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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0273-16T2

TRADEWINDS MARINA, INC.,
a New Jersey Corporation,

Plaintiff-Appellant,

v.

BOROUGH OF SOUTH TOMS RIVER,
a Municipal Corporation in the
County of Ocean, State of New
Jersey and BOROUGH OF SOUTH
TOMS RIVER PLANNING BOARD, a
Municipal Board organized by
the laws of the State of New
Jersey,

Defendants-Respondents.

Argued October 11, 2017 – Decided November 28, 2017

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. L-3670-
14.

Peter H. Wegener argued the cause for
appellant (Bathgate, Wegener & Wolf, PC,
attorneys; Mr. Wegener, on the brief).

William W. Northgrave argued the cause for respondents (McManimom, Scotland & Baumann, LLC, attorneys; Mr. Northgrave, on the brief; Ted Del Guercio, III, on the brief).

PER CURIAM

Plaintiff Tradewinds Marina, Inc. filed an action in lieu of prerogative writs in the Law Division challenging the designation by the Borough of South Toms River (Borough) of its property as an area in need of redevelopment, pursuant to the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -73. Plaintiff appeals from the trial court's order of August 4, 2016, which entered final judgment in favor of defendants, the Borough and its Planning Board. For the reasons that follow, we affirm.

I.

Plaintiff is the owner of Block 5, Lot 1 in the Borough, which is located at the headwaters of the Toms River. The property consists of 1.3 acres of land, with frontage on Crabbe Road and Atlantic City Boulevard (Route 166), and it has been improved with several buildings and structures. Plaintiff acquired the property in November 1988 from Cedar Cove Marina, Inc. In July 2003, plaintiff sold an adjoining lot to Lighthouse Point Marina and Yacht Club, LLC (Lighthouse Point) and gave Lighthouse Point the right of first refusal to purchase its property.

Plaintiff operated a marina on the site until October 29, 2012, when the property suffered extensive damage during Superstorm Sandy. The property had previously suffered from neglect. Several deteriorating and sunken boats, including an eighty-two-foot-long ferry, a tugboat, and a large wooden schooner had been abandoned on the site. Some of those vessels had discharged oil, gasoline, and other pollutants into the surrounding waters.

The New Jersey Department of Environmental Protection (NJDEP) imposed a civil administrative penalty of \$115,000 upon plaintiff, due to the violation of certain environmental laws. In addition, dilapidated pier and dock structures on the property had encroached upon a New Jersey Department of Transportation (NJDOT) right-of-way, and the NJDOT imposed civil penalties upon plaintiff due to this encroachment.

Since the death of her husband in November 2012, Mirta Monica Miller has been plaintiff's President and sole shareholder. She has worked with the NJDEP to rehabilitate the property by removing the abandoned vessels and equipment, debris, and trash from the site. In November 2014, Ms. Miller executed a consent order with the NJDEP settling the administrative penalty for the reduced amount of \$17,500.

In July 2014, the Borough's Council adopted Resolution 2014-222, which authorized the Planning Board to conduct a preliminary investigation of Block 5, Lots 1, 2, 3, 4, and 6 (the Study Area) to determine whether it should be designated as an area in need of redevelopment pursuant to the LRHL. Redevelopment of the Study Area is part of a larger redevelopment plan that is intended to revitalize a corridor, which runs from the Borough of Beachwood to the Township of Toms River, where it connects to downtown Toms River and continues to Route 9.

The Borough retained David G. Roberts, AICP/PP, of Maser Consulting, PA (Maser) to conduct the investigation, and designated Riverfront Property Associates, LLC (Riverfront) as the conditional redeveloper for the Study Area. Donato J. Donofrio, the registered agent for Riverfront, is the son of Donato Donofrio, the owner of Lighthouse Point.

Roberts prepared a report entitled, "Redevelopment Study Area Determination of Need" (the Redevelopment Study or Report). In the Report, Roberts noted that as a result of the Borough's post-Sandy enforcement efforts, derelict boats and debris had been removed from Block 5, Lot 1, but he stated that the overall neglect of the buildings and improvements on the property was evident. Roberts wrote that an in-water boat shed was in danger of collapse, an equipment shed was full of debris and missing a portion of its

roof, and the roof and mansard of the main building was a public safety hazard.

In addition, Roberts noted that bulkheads, finger docks, and pilings on the property were in a dilapidated or collapsed condition, which also presented a public safety hazard. Roberts found that Lot 1 met the criteria under the LRHL for designation as an area in need of redevelopment. He reached the same conclusion with regard to Lots 2, 3, 4, and 6.

In August and September 2014, the Planning Board published a notice in the Asbury Park Press stating that it would be holding a public hearing on September 16, 2014, at which the Redevelopment Study would be considered. The notice stated that if the municipal Council found that the area at issue is in need of redevelopment, the Borough would be authorized to acquire the subject property and could do so by the exercise of the power of eminent domain.

On September 4, 2014, the Planning Board wrote to plaintiff and provided notice pursuant to N.J.S.A. 40A:12A-6(b)(3)(d) of the scheduled public hearing and enclosed a copy of the newspaper notice, indicating that plaintiff's property was being considered as a potential area in need of redevelopment under the LRHL.¹ On

¹ N.J.S.A. 40A:12A-6(b)(3)(d) provides in part that a copy of the hearing notice must be sent at least ten days prior to the scheduled hearing to the last record owner of property within the proposed redevelopment area.

September 15, 2014, plaintiff's attorney wrote to the Planning Board and stated that plaintiff "strongly disputed" the conclusions reached in the Redevelopment Study. He asked for an adjournment of the scheduled hearing so that plaintiff could retain engineers, architects, planners, and experts to prepare "a complete rebuttal" to the Report.

In the letter, plaintiff's attorney also asserted that the matter involved a conflict of interest because the Donofrios had interests in Riverfront, the entity the Borough had designated as the conditional redeveloper of the subject area, and in Lighthouse Point, which had a right of first refusal to purchase plaintiff's property. The Planning Board denied the request for an adjournment.

On September 16, 2014, the Planning Board conducted the hearing as scheduled. Plaintiff's attorney appeared and objected to the Board's consideration of the Report, claiming that plaintiff did not have sufficient time to assemble experts to address the findings regarding plaintiff's property. He again raised the alleged conflict of interest involving the Donofrios.

The Planning Board's attorney stated that the Borough's Council had directed the Planning Board to investigate the Study Area and determine if it meets the criteria under the LRHL for an area in need of redevelopment. The attorney stated that the Board was only going to make a recommendation to the Borough's Mayor and

Council, and if the Board elected to proceed with a vote, the objectors would have another opportunity to present their comments to the Council before it acted on the Board's recommendation.

The Planning Board decided to proceed with its consideration of the Redevelopment Study and heard testimony from Dan Bloch, AICP/PP, from Maser. Bloch summarized the Report. Plaintiff's attorney questioned Bloch about some of the findings in the Report, but Bloch noted that he did not write the Report and he had not visited the site. The Planning Board voted to accept the findings in the Report and recommend that the Council designate the Study Area as an area in need of redevelopment. The Board memorialized its action in Resolution 2014-05.

On October 20, 2014, the Council conducted a public hearing to consider the Board's recommendation and public comments regarding the Redevelopment Study. Plaintiff's attorney and Ms. Miller provided comments to the Council. Ms. Miller explained that the marina on plaintiff's property had closed after Superstorm Sandy, but she was making "many repairs" to the structures. She said the environmental cleanup was continuing.

Ms. Miller further explained that she did not have flood insurance and she had spoken to persons from the State government about obtaining funds to make repairs. She told the Council that she had received bids to fix the bulkhead and dock. She also said

that since her husband died, she was "the only one who can deal with this."

The Council voted to accept the Planning Board's recommendation and designated the Study Area as an area in need of redevelopment under the LRHL. The Council memorialized its action in Resolution 2014-262, which also authorized the Borough to exercise the power of eminent domain to acquire property within the Study Area.

II.

On December 5, 2014, plaintiff filed its complaint in the Law Division challenging the Council and Planning Board's actions. Thereafter, Judge Marlene Lynch Ford conducted a trial in the matter. At the trial, Ms. Miller testified that conditions of the property had improved and the environmental cleanup was continuing. She explained her plans to renovate and revitalize the site.

Plaintiff's attorney argued that the Planning Board failed to comply with the LRHL because it did not permit plaintiff to introduce expert testimony challenging the findings in the Redevelopment Study and cross-examine the witness who appeared at the hearing. Plaintiff's attorney also argued that the Planning Board was not aware it was authorizing the exercise of the power of eminent domain and that the designation of the property as an

area in need of redevelopment was invalid because it was intended to serve private interests. In addition, plaintiff's attorney asserted that the conclusions in the Redevelopment Study should not have been considered because they are an impermissible net opinion.

On August 4, 2016, Judge Ford issued a written opinion in which she found that the Borough's designation of plaintiff's property as part of an area in need of redevelopment was supported by sufficient evidence in the record and consistent with the criteria in the LRHL. The judge determined that the Borough did not act improperly by designating Riverfront as the conditional redeveloper; the conclusions in the Redevelopment Study are not an impermissible net opinion; and plaintiff had a fair opportunity to present a full record at the Board and Council proceedings. Judge Ford memorialized her decision in an order dated August 4, 2016, which entered final judgment for defendants. This appeal followed.

On appeal, plaintiff argues: (1) judicial review of the actions of the Planning Board and Council is warranted as of right; (2) the procedures followed by the Board and Council denied plaintiff the opportunity to present a complete record for judicial review; (3) the Board was not advised regarding the designation of plaintiff's property as a "condemnation development area" under

N.J.S.A. 40A:12A-6(b)(5)(e); (4) plaintiff was improperly denied the right to cross-examine the Borough's planning consultant; and (5) the record lacks substantial evidence to support the Board and Council's actions because there was no foundation for the admission of the Redevelopment Study without testimony verifying the facts or conditions of the property as of the hearing date.

We are not persuaded by plaintiff's arguments. We affirm the trial court's order substantially for the reasons stated by Judge Ford in her thorough and well-reasoned opinion. We add the following.

III.

A decision by a municipal agency designating an area as in need of redevelopment under the LRHL is "invested with a presumption of validity." 62-64 Main Street, LLC v. Mayor & Council of City of Hackensack, 221 N.J. 129, 157 (2015) (quoting Levin v. Twp. Comm. of Bridgewater, 57 N.J. 506, 537, appeal dismissed, 404 U.S. 803, 92 S. Ct 58, 30 L. Ed. 2d 35 (1971)). "[W]hen reviewing a decision of a municipal agency, the trial court must recognize that the Legislature has vested discretion in the municipal agency to make that decision." R. Neumann & Co. v. City of Hoboken, 437 N.J. Super. 384, 391 (App. Div. 2014) (quoting Charlie Brown of Chatham, Inc. v. Bd. of Adj. for Chatham Twp., 202 N.J. Super. 312, 321 (App. Div. 1985)). "[B]ecause of their peculiar knowledge

of local conditions," municipal agencies "must be allowed wide latitude in the exercise of their delegated discretion." Ibid.

The court "need not determine if [it] would have concurred in the designation" but need only determine "if [the designation] is supported by substantial evidence." Ibid. (quoting Forbes v. Bd. of Tr. of Twp. of S. Orange Vill., 312 N.J. Super. 519, 532 (App. Div.), certif. denied, 156 N.J. 411 (1998)). "So long as the blight determination is supported by substantial evidence in the record, a court is bound to affirm that determination." 62-64 Main Street, supra, 221 N.J. at 157 (citing Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 372-73 (2007)); see also N.J.S.A. 40A:12A:6(b)(5).

Municipal discretion is not, however, unfettered and "[j]udicial deference does not mean that a court is a rubber stamp." 62-64 Main Street, supra, 221 N.J. at 157 (citing Levin, supra, 57 N.J. at 537). "A court may set aside a municipal board decision if it is shown to be arbitrary, capricious or unreasonable, not supported in the evidence, or otherwise contrary to law." Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 378 (citing Reid v. Twp. of Hazlet, 198 N.J. Super. 229, 234 (App. Div.), certif. denied, 101 N.J. 262 (1985)), cert. denied, 519 U.S. 911, 117 S. Ct. 275, 136 L. Ed. 2d 198 (1996).

Plaintiff argues that the procedures followed by the Planning Board and Council did not afford plaintiff the opportunity to present a complete record for judicial review. We disagree. Here, the Board and the Council adhered to the requirements of the LRHL in designating plaintiff's property as part of an area in need of redevelopment.

As noted, in July 2014, the Council adopted a resolution directing the Planning Board to investigate the Survey Area to determine if it constituted an area in need of redevelopment under the LRHL. The Board published notice of the public meeting, which was scheduled to consider the Redevelopment Survey. At that meeting, Bloch, Roberts's associate, presented the Report to the Board, and the Board permitted members of the public to comment.

Plaintiff's attorney began to question Bloch, but Bloch noted that he did not write the report and he had not visited the property. The Board's attorney stated that Bloch was not present to go "back and forth" with plaintiff's counsel regarding the findings in the Report. The Board's attorney observed that the proceeding was not a trial. Counsel stated that plaintiff could rebut the findings in the Report when the Council considered the Report.

At the Council's public hearing, Roberts presented the Redevelopment Study to the Council members. Plaintiff's attorney

provided comments on the Report, Roberts's testimony, and the Planning Board's recommendation. Ms. Miller also testified and disputed certain findings in the Report. She described the current condition of the property and her ongoing renovation and rehabilitation efforts.

Judge Ford aptly noted that the LRHL does not require the Planning Board or the Council to permit cross-examination of witnesses at the public hearings on whether an area should be designated as an area in need of redevelopment. The judge also determined that even if the Council erred by not permitting plaintiff's attorney to cross-examine Roberts, plaintiff was not precluded from presenting its own facts and opinions on the record.

Plaintiff argues, however, that the Council improperly refused to allow it to present testimony from its architect. At the hearing, plaintiff's attorney stated that he wanted to have plaintiff's architect present the Council with "a drawing of some different things" for its consideration. In her testimony, Ms. Miller indicated that she had retained the architect and she wanted to show the Council the potential concept plan he had drawn up.

An attorney for the Council stated that it was premature to consider redevelopment plans for the site. He asserted that it was appropriate for a property owner to speak about the current condition of the property as it relates to the Redevelopment Study,

but "what will happen on that property is for another day." The attorney asserted that the issue for the Council at that meeting was whether the property met the criteria under the LRHL for designation as an area in need of redevelopment.

We are convinced that the Council did not abuse its discretion by refusing to permit plaintiff's architect to testify at the public meeting. The Council properly limited the testimony to the presentation of facts relevant to the issue at hand, that is, whether the property as described in the Redevelopment Study met the criteria for designation as an area in need of redevelopment under the LRHL. The record shows that plaintiff's architect intended to discuss future plans for the property. That testimony was beyond the scope of the proceeding.

IV.

Plaintiff further argues that the Board was not advised regarding the designation of the property as a "condemnation redevelopment area" under N.J.S.A. 40A:12A-6(b)(5)(e). Plaintiff notes that the designation of a "condemnation redevelopment area" operates as a finding of public purpose, which authorizes a municipality, or redevelopment entity, to exercise the power of eminent domain to acquire property in the redevelopment area.

Plaintiff asserts that comments by members of the Planning Board at the September 16, 2014 public hearing indicated that they

were not aware they were recommending that the Borough exercise its condemnation power for the acquisition of properties in the redevelopment area. However, as the record shows, one Planning Board member noted that the Board was "not here to take anybody's property tonight. We are here to just determine if this area is in need of revitalization."

As the Board's attorney observed, the Board's determination is "step one of a very long process." After the Council adopts a resolution designating the property as a redevelopment area, the municipal Council must then develop a "redevelopment plan" pursuant to N.J.S.A. 40A:12A-7. Only after the adoption of a redevelopment plan may a municipality or designated redevelopment entity acquire, by the exercise of the power of eminent domain, any land or building necessary for the project. N.J.S.A. 40A:12A-8.

Therefore, the Planning Board recognized that its sole responsibility in conducting the public hearing on the Redevelopment Study was to determine whether the subject property constitutes an area in need of redevelopment under the LRHL and make a recommendation to the Mayor and Council on that issue. The LRHL did not require the Board to make any judgment as to the exercise of the power of eminent domain, and the record does not

support plaintiff's contention that the Board was not properly advised of its role in the process.

V.

Plaintiff also argues that the Planning Board and Council's actions are not supported by sufficient credible evidence. Again, we disagree.

"A redevelopment area may include lands, buildings, or improvements which themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part." N.J.S.A. 40A:12A-3. Property may be designated an area in need of redevelopment if the property satisfies any one of eight statutory criteria. N.J.S.A. 40A:12A-5.

The Redevelopment Study reviewed each of the lots in the Survey Area. As noted, the Report concluded that plaintiff's property met three criteria under N.J.S.A. 40A:12A-5. It included buildings that are substandard, dilapidated, or obsolescent. N.J.S.A. 40A:12A-5(a). Furthermore, the use of the bulkhead and docks had been discontinued and met the criteria under N.J.S.A. 40A:12A-5(b). These structures had been allowed to deteriorate to the point where they are no longer tenantable. Moreover, the


physical condition of the buildings and improvements is hazardous and presents a danger to the public safety. N.J.S.A. 40A:12A-5(d).

Plaintiff argues that the Planning Board erred by relying upon the Report because Roberts was not present to introduce the Report and explain its findings. Roberts's presence was not required for the Board's consideration of the Report. Moreover, as noted previously, Roberts was present when the Report was presented to the Council for its consideration.

Judge Ford also noted that plaintiff had been permitted to challenge the opinions in the Redevelopment Study and present its own facts as to the conditions of the property. The judge correctly found that there was sufficient evidence in the record to support the Planning Board and the Council's findings that plaintiff's property was part of an area in need of redevelopment under N.J.S.A. 40A:12A-5.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION