SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1394-16T3

BRIAN KIMMINS and PATRICIA KIMMINS, his wife, JOSEPH NATOLI, and JANICE NATOLI, his wife, STEVEN HEGNA and METTE HEGNA, his wife, CHRISTIAN SIANO and CARRIE SIANO, his wife, DANIEL KEATING and DIANE KEATING, his wife, EDWARD BREHM and JODI BREHM, his wife, CHRISTOPHER KAISAND and KELLY KAISAND, his wife, and PETER PETRACCO and MAY PETRACCO, his wife,

Plaintiffs-Respondents,

v.

BOROUGH OF BRIELLE PLANNING BOARD,

Defendant,

and

MICHAEL and LORI CENTRELLA,

Defendants-Appellants.

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Argued September 12, 2017 – Decided November 15, 2017

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2949-15.

C. Keith Henderson argued the cause for appellants (C. Keith Anderson & Associates, attorneys; Mr. Henderson, on the briefs).

Edward F. Liston, Jr. argued the cause respondents.

PER CURIAM

Defendants Michael and Lori Centrella appeal from the October 28, 2016 Law Division order vacating the Borough of Brielle Planning Board (Board) resolution, which granted defendants' application to divide their existing single lot into three lots, along with ancillary variance relief from municipal zoning ordinances. We affirm.

I.

The following facts are relevant to our review. Defendants purchased the subject property in 2001. Slightly larger than one acre at 46,618 square feet, and 185.45 feet wide, the cork-shaped property lies at the corner of two roads – one to the west and one to the south, and adjacent to the Manasquan River to the east. When defendants purchased the property, it contained a "main dwelling," "a guest cottage," "a two-car garage," and "a large swimming pool." Within a year of the purchase, defendants demolished the main dwelling and swimming pool. In 2012, Hurricane

Sandy severely damaged the guest cottage, causing defendants to move out of the cottage for almost one year.

At the time of the Board's proceedings, defendants lived in the guest cottage, which sits 2.57 feet from the northern property line. Upon finalization of their subdivision plan, defendants intended to build a house on the middle lot and tear down the guest cottage.

In November 2014, defendants applied to the Board for approval to divide their property into three lots; notably, their application required two variances. The Board addressed defendants' application in a hearing that extended over three Board meetings.

On March 10, 2015, the first hearing date, defendants presented testimony from two expert witnesses. The first expert, a professional engineer and planner, testified the property needed a "pre-existing nonconforming" variance for the "guest cottage" because it sits 2.57 feet from the northern property line. He also said defendants' plan required a variance because the southern lot would measure only 34.23 feet wide, but the ordinance required a minimum sixty-foot width; the other two lots would conform, measuring 75.14 and 75.76 feet wide. He further noted the three lots would nevertheless satisfy the ordinance's total-area requirements.

Defendants' second expert, a licensed professional planner, addressed defendants' application for a variance under N.J.S.A. 40:55D-70(c)(1), which authorizes a board of adjustment to grant a variance for "exceptional and undue hardship." He explained defendants' plan would create

> three lots which fully conform with the exception of the fact that there is a technical lot width variance on the largest lot, the corner lot, . . . where if . . . you measure the lot width at the setback[,] it's . . . a little over 34 feet, and the ordinance requires 60 [feet]. But then when you look at the rest of the parcel, clearly, that parcel is substantially large. It's a very large building envelope on it. So it's clearly a lot that would be envisioned by your ordinance to be a buildable building lot.

He added, "[I]t's much more consistent with the character of the zone than . . . what could be done with a fully conforming subdivision." He therefore concluded, "[T]here is a practical and undue hardship that is associated with the configuration of the lot that inhibits the extent to which [defendants] can use the property."

The expert then discussed the application for a variance under N.J.S.A. 40:55D-70(c)(2), which authorizes granting a variance when "the benefits of the deviation would substantially outweigh any detriment." He asserted defendants' plan did not have any "substantial negative impacts." He explained the three

lots would "be very consistent with the character of the other lots in this zone." He added that the plan would eventually get rid of defendants' nonconforming "guest cottage," and would further the purposes of Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-2.

At the conclusion of the testimony of defendants' second expert, the Board opened the meeting to "any members of the public [who] have questions." The Board did not inquire whether anyone wanted to present any testimony or evidence regarding the application. Nor did the Board announce the closure of the evidentiary portion of the hearing. One member of the public asked defendants' second expert some questions, but none of any relevance to this appeal. The chairperson then said, "[W]e have to open up for public comments[,] and there's a lot of people here. I just don't feel like rushing people."[1] He consequently adjourned the proceedings.

On April 14, 2015, the second hearing date, plaintiffs attended with their attorney, who advised the Board that he intended to have a public planner testify on plaintiffs' behalf. The Board's chairperson responded, "This is the open public

[1] The record suggests the Board follows a general rule of allocating forty-five minutes to an application; if not completed, the Board adjourns the matter to their next meeting date.

meeting. There's no . . . section here for you to call your planner. The other [section,] that was closed at the lasting meeting. It was opened for public comment[,] and the comment was on the testimony that was given prior." Plaintiffs' attorney repeated his request to have plaintiffs' public planner expert testify. The chairperson replied, "This is the public portion. It's for public comment. The hearing portion of it was closed at the last meeting. Everybody was noticed. Nobody showed up . . . with a planner to oppose this."

The attorney representing defendants then stated:

> What this Board may not be aware of[,] and what [plaintiffs' attorney] may not be aware of, too, is that the [o]bjectors had an attorney here last time. There was an attorney[,] [i]ntroduced himself, told me he was representing the [o]bjectors, and nothing was said. And so it is [not] as if they didn't have an opportunity before it was closed. It isn't as if they weren't represented by counsel. Counsel chose, for whatever reason, not to make an appearance before the Board. He was here[,] and he introduced me as having represented the same people.

Contrary to the representation of defendants' attorney, the transcript does not indicate the Board ever closed the evidentiary portion of the hearing.

After plaintiffs' attorney raised an issue regarding jurisdiction, Brielle's mayor — a member of the Board — interjected, and said, "I'm going to make the following suggestion

. . . . I cannot see jeopardizing the Borough's position at this point . . . . I would suggest that we adjourn . . . this portion of the hearing until next meeting to give our legal and engineering experts time to review these questions[,] . . . and then we proceed next month." The Board agreed and postponed the hearing "to the next meeting."

On June 9, 2015, the third hearing date, the Board's recording secretary asked defendants whether they wanted to present any "testimony[,] . . . and the answer was no."[2] The chairperson "then turned to [plaintiffs' attorney] and told him the public portion of this hearing was closed[,] and no further testimony will be heard." The chairman then announced, "[T]he Board is asking that each person speak for [three] minutes only so everyone who wishes can make a comment."

Plaintiffs' attorney reiterated his request to have plaintiffs' expert testify, and noted the expert "is a resident of Brielle." The Board rejected the request and approved "a motion to allow public comments only" on the testimony already given. Plaintiffs' counsel then asked the Board to give his planner more

[2] After the audio recording for the third meeting proved defective, the parties stipulated the court and counsel "shall rely on the official minutes of the June 9, 2015 Meeting of the Borough of Brielle Planning Board as well as planning testimony outline of [p]laintiff's [e]xpert."

than three minutes to speak. When plaintiffs' counsel asked to mark charts he brought for identification, the mayor responded "there is no more testimony." Plaintiffs' counsel said his clients "were being denied their right to present their case[,] and this is a denial of their Constitutional rights."

The Board proceeded to hear "public comment" from eight residents, six who opposed the application and two who spoke in favor of it. The Board then voted on whether to approve defendants' application, with five members voting yes and two members voting no.

On July 14, 2015, the Board adopted a resolution granting defendants' application for the subdivision and two variances. The Board concluded defendants were "entitled to C1 relief due to the features existing which uniquely affect this specific piece of property and due to peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property." The Board reasoned:

> [A]s it relates to the first requested variance, there is a preexisting conformity [sic] as it relates to the guest house which lawfully exists on the lot and that, furthermore, this existing condition will be extinguished once the guest house is demolished per [defendants'] stated intention. As it relates to the second aforementioned variance, the Board notes that because of the width of the lot adjacent to [the western street], one would not be

> permitted to have four (4) conforming lots, an issue which presents a hardship. Nothing can be done to increase the frontage along [the western street]. Given the unique pie-shaped dimensions of the subject parcel, the Board further notes [defendants have] sought to create three (3) lots which fully conform to the [z]oning ordinance, with the exception of the lot width variance on . . . the corner lot. The Board notes that it would be impossible for [defendants] to acquire additional property in order to meet the lot width requirements in the R-3 Zone. The Board concludes that there is a practical hardship associated with the configuration of the lot that inhibits the extent to which [defendants] can use the property, a hardship which satisfies the C-1 criteria. The Board further concludes that no substantial negative impact exists on this application sufficient to negatively impact the surrounding properties or the zone plan in a meaningful way. In this instance, the Board concludes that these properties can be developed in such a manner as to meet all of the setback criteria, height criteria, and in such a manner as to be consistent with surrounding properties and homes on properties. There is a positive reason for nonconformity to continue. Thus, any developed lots will meet all of the requirements in the R-3 Zone with the exception of the lot width variance on [the corner lot] as previously indicated.

The Board also concluded, "[U]nder the C2 analysis[,] . . . the positive and negative criteria were met by [defendants,] and the granting of 'C' variance relief as set forth herein is appropriate." It reasoned:

> [W]hen taking into account the current character of the R-3 Zone as it extends between [the western street] and the Manasquan

> River, every single lot in that zone runs from the street through to the [r]iver with waterfront frontage, and that furthermore, within this area there are fifteen (15) other lots, of which seven (7) have nonconforming lot widths. The Board determines that approval of this application represents a better zoning alternative for the property which benefits the community. The Board also points out that preliminarily[, defense counsel] intimated [defendants] might seek a subdivision of four (4) lots, but that since that time [defendants have] filed an [a]pplication seeking a minor three (3) lot subdivision. The Board determined that having fewer lots with a larger lot area makes better planning sense and will not be in conflict with the nature and character of the R-3 Zone as presently developed.

On August 5, 2015, plaintiffs filed an action in lieu of prerogative writs in the Law Division, challenging the Board's decision. After conducting a hearing, the court reversed the variances granted by the Board, and vacated "the remainder of the Board's decision" and remanded the matter for further proceedings. The court concluded the Board's findings relating to the variances "are without legal or factual support." The court further concluded, "A review of the record reveals the Board failed to conduct the hearing consistent with principles of due process and fundamental fairness. By denying [o]bjectors the right to present expert testimony, the Board's decision resulted in an unfair outcome, warranting reversal."

II.

Zoning boards make quasi-judicial decisions to grant or deny applications within their jurisdiction. Willoughby v. Planning Bd. of Deptford, 306 N.J. Super. 266, 273 (App. Div. 1997); Kotlarich v. Mayor of Ramsey, 51 N.J. Super. 520, 540-41, (App. Div. 1958). The determination of a zoning board is presumed to be valid. Kramer v. Bd. of Adjustment, 45 N.J. 268, 285 (1965); Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002). The court's review of a board's decision is based solely on the record before the board. Kramer, supra, 45 N.J. at 289. A court must not substitute its own judgment for that of the board unless there is a clear abuse of discretion. See Cell S. of N.J., supra, 172 N.J. at 81. The burden is on the challenging party to demonstrate that the board's decision was arbitrary, capricious, or unreasonable. New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 160 N.J. 1, 14 (1999); Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1988); Cell S. of N.J., supra, 172 N.J. at 81.

This court applies the same standards as the trial court. Bressman v. Gash, 131 N.J. 517, 529 (1993); D. Lobi Enters., Inc. v. Planning/Zoning Bd., 408 N.J. Super. 345, 360 (App. Div. 2009). However, when an appeal raises a question of law, we apply a

plenary standard of review. Wyzykowski v. Rizas, 132 N.J. 509, 518 (1993).

A.

We first address defendants' argument that the trial court erred when it concluded the Board's hearing denied plaintiffs due process. Defendants assert the Board complied with due process throughout these proceedings.

N.J.S.A. 40:55D-10(d) states:

> The testimony of all witnesses relating to an application for development shall be taken under oath or affirmation by the presiding officer, and the right of cross-examination shall be permitted to all interested parties through their attorneys, if represented, or directly, if not represented, subject to the discretion of the presiding officer and to reasonable limitations as to time and number of witnesses.

Planning boards have the obligation "to afford . . . all objectors a fair opportunity to address the full range of planning issues" presented by development applications. Witt v. Borough of Maywood, 328 N.J. Super. 432, 454 (Law Div. 1998), aff'd o.b., 328 N.J. Super. 343 (App. Div. 2000), citing N.J.S.A. 40:55D-10(d).

Although an attorney representing some plaintiffs may have attended the first Board hearing, the transcript of the proceedings contains no confirming evidence. During the second proceeding, the Board refused to allow plaintiffs to present an expert on

their behalf, and adjourned the proceeding without hearing any public comments. At the beginning of the third proceeding, the Board secretary asked defendants' attorney "if he had any new testimony to present and the answer was no." When plaintiffs' counsel asked to call their expert, the planning board refused to permit it. When a planning board allows an applicant to present testimony but denies objectors "a fair opportunity [to] present all of their witnesses[,] [it] deprives the ultimate conclusion of legitimacy." Witt, supra, 328 N.J. Super. at 454 (Law Div. 1998).

Before the trial court, the Board's attorney argued that the Board had the right to "make the rules governing" its hearings, pursuant to N.J.S.A. 40:55D-10(b). The trial court rejected this argument, noting that:

> [A] review of the record reveals that if there were rules, they were not known to all who appeared, as the [o]bjectors were "surprised by the order of the proceedings."
>
> A review of the transcript makes it perfectly clear that the Board never advised the public that objectors were required to sign a book or give notice that they wished to call witnesses in advance of the hearing.

Although the Board had the discretion to set "reasonable limitations" as to the number of witnesses and how long they could testify, N.J.S.A. 40:55D-10(d), it abused its discretion when it

refused to allow plaintiffs to present even a single expert witness to oppose defendants' two experts. See Witt, supra, 328 N.J. Super. at 454 (Law Div. 1998). We agree with the trial court that "the record reveals the Board failed to conduct the hearing consistent with principles of due process and fundamental fairness," warranting reversal of the Board's decision.

B.

We next address defendants' argument that the record lacks support for the trial court's conclusion that the Board improperly granted defendants' requested variances.

"An applicant who pursues a variance under N.J.S.A. 40:55D-70(c)(1) must establish that the particular conditions of the property present a hardship." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 29 (2013); see also N.J.S.A. 40:55D-70(c)(1). "'Undue hardship' involves the underlying notion that no effective use can be made of the property in the event the variance is denied." Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 605 (1980).

"Thus, [(c)(1)] variance approval require[s] the party requesting the variance to prove both positive and negative criteria: there must be a benefit to the community from granting the variance that outweighs the detriment to the zoning plan, and

the purposes of the MLUL must be advanced." Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 125 n.4 (2013).

"A 'c(1)' variance is not available to provide relief from self-created hardship." Green Meadows at Montville, LLC v. Planning Bd. of Montville, 329 N.J. Super. 12, 22 (App. Div. 2000). An applicant may not claim an undue hardship when the applicant seeks to divide the lots "in such a way as to make [the] lots nonconforming." Ibid.

If the applicant created the hardship, the planning board may nevertheless grant a variance under N.J.S.A. 40:55D-70(c)(2). Ibid. In Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 198 (App. Div. 2009), this court stated that in order to secure variance relief pursuant to N.J.S.A. 40:55D-70(c)(2), the applicant must show:

> (1) [that the variance] relates to a specific piece of property; (2) that the purposes of the [MLUL] would be advanced by a deviation from the zoning ordinance requirement; (3) that the variance can be granted without substantial detriment to the public good; (4) that the benefits of the deviation would substantially outweigh any detriment[;] and (5) that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.
>
> [Ibid. (quoting William M. Cox, New Jersey Zoning and Land Use Administration, § 6-3.3 at 143 (Gann 2008)).]

Defendants argue their "'hardship' arises not from an act of [their own or] their predecessors in title, but rather from the shape of the property." (Db22) They argue a "(c)1 [d]efendant need only prove that [the] property's unique characteristics inhibit 'the extent' to which the property can be used." They cite Bressman v. Gash, 131 N.J. 517, 529-30 (1993), in which our Supreme Court concluded the applicant suffered a hardship when "the physical characteristics of the lot both precluded construction of a house consistent with the character of the neighborhood and constituted a sufficient hardship to support the grant of a c(1) variance." They also cite Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 61 (1999), in which our Supreme Court concluded the applicant suffered a hardship when:

> it was not the size of the proposed pool, but rather the unusual narrowness of the applicant's property in relation to the ordinance's minimum width and the width of properties in the vicinity, combined with the existing structures on the property, that constituted the reasons why the setback and area variances were required.

The Court further noted a "misconception about the term 'undue hardship[]' . . . is the belief that an applicant seeking a variance under subsection c(1) must prove that without the variance the property would be zoned into inutility." Id. at 54. Instead, a hardship inhibits "the extent to which the property can be used."

Id. at 55 (quoting Davis Enters. v. Karpf, 105 N.J. 476, 493 (1987) (Stein, J., concurring)).

Defendants misinterpret both Bressman and Lang. In each case, the applicant sought a variance to build on a single lot. They did not seek to divide a lot into nonconforming lots, as defendants propose to do. Defendants have only established the hardship that they cannot divide their single, useful lot into three new lots, one of which fails to conform to Brielle's zoning ordinances. Without the subdivision they seek to create, the shape of the lot fails to limit their use of the property. Green Meadows at Montville, LLC, supra, 329 N.J. Super. at 22, is directly on point: defendants may not claim an undue hardship when they seek to divide the lots "in such a way as to make [the] lots nonconforming."

Defendants also argue they "satisfied their burden of proof to justify relief under" N.J.S.A. 40:55D-70(c)(2). We disagree.

Defendants first requested a variance for their "guest cottage." The Board found, "[T]here is a preexisting conformity [sic] as it relates to the guest house which lawfully exists on the lot and that, furthermore, this existing condition will be extinguished once the guest house is demolished per [defendants'] stated intention." The trial court correctly concluded the record does not support a finding of when the "guest cottage" was built

or when the zoning ordinance rendering it nonconforming was passed. Without those facts, the planning Board could not find the "guest cottage" constituted a preexisting condition.

With respect to the lot-width variance, the planning Board's resolution does not explain the purpose of the lot-width requirement or how the variance would further that purpose. The planning Board's resolution also fails to explain how the variance would further the purposes of the MLUL. We agree with the trial court that the Board's findings relating to the variances "are without legal or factual support."

Affirmed.