

## Supreme Court Clarifies The Standard To Be Applied When Evaluating The Negative Criteria For A Conditional Use Variance Application

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In a recent decision entitled *TSI East Brunswick, LLC v. Zoning Bd. of Adjustment of Twp. of East Brunswick*, the Supreme Court held that the enhanced quality of proofs standard established in *Medici v. BPR Co.*, 107 N.J. 1 (1987) governing use variances is inapplicable to an application for a conditional use variance. Instead, the relaxed standard of proof established in *Coventry Square Inc. v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285 (1994), applies.

An understanding of the difference between a use variance pursuant to N.J.S.A. 40:55D-70(d)(1) and a conditional use variance pursuant to N.J.S.A. 40:55D-70(d)(3) is fundamental to grasping the significance of the Supreme Court's decision in *TSI*. An application for a use variance, or a (d)(1) variance as it is often referred to, seeks permission from the zoning board to place a use on property which is otherwise prohibited in the zone. To secure a use variance, an applicant must demonstrate that it can satisfy both the positive and negative criteria in accordance with the enhanced quality of proofs established in *Medici, supra*. The positive criteria or special reasons for the grant of a (d)(1) use variance for a use that is not one which inherently serves the public good is met when a proposed project carries out a purpose of zoning or the refusal to allow the project would impose on the applicant an undue hardship. The zoning purpose most often cited is the promotion of the general welfare. In that instance, an applicant must demonstrate and the board must specifically find, that the use promotes the general welfare because the proposed site is particularly suited for the proposed use.

In addition to proving special reasons, the applicant must satisfy the negative criteria by offering "an enhanced quality of proof" that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance, proof which must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the district. *Medici, supra*, 107 N.J. at 4.

Conversely, a conditional use is a permitted use as long as the applicant meets all of the conditions in the ordinance. In that case, no variance is required and the application would proceed before the planning board. If the applicant, however, is unable to satisfy one or more of the conditions imposed by the ordinance, the applicant is required to seek a conditional use variance from the zoning board. (N.J.S.A. 40:55D-70(d)(3)). Similar to a use variance, an applicant seeking a conditional use variance is also required to satisfy the positive and negative criteria. However, rather than the enhanced quality of proof analysis as enunciated in *Medici*, the Court in *Coventry Square* established a less stringent standard to address the positive criteria. That is, the positive criteria in a conditional use variance case is established if the applicant can demonstrate that the site "continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance." *Coventry Square, supra*, 138 N.J. at 228-229. In addressing the proofs for the negative criteria, the Court in *Coventry Square* simply stated that the applicable test is "similar" to the standard to be applied to the positive criteria but it did not delineate the test more specifically. In the *TSI* case, the Court took the opportunity to clarify the level of proofs required for evaluation of the negative criteria in applications for conditional use variances.

In *TSI*, plaintiff-competitor objected to the defendant's application seeking approval to convert an existing free-standing building into a for-profit health club. Under the municipality's zoning ordinance the proposed for-profit health club was permitted as a conditional use in the HC-2 zone. The proposed health club, however, violated

one condition established in the ordinance that prohibits such a facility from being located within 500 feet of any residence or residential zone. Although the properties immediately surrounding the defendant's site were nonresidential on the other side of the state highway behind other existing commercial buildings, there is a trailer park and a small residential neighborhood of approximately eight units. Thus, even though the proposed building would be approximately 1200 feet from the nearest residential dwelling, the edge of defendant's property was within 500 feet of the residential neighborhood and so defendant was required to seek a conditional use variance to deviate from the distance requirement before it could open and operate the for-profit health club.

Ironically, the plaintiff-objector's property is situated within 200 feet of the residential units on the same side of the state highway. In fact, the plaintiff-objector secured a conditional use variance from the Zoning Board to operate a for-profit health club several years prior to defendant's request to do same.

During the public hearing, both parties presented the testimony of a professional planner. Defendant's planner opined that the enhanced quality of proofs required for a use variance did not apply. Instead, he testified that with respect to the first prong of the negative criteria that there would be "essentially no substantial negative" impacts on the residential neighborhood within 500 feet of the property. This conclusion was based on the location of the residential neighborhood on the other side of a major highway which would serve as a barrier between the two uses and which roadway would also independently create major impacts on the residences. He also testified that the proposed health club was to be less intense than other permitted for-profit conditional uses, such as movie theatres, skating rinks, and bowling alleys.

In addressing the second prong of the negative criteria, defendant's planner examined the Township's master plan and opined that defendant's conditional use application could be granted because "it would not impose a substantial detriment upon the public good and would not substantially impair the zone plan or the zoning ordinance." He reached this conclusion based on the master plan's designation of the area as highway commercial and the fact that permitted uses such as "department stores, retail offices, services, governmental buildings . . . [and] private non-profit recreational buildings" would actually generate "higher peaks in terms of activity."

Conversely, plaintiff's planner first opined that defendant's proposed for-profit health club required a use variance (*N.J.S.A. 40:55D-70(d)(1)*), rather than a conditional use variance (*N.J.S.A. 40:55D-70(d)(3)*). He arrived at this conclusion based on his view that the Ordinance's 500 foot distance requirement effectively prohibited defendant from locating the health club facility at this site. Thus, he applied the more rigorous standard applicable to a d(1) use variance as set forth in *Medici, supra*, and concluded that defendant failed to satisfy the level of proof required for the variance.

He further opined with respect to the negative criteria that defendant's application fell short. He relied, in part, on the fact that the governing body knew that the Zoning Board had granted plaintiff relief from the conditional use standards several years ago and yet failed to amend the zoning ordinance to eliminate the distance requirement. He therefore claimed that the Zoning Board should find that future relief from the distance requirement would be inconsistent with the zone plan and any application seeking such relief should be denied.

The Zoning Board granted defendant's application for a conditional use variance and rejected plaintiff-objector's position that a d(1) use variance was required. On appeal, both the Law Division and the Appellate Division affirmed the Zoning Board's decision. Thereafter, the Supreme Court granted plaintiff's petition for certification, for the limited purpose of determining the quality of proofs required to satisfy the negative criteria for the issuance of a conditional use variance pursuant to *N.J.S.A. 40:55D-70(d)(3)*.

In affirming the lower courts' decisions, the Supreme Court held that the *Medici* enhanced quality of proofs standard has no application in the evaluation of an application for a conditional use variance. The Supreme Court found that "the analyses of use variances and conditional use variances is fundamentally different. The former proceeds in the context of a use that the governing body has prohibited, whereas the latter proceeds in the context of a use that, if it complies with certain conditions, is permitted." If the *Medici* standards were

required for consideration of the negative criteria in a conditional use application, “it would effectively erase the distinction that a conditional use variance creates.” Rather than being a permitted use subject to conditions, a conditional use would in essence become a prohibited use. Such a result would conflict with the fundamental basis on which the *Coventry Square* decision rests.

In sum, the Supreme Court concluded that the Zoning Board properly applied the test established in *Coventry Square*, weighing the proofs as to the negative criteria in order to determine whether, notwithstanding the failure of one of the conditions, the proposal was reconcilable with the zone. The Zoning Board carefully evaluated the location where the health club would be built and gave due consideration to the impact on the residential neighborhood across the highway. Because the Supreme Court found that the Zoning Board’s decision was not arbitrary, capricious, or unreasonable, it was sustained.

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**[Donna M. Jennings](#)** is a shareholder on the Firm’s **[Land Use Team](#)**. She represents developers and redevelopers in all phases of land use approvals, and related environmental and regulatory matters, as well as litigation and appeals involving the approval and permitting process.

**Attorney**

- Donna M. Jennings

**Practice**

- Land Use