with an aesthetically-pleasing development on the whole tract. However, the judge noted if the tract were developed with a more imaginative multi-use as contemplated by the master plan, "the fact that this facility was located at kind of a

critical entrance juncture to the property might be incompatible with comprehensive development."

The judge found the Board believed Sunrise had proposed a structure too massive in size in terms of its visual aesthetic impact, even as limited by setbacks and landscaping, and that the massiveness was imposed at a critical point on the property which had maximum potential for affecting future development, as either an existing high school, a single-family residential development tract, or a multi-use development under the master plan. The trial judge stated "in some ways" this analysis was "clearly incorrect . . . in terms of the priority which it gives to the beneficial use, and . . . probably skewed somewhat in the worrying about compatibility with the rest of the tract and with the rest of the development of the property" as a residential site, a multi-use development, or a high school.

The judge concluded that if he were making the Sica balancing analysis, he would have granted the requested use variance. However, applying the test for judicial review of municipal decisions, the judge stated he could not find that the Board's decision was unreasonable.

Addressing traffic and truck delivery issues, the judge determined they were not a problem. He found there would be very little vehicular traffic: few passenger cars, and a very modest number of truck deliveries each week.

Addressing the Federal Fair Housing Act, the judge found Sunrise did not fail to accommodate the needs of a protected class of persons.

On appeal, Sunrise presents the following arguments for consideration:

POINT I

BECAUSE SUNRISE PRESENTED SUBSTANTIAL AND COMPELLING EVIDENCE ESTABLISHING THAT ITS PROPOSED ASSISTED LIVING FACILITY WAS AN INHERENTLY BENEFICIAL USE AND THE GRANT OF THE VARIANCE WOULD NOT CAUSE A SUBSTANTIAL DETRIMENT TO THE PUBLIC GOOD, THE BOARD'S ACTION IN DENYING SUNRISE'S VARIANCE APPLICATION WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE.

POINT II

THE DENIAL OF THE SUNRISE VARIANCE VIOLATED THE FEDERAL FAIR HOUSING AMENDMENT ACTS (FHAA).

POINT III

DEFENDANT MADISON BOARD OF ADJUSTMENT UNLAWFULLY FAILED TO DELIBERATE FULLY AND OPENLY AS REQUIRED BY THE SUNSHINE LAW AND THE MUNICIPAL LAND USE LAW.

POINT IV

THE PARTICIPATION BY A FORMER BOARD MEMBER AS A VOCAL OPPONENT TO SUNRISE'S VARIANCE APPLICATION IN PUBLIC HEARINGS BEGINNING IN 1997 EXERTED IMPROPER INFLUENCE AND PRESSURE UPON FELLOW BOARD MEMBERS, PRECLUDED A FAIR AND IMPARTIAL DECISION PROCESS, AND CREATED AN APPEARANCE OF IMPROPRIETY WHICH TAINTED THE BOARD'S PROCEEDINGS.

We consider these arguments in the order presented.

II

Sunrise asserts because it presented substantial and compelling evidence establishing the proposed assisted-living

facility was an inherently beneficial use and the grant of the variance would not cause a substantial detriment to the public good, the Board's action in denying Sunrise's variance application was arbitrary, capricious, and unreasonable. We agree.

Variance questions are entrusted to the sound discretion of the municipal board hearing the application. Kaufmann v. Planning Bd. for Township of Warren, 110 N.J. 551, 558 (1988). A court reviewing a municipal board's action on zoning and planning matters, such as a variance application, is limited to determining whether the decision was arbitrary, unreasonable, or capricious. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965); Medical Realty Assocs. v. Board of Adjustment of City of Summit, 228 N.J. Super. 226, 233 (App. Div. 1988).

The parties agree the Board correctly determined Sunrise's application involved an inherently beneficial use. Sunrise relies on the judge's recognition that the use of this site as an assisted-living facility would be a "highly desirable and highly important" inherently beneficial use, and emphasizes that Gruel, the Borough's planner, found no problem with the application. Sunrise asserts because it clearly satisfied the criteria for grant of a variance, the Board's decision should be reversed.

In its resolution of denial, the Board weighed the "substantial detriments" it found against the "somewhat limited, inherently beneficial aspect of the proposed living facility," and concluded "[t]hese substantial detriments clearly outweigh" the

proposed use. In considering the Board's analysis of the use, the trial judge stated:

And I note that in that respect I disagree with the Board's characterization of this use. The Board did characterize this as fundamentally an inherently beneficial use, but it gave it a relatively low order or importance within the category of inherently beneficial uses.

I think that was a mistake, not necessarily a fatal mistake, but I do believe that was a mistake that the Board made in the way in which it dealt with this case.

In further discussing the proposed use in relation to the proofs contained in the record, the judge concluded:

It also seems clear to me that this is an inherently beneficial use of a rather high caliber, of a high order or need and priority and importance, because the reality is that our population is aging, we are getting a dramatic expansion in the absolute numbers of people who are elderly, and we are getting an expansion in terms of the percentage of elderly persons to the population generally.

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In other words, it is -- there's an important social objective to be furnished by encouraging the availability of options for elderly people which enhance chances for autonomy and independence and dignity, as consistent with the actual needs of the elderly person involved.

So I think it is clear that this is a -- this is an inherently beneficial use of a high order of importance, and one that is going to [] become increasingly important as time goes by.

The judge carefully reviewed the twenty-five page resolution of the Board, concluding "the heart of the Board's thinking" is contained in paragraph twenty-four, which reads, as follows:

The final step in the analysis required by Sica requires the Board to weigh and balance the positive and negative factors. Upon doing so, the Board concludes that the significant size of the proposed assisted living building, the significant additional paving of this corner of the Bayley Ellard property for driveways and additional parking lots for the assisted living facility and high school, the proposed reduction in size of the land for the existing high school, the significant reduction of open space and the open character of this property, the resulting significant impairments of the future redevelopment of the property in accordance with both existing single-family zoning and the Master Plan recommendations, and the substantial impairments of the specific master goals for this unique property all represent substantial detriments to the surrounding properties and to the public good.

These substantial detriments clearly outweigh the somewhat limited, inherently beneficial aspect of the proposed living facility.

Sunrise's application is governed by N.J.S.A. 40:55D-70(d), which in its current form¹ authorizes the Board to:

d. In particular cases for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit: (1) a use or principal structure in a district restricted against such use or principal structure, (2) an expansion of a nonconforming use, (3) deviation from a specification or standard pursuant to section

¹The underlined portion of this provision incorporates L. 1997, c. 145, effective June 30, 1997.

54 of P.L. 1975, c. 291 (C.40:55D-67) pertaining solely to a conditional use, (4) an increase in the permitted floor area ratio as defined in section 3.1. of P.L. 1975, c. 291 (C.40:55D-4), (5) an increase in the permitted density as defined in section 3.1 of P.L. 1975, c. 291 (C.40:55D-4), except as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings, which lot or lots either an isolated undersized lot or lots resulting from a minor subdivision or (6) a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure. A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board, or two-thirds of the full authorized membership, in the case of a regional board, pursuant to article 10 of this act.

If an application development [sic] requests one or more variances but not a variance for a purpose enumerated in subsection d. of this section, the decision on the requested variance or variances shall be rendered under subsection c. of this section.

No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without 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. . . .

[N.J.S.A. 40:55D-70(d).]

This statute requires an applicant to prove both positive and negative criteria to obtain a use variance. Smart SMR of New York, Inc. v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998). In general, the positive criteria requires an applicant establish "special reasons" for granting the variance and the

negative criteria require proof the variance "can be granted without substantial detriment to the public good" and that it "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." Ibid. (citing Sica, 127 N.J. at 156).

If, however, the proposed use is "inherently beneficial," an applicant's burden of proof is significantly lessened, because an inherently beneficial use presumptively satisfies the positive criteria. Smart SMR, 152 N.J. at 308 (citing Burbridge v. Governing Body of Township of Mine Hill, 117 N.J. 376, 394 (1990)). The Sica Court explained that with an inherently beneficial use, satisfaction of the negative criteria does not require an enhanced quality of proof, but instead the grant of the variance depends on balancing the positive and negative criteria. Sica, 127 N.J. at 160-61, 163.

In examining the extent to which a use variance involving an inherently beneficial use must satisfy the negative criteria, the Court stated:

A too-strict reading of the negative criteria can result in the denial of many deserving inherently beneficial uses, which 'should have the right to locate on any appropriate site where the physical impact of their operation can be alleviated to a reasonable extent by the imposition of suitable conditions and restrictions.'

The dispositive issue is not whether inherently beneficial uses should be subject to the negative criteria, but whether a board of adjustment or planning board should balance the positive and negative criteria in determining whether to grant a variance.

[Sica, 127 N.J. at 163 (quoting Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus, 47 N.J. 211, 222 (1966).)]

In considering a use variance for commercial purposes, "the standard is to weigh benefits from the grant of the variance against the detriment to the public good," where the Board must "consider the relationship between the benefits and burdens of the grant of the variance." Sica, 127 N.J. at 163. The Court outlined a balancing test to be employed when evaluating use variance applications where the applicant proposes an inherently beneficial use:

Some balancing of benefits and burdens necessarily occurs when one considers whether a use variance will have a substantial detrimental effect on the public good and the zone plan. Without any balancing, a local board's finding that an applicant has not satisfied the negative criteria would always defeat an inherently beneficial use, no matter how compelling the need for that use. Baptist Home, supra, 201 N.J. Super. at 245, 492 A.2d 1100.

Although N.J.S.A. 40:55D-70d does not expressly require a balancing of the positive and negative criteria, the need for balancing is implicit in the statutory requirement that the grant of a variance must be 'without substantial detriment to the public good.' See Medici, supra, 107 N.J. at 22 n.12, 526 A.2d 109. Under the legislative scheme, not every detriment will support the denial of a use variance. Only one that is 'substantial' will suffice. Id. at 22-23, n.12, 526 A.2d 109. Fairly read, the requirement that a detriment be substantial necessitates a balancing of positive and negative criteria. Ibid. Yahnel, supra, 79 N.J. Super. at 512, 192 A.2d 177.

The facts of each case will demonstrate the extent to which an inherently beneficial use compensates for its adverse effect on the

neighborhood. Any non-residential use is bound to produce some adverse effect. Yahnel, supra, 79 N.J. Super. at 519, 192 A.2d 177. When the impact of that effect is significant, the balance may tip toward denial. Baptist Home, supra, 201 N.J. Super. at 247, 492 A.2d 1100. Because of an inherently beneficial use's satisfaction of the positive criteria, a minimal effect, however, would support a finding that the detriment is not substantial.

[Sica, 127 N.J. at 164-65.]

The Sica Court established a four-part procedure municipal boards should follow when balancing the positive and negative criteria:

First, the board should identify the public interest at stake. Some uses are more compelling than others. . . .

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Second, the Board should identify the detrimental effect that will ensue from the grant of the variance. Certain effects, such as an increase in traffic, Baptist Home, supra, 201 N.J. Super. at 246, 492 A.2d 1100, or 'some tendency to impair residential character, utility or value,' Yahnel, supra, 79 N.J. Super. at 519, 192 A.2d 177, will usually attend any non-residential use in a residential zone. When minimal, such an effect need not outweigh an inherently beneficial use that satisfies the positive criteria.

Third, in some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use.

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Fourth, the Board should then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good. This balancing, "[w]hile properly making it more difficult for

municipalities to exclude inherently beneficial uses * * * permits such exclusion when the negative impact of the use is significant. It also preserves the right of the municipality to impose appropriate conditions upon such uses.' Id. at 247, 492 A.2d 1100.

[Sica, 127 N.J. at 165-66 (emphasis supplied).]

We conclude this weighing process necessarily involves careful consideration of the nature and benefits of the "inherently beneficial" use. Obviously, the Board considered the nature and benefit of this assisted-living facility use as "somewhat limited," a conclusion clearly not supported by the record. The trial judge recognized this "characterization" by the Board was incorrect. We are in accord with the judge's finding. The evidence supports the conclusion of the trial judge that this "inherently beneficial" use is one of a "rather high caliber . . . of a high order or need and priority" because of the "dramatic expansion in the absolute numbers of people who are elderly," and there is "an important social objective" to this use. How the inherently beneficial use is characterized and viewed has a direct relationship to the conclusions reached when applying the critical weighing process. Here, the Board incorrectly characterized the proposed inherently beneficial use, skewing its weighing of the positive and negative criteria.

The Smart SMR Court explained that the recent amendment to section (d) of N.J.S.A. 40:55D-70 substantially codifies the Sica balancing test. 152 N.J. at 324. Thus, even when a proposed use

inherently benefits the general welfare, the applicant still must prove that the variance "can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." Ibid. In effect, the 1997 amendment serves as a reminder that even with an inherently beneficial use, an applicant must satisfy the negative criteria. Ibid.

[The Board identified four possible negative elements in its resolution denying the application: (1) negative impact on adjacent single-family homes; (2) conflicts presented with the continued use of the high school on the remainder of the property; (3) the impairment of future redevelopment of the remainder of the site for single-family homes in accordance with present zoning; and (4) the impairment of future redevelopment of the remainder of the site in accordance with specific recommendations of the Borough's master plan.

With the consent and presence of counsel we conducted a site visit to assist us in understanding the arguments presented. Sunrise argues the detriments identified by the Board pose no real harm to the neighborhood and community. We agree. "Significant detriments" include uses which impact public safety of the neighborhood or require significant output of municipal services (such as water or electricity), or where the use creates traffic problems or other hazards. The record supports the conclusion the proposed facility creates little or no "substantial detriment" to the neighborhood or zone plan or zoning ordinance. Where the

proposed use is "inherently beneficial," it should be excluded only when the negative impact of the use is "substantial." Sica, 127 N.J. at 166.

The detrimental effects the Board noted do not rise to the level of being "substantial." Three of the negative elements considered by the Board were based on alternative scenarios not encompassed by this application. If Bayley Ellard High School continues in operation, and the intent of the Diocese is to do so, then the detrimental effects based on future redevelopment are not significant, much less substantial, and are based on speculation. If the school did close in the future, then only elements (3) and (4), regarding impairment of future redevelopment, would be implicated. The only significant negative effects identified by the Board are, (1) the impact on neighboring residences, and (2) the impact on the remainder of the site. The issue is whether there is adequate support in the record to support a finding these negative effects found by the Board are substantial enough to justify denial of the use variance. We conclude they are not.

The impact on neighboring residences would, according to all credible testimony, be negligible. ~~The testimony presented by Jon Brody, Sunrise's real estate appraiser and consultant, was that there would be no decrease in the value of adjacent homes.~~ The bulk of the professional testimony presented concluded any visual impact could be mitigated by architectural details and landscaping. Certainly that is an important issue to address at the time of site plan review.] Board planner Gruel did not identify the impact on

adjacent homes as a detriment. There was also testimony that the impact on adjacent homes would be positive, given the planned demolition of the dilapidated carriage house and the increased setbacks for neighboring residences.

Although the Board gave reasons for rejecting testimony by Kauker, Brody and its own planner, Gruel, we are satisfied the reasons given and the findings made by the Board are not significant or substantial enough to reject the application, given the nature and value of this inherently beneficial use.

[Further, the conflicts presented by the continued use of the high school were not substantial. There was no testimony presented that if the application was granted the school would lack sufficient room to grow to meet any increase in enrollment. There was no testimony on which to conclude or speculate there would be a significant increase in the school's enrollment; rather, the testimony supports the conclusion enrollment is stable. There was also no testimony showing any increase in school facilities or activities could not be handled on the site.]

The Board found Sunrise did not adequately consider the accommodation of overflow parking and the impact of the potential for expansion of activities at the school. The primary conflict identified in the testimony was the shared driveway and perceived parking problems. However, the alternate proposal by Sunrise for the driveway and the testimony established parking at the school would be improved by the proposed facility. We also note the existence of any parking problems identified at the hearing was

established by referring to extreme conditions created by the annual Thanksgiving football game, not by any normal conditions.

The Board concluded Sunrise's proposal would have a significant negative impact on the future development of the site for conventional single-family homes as envisioned under present zoning as well as master plan recommendations for the site. This included the master plan's statement disfavoring piecemeal redevelopment of the site. The Board's planner, Gruel, concluded this proposal would not fall within the definition of piecemeal development. However, the Board concluded this constituted piecemeal development. The master plan called for redevelopment of the entire site, not one portion at a time. While there is support in the record that this initial development of a corner of the high school site would impact future plans for development of the remainder of the site, the testimony before the Board was that the balance of the site would continue to be used for school purposes. The record contains little evidence demonstrating any negative impact on continued use of the rest of the site by the school. Assuming abandonment of the school use and redevelopment of the balance of the site, there is support in the record demonstrating some detriment to the neighboring single-family houses and impact on future development of the entire site.

There is substantial evidence in the record to support a conclusion these detriments can be significantly mitigated by imposing reasonable conditions on the development during site plan and subdivision review, by design, layout, setbacks, buffering, and

landscaping.. When weighed against the benefits of this particular inherently beneficial use, the negative impacts identified by the Board are not substantial enough to warrant denial of the use variance. In view of this analysis, the Board's denial of the application was arbitrary, capricious, and unreasonable.

As noted above, approximately two months after the Board's denial of the use variance in this bifurcated application, the governing body of the Borough of Madison (Borough) adopted and approved Ordinance No. 14-97, permitting assisted-living residences in any zone subject to certain conditions, including a minimum five-acre lot area and location on a collector road. At argument we were advised that ordinance is being challenged in federal court on allegations it is violative of the Federal Fair Housing Act. While the issue of the validity of Ordinance No. 14-97 is not before us, the issue of its applicability on remand is.

At the request of Sunrise, the application for site plan approval was bifurcated from its application for a use variance. Pursuant to N.J.S.A. 40:55D-76b, the board of adjustment has the same power as a planning board to consider site plan applications whenever the proposed development requires approval by the board of adjustment of a use variance pursuant to N.J.S.A. 40:55D-70(d), and,

The developer may elect to submit a separate application requesting approval of the variance and a subsequent application for any required approval of a subdivision, site plan or conditional use. The separate approval of the variance shall be conditioned upon grant of all required subsequent approvals by the board of adjustment. No such

subsequent approval shall be granted unless such approval can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance.

[N.J.S.A. 40:55D-76b (emphasis supplied).]

Here, the application for development initially requested both variance and site plan approval. However, at Sunrise's request, the application was bifurcated based on the reality that without permission for the proposed use, the site plan application was meaningless. The issue is whether the intervening ordinance is applicable to Sunrise's site plan application. We rule that in view of the legislative expression embodied in Ordinance No. 14-97, when considering the site plan application, N.J.S.A. 40:55d-76b requires the Board to consider whether the proposed site plan can be granted "without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance."

The purpose of a zoning ordinance is to further the public health, safety, morals or welfare. Kruvant v. Mayor & Council Tp. of Cedar Grove, 82 N.J. 435, 442 (1980). "Since an amendment to or enactment of a zoning ordinance presumably advances those goals, application of the ordinance at the time of decision serves a beneficial goal." Ibid. This is not a situation where site plan approval is obtained based on a use being permitted in the zone, with statutory insulation against adverse zoning changes conferred for a three-year period. N.J.S.A. 40:55D-49a; see S.T.C. Corp. v.

Planning Bd. of Tp. of Hillsborough, 194 N.J. Super. 333, 336 (App. Div. 1984). In addition to statutory protection from the effect of changes in the zoning ordinance, under certain circumstances "vested rights" against such changes can be obtained by application of the judicially-developed doctrine of equitable estoppel. Timber Properties, Inc. v. Chester Tp., 205 N.J. Super. 273, 278 (Law Div. 1984).

In discussing application of the "vested rights" exception to the "time of decision" rule in Timber Properties, Judge Skillman stated:

There are only two circumstances in which the courts of this State have concluded that a municipality may be barred under principles of equitable estoppel from applying an amended zoning ordinance to a landowner. One circumstance is where a building permit or similar municipal authorization has been issued and there has been substantial reliance upon that authorization. The second is where a trial court has entered judgment ordering municipal approval for a particular land use and there are special equities which militate against application of a subsequently adopted ordinance to bar that use.

[Timber Properties, 205 N.J. Super. at 278 (citations omitted).]

As further noted by Judge Skillman, "New Jersey courts have barred municipalities from invoking newly adopted zoning ordinances to prevent proposed uses of property only in very compelling circumstances." Ibid. See also Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 235-36 (1994); Lake Shore Estates v. Denville Tp., 255 N.J. Super. 580, 589-91 (App. Div. 1991), aff'd.

o.b., 127 N.J. 394 (1992); Allocco & Luccarelli v. Holmdel, 299 N.J. Super. 491 (Law Div. 1997).

Reliance by Sunrise on the recent trial court decision in Dinizo v. Plan. Bd. of Westfield, 312 N.J. Super. 225 (Law Div. 1998) is misplaced. There, the judge declined to follow the "time of decision" rule and apply changes in the zoning ordinance requirements for lot width which were adopted while the planning board's denial was on appeal, where the judge reversed denial of a combined subdivision and bulk variances application heard under the prior ordinance. The judge reasoned that "[i]f the subdivision application was granted as it should have been, it would have been protected for a two year period of time," 312 N.J. Super. at 231, citing to N.J.S.A. 40:55D-47. Here, the Board did not consider or adjudicate a subdivision or site plan application because the variance application was bifurcated. Therefore, the potential protections contained in N.J.S.A. 40:55D-47 and N.J.S.A. 40:55D-49 are not applicable.

We find no "compelling circumstances" to conclude Sunrise is exempt from application of Ordinance No. 14-97 when the Board considers Sunrise's subdivision and site plan applications. To the contrary, assisted-living facilities are now a permitted use throughout the Borough.

Under our analysis, Sunrise's entitlement to a use variance in accordance with the criteria contained in N.J.S.A. 40:55d-70(d) is clear. The use variance is granted. Accordingly, the subdivision and site plan review process, as well as any other required

applications, must proceed, with the Board taking into consideration the enactment of Ordinance No. 14-97 when it considers whether the proposed subdivision and site plan can be granted "without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-76b. Of course, consideration of those factors must be viewed within the context that the use variance has been granted for this site and assisted-living facilities are now a permitted use in the R-3 zone. Plaintiff has already demonstrated in its use variance application that the negative impacts identified by the Board are not substantial and do not outweigh the positive criteria. As noted by Susan Gruel, the Board's planner in her November 13, 1996 report:

The land use pattern surrounding the site is a mix of residential, industrial and corporate office uses. To the southeast of the site along Danforth Road are single-family residences. The majority of those homes front on Ferndale Road. Giralda Farms, a planned corporate office park, is located to the southwest of the site. The area to the north is occupied by Bayley Ellard High School and the property to the east is vacant Borough-owned land.

As stated in the July 9, 1996 report of Michael F. Kauker, plaintiff's professional planner for the site, the municipally-owned site to the west of and directly adjacent to the site "contains a large water tower," located on lot 1, block 209, bounded by Madison Avenue and Morris Place at its intersection with Danforth Road. The Giralda Farms development located directly

across Madison Avenue from the site is described in the recent Master Plan, adopted by the Board on May 4, 1999 and supplied to us subsequent to argument, as follows:

The strong market in Morris County has resulted in several development applications and approvals at Giralda Farms, one of the premiere planned office parks in the State. In 1998, Reckson Associates received development approvals to construct 435,000 square feet of office space on the 40 acre site at the corner of Dodge Drive, Madison Avenue and Loantaka Way. Seven Giralda Farms recently received amended site plan approval to construct a 202,000 square foot multi-tenanted office building at the corner of Loantaka Way and Woodland Road. Finally, a child care facility located at American Home Products Corporate Headquarters was approved in 1994 to serve the tenants of Giralda Farms. The build-out of the Madison portion of Giralda Farms through development approvals is complete with the Reckson approval. The original projected build-out was 2,250,000 square feet of office space. Based on existing and approved development within Giralda Farms, approximately 1.65 million square feet will be constructed.

[We conclude the land use patterns surrounding the site are predominantly institutional, municipal utility and corporate office in nature as opposed to residential and that those residential uses existing are generally insulated from those uses through the existing road patterns.] Any detrimental effect to the public good, zone plan or zoning ordinance by development of this site with an assisted-living facility is clearly outweighed by the inherently beneficial and positive nature of this use.

Whether Ordinance No. 14-97 is invalid or represents an attempt to zone-out Sunrise's application are issues not before us.

As the Court noted in Kruvant, one of the reasons for the time of decision rule is to avoid rendering advisory opinions. 82 N.J. at 440.

III

Sunrise contends denial of the use variance violated the Federal Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C.A. §§ 3601 to -3631. In view of our conclusion the use variance should have been granted, we need not address this issue. Even if we were to address this issue, we reject this argument substantially for the reasons set forth by the trial judge in his oral opinion of January 9, 1998, denying Sunrise's motion for reconsideration. We note Sunrise has filed suit in United States District Court alleging violation of the FHAA and seeking invalidation of Ordinance No. 14-97 as well as an order directing issuance of a building permit to permit construction of their assisted living facility.

IV

Sunrise argues the Board unlawfully failed to deliberate fully and openly as required by the Open Public Meetings Act ("Sunshine Law"), N.J.S.A. 10:4-6 to -21, and the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -136. In view of our decision reversing denial of the use variance, we need not address this issue. We note, however, this contention is without merit and make the following observations.

Under the Sunshine Law,

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and vital functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling in its role in a democratic society. . . .

[N.J.S.A. 10:4-7.]

Sunrise contends the MLUL requires in N.J.S.A. 40:55D-10 all testimony and evidence which a board bases its determination to be made a part of the record. The statute calls for testimony of all witnesses to be taken under oath with the right of cross-examination, N.J.S.A. 40:55D-10(d), transcription of a verbatim record, N.J.S.A. 40:55D-10(f), and findings of fact and conclusions based thereon in writing, N.J.S.A. 40:55D-10(g).

Sunrise cites to Commercial Realty & Resources Corp. v. First Atl. Properties Co., 235 N.J. Super. 577, 596-97 (App. Div. 1989), aff'd, 122 N.J. 546 (1991), for the proposition that a board's resolution with respect to a development application must be made at a public hearing, and not in private. However, in Commercial Realty, this court merely repeated the procedure that the board followed:

Board members had an opportunity to review the draft resolution. The Board's attorney told Board members that the resolution was submitted by the applicant. He cautioned the Board concerning its independent responsibilities. When one Board member asked to recess, the attorney responded that it was improper to discuss the matter privately.

[Ibid.]

Sunrise contends that the process that took place on February 18, 1997, deprived it of the benefit of a full and fair deliberation by the Board although it does not claim the meeting was not public. At the previous hearing on February 10, 1997, the Board's Chairperson stated that the final public hearing would be reserved for counsel summations and deliberations by members of the Board. On February 18, 1997, the Chairperson stated the time for summation and deliberations had arrived. After counsel completed summations, the Chairperson announced, "I think what I will do as Chair is begin the discussion."

Sunrise complains that "discussion" was, for a majority of the Board members, simply the reading of pre-written statements of unilateral, pre-conceived and already-determined opinion. Sunrise argues preparation of written statements prior to hearing summations violated the MLUL because the decision process was not based on all of the evidence and argument, and was not the result of public deliberation.

The evidentiary record closed prior to the night the Board voted. While Sunrise argues it was obvious the Board collectively deliberated in secret, all that is evident from the record is that Board members personally evaluated the evidence prior to the February 18, 1997, meeting, and some presented prepared statements on that date. We find no impediment to individual board members delivering a prepared statement. Board members heard closing statements before giving their comments, and they were able to make

statements or change their views based on closing arguments and the comments of the other Board members. Sunrise has not shown that any deliberations were conducted in private. There is no merit to Sunrise's argument that the Board failed to deliberate fully and openly as required by the Sunshine Law and the MLUL.

V

Sunrise claims that, beginning in 1997, a former Board member's participation in public hearings as a vocal opponent to Sunrise's variance application caused improper influence and pressure upon fellow Board members, precluded a fair and impartial decision process, and created an appearance of impropriety which tainted the Board's proceedings. While we need not address this issue in view of our decision on the focal issue in this appeal, we elect to do so.

At the first Board meeting, Paul Heitmann, at the time a Board member, stated that although he lived within 500 feet of the proposed facility, he could remain objective and impartial and come to a fair and impartial decision. After he completed his term on the Board, he participated in hearings on this application as a member of the public, objecting to the application. Sunrise claims Heitmann's opposition to the application showed he was not impartial and had never been impartial. However, his testimony does not show that he was a "vocal opponent" or that he acted improperly when he was a Board member.

Heitmann testified, in his opinion, the assisted-living facility was an inherently beneficial use. He stated the applica-

tion was also positive because the facility would increase tax revenue without any offsetting costs. In addition, he stated the proposal would add to the diversity of the community.

As negatives, Heitmann noted disruption to the neighborhood, including visual disruption, parking problems, and traffic. He also stated the proposal "seriously dilutes the Master Plan intent" by opening up the area to commercial development and by removing a significant historic structure. He claimed this project involved "shoehorning" into the site. Finally, Heitmann testified the long-term perspective showed few adaptive reuses if assisted living did not work out in the proposed building. Heitmann closed his comment by stating he did not want to make a decision, but would defer to his peers, his neighbors, and his former colleagues on the Board.

The trial judge stated it was not "in very good taste" to do what Heitmann did and it was disquieting that Heitmann sat for awhile in the role of a judge and then became an advocate for one side. However, the judge concluded Heitmann was not barred from participating in the hearing, since he did not participate in the voting and when he participated in the proceedings as an advocate he was off the Board. The judge concluded there was no significant capacity to do harm and that Heitmann did not have an adverse impact under all of the circumstances. We are in accord with those findings.

Sunrise relies on N.J.S.A. 40:55D-69, that "[n]o member [of a zoning board of adjustment] shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or

financial interest." However, this provision does not address rights and responsibilities of former members.

There are no reported decisions addressing allegedly tainted proceedings due to actions by a former member of a board or individual with another interest in municipal government. Sunrise relies on Wyzykowski v. Rizas, 132 N.J. 509, 524 (1993) (quoting Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960)), where the Court stated that "[a]n actual conflict is not the decisive factor, nor is 'whether the public servant succumbs to the temptation,' but rather whether there is a potential for conflict." However, that language again refers to current public officials, not former ones. As the Wyzykowski Court explained, "A conflicting interest arises when the public official has an interest not shared in common with the other members of the public." Ibid. (citing Griggs, 33 N.J. at 220-21).

Sunrise maintains Heitmann had a potential for conflict because he lived within 500 feet of the proposed assisted living facility. However, nothing in the record shows this potential was realized while Heitmann was a Board member. In addition, his testimony after he was a member does not show any attempt to unfairly influence the remaining Board members.

Sunrise also cites to William M. Cox, New Jersey Zoning and Land Use Administration, § 3-2 at 45 (1998), claiming this treatise suggests a disqualified or former board member should be precluded from appearing either in favor of or in opposition to an application because of "the possible influence on his fellow board members

and because of the appearance of impropriety from the point of view of the general public." However, Cox does not address the situation of former members and the quoted statement only concerns disqualified board members. Addressing disqualified board members, Cox states:

Whether a board member who disqualifies himself and takes his place among the general public is free to exercise his rights as a citizen and property owner and to voice his objections to or approbation of the relief sought in the application has not been authoritatively determined by the court. A board member does not, of course, lose his rights of citizenship by serving on the board; hence, if he owns property within 200 feet of applicant's property, he has every right to enter his objections or have his approbation recorded. The question is whether he has a right to do this in person or whether he should use an intermediary, such as a member of his family or an attorney. The better view would appear to be to preclude the board member from personally appearing either in opposition to or in favor of an application because of the possible influence on his fellow board members and because of the appearance of impropriety from the point of view of the general public.

[Ibid.]

Cox does not suggest that there is anything improper with a former board member appearing before a board.

VI

In summary, we reverse the Board's denial of Sunrise's application for a use variance pursuant to N.J.S.A. 40:55D-70d and direct the Board to issue the use variance to Sunrise, subject to all other required municipal, county and State approvals,

including, but not limited to subdivision and site plan approval. We remand the matter to the Board for consideration of the subdivision, site plan and other required municipal applications by Sunrise for the proposed assisted-living facility at this site in a manner consistent with this opinion.

Reversed and remanded to the Zoning Board of Adjustment of the Borough of Madison.

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


Clerk