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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1853-15T4  
A-4780-15T4

JULIO C. NUNEZ,

Plaintiff-Appellant,

v.

ENGEL INVESTMENTS, LLC, ENGEL  
GARDENS, LLC, and PLANNING BOARD OF  
THE CITY OF ELIZABETH, NEW JERSEY,

Defendants-Respondents.

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Argued April 5, 2017 – Decided June 6, 2017

Before Judges Manahan and Lisa.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Docket Nos. L-  
3712-14 and L-3633-15.

Fred R. Gruen argued the cause for appellant  
(Gruen & Goldstein, attorneys; Mr. Gruen, on  
the briefs).

Scott E. Becker argued the cause for  
respondent Engel Investments, LLC.

Patrick J. McNamara argued the cause for  
respondent Planning Board of the City of  
Elizabeth, New Jersey (Scarinci & Hollenbeck,  
LLC, attorneys; Mr. McNamara, on the briefs).

PER CURIAM

In these consolidated appeals, plaintiff Julio C. Nunez appeals from orders entered by the Law Division affirming the decisions of defendant Planning Board of the City of Elizabeth (Board) for construction of apartments located on two separate lots. In light of the Law Division judge's thorough and well-reasoned decisions, and our deferential standard of review, we affirm.

Defendants Engel Investments, LLC, (Engel Investments) and Engel Gardens, LLC, (Engel Gardens) submitted two separate applications to the Board seeking preliminary and final site plan approval to develop properties located at 650-656 Westfield Avenue in the City of Elizabeth (Property I) and 618-630 Westfield Avenue in the City of Elizabeth (Property II). The application for Property I included several bulk variances. The proposed site plan for Property II did not require any variances.

Property I and Property II are located in an area governed by the R-3 multi-family zone under the Land Use Development Ordinance of the City of Elizabeth (LDO), where multi-story, multi-family residential development is a permitted use. After defendants' submissions, the Board deemed the applications complete and held public hearings on July 10, 2014, for Property I, and on July 23, 2015, for Property II.

I.

At the July 10, 2014 hearing for Property I, the Board heard testimony from Samuel Engel, the managing member of Engel Investments. Engel testified that the development of Property I involved the merger of three parcels, demolition of the existing structures, and the construction of a multi-story building containing thirty-two residential units. Engel addressed the number of proposed available parking spaces and acknowledged the need to provide new curbs, sidewalks and trees along the frontage of Property I.

Anthony Kurus, a licensed professional engineer, also testified. Kurus provided the Board with a detailed review of the proposed site plan, including the landscaping, storm water management, and means of access and egress. Kurus testified that Engel Investments would address and satisfy various conditions articulated in the June 12, 2014 report by Victor E. Vinegra, the Board planner.

James R. Guerra, a licensed architect and professional planner, testified relative to the bulk variances. In its application, Engel Investments sought four variances from the requirements of the LDO. First, the LDO required a rear yard setback of fifty feet; the development proposed a rear yard setback of fifteen feet. Second, the LDO required a maximum impervious

coverage of sixty percent; the development proposed a maximum impervious coverage of approximately seventy-eight percent. Third, the LDO required a maximum permitted height in the R-3 multi-family zone of thirty-five feet; the development proposed a height of approximately thirty-eight feet. Fourth, the LDO required a minimum of fifty percent of the total open space be exterior lawn; the development proposed for no lawn.

After Guerra's testimony, plaintiff's counsel made an opening statement to the Board and cross-examined the witnesses. Specifically, plaintiff's counsel questioned Engel about the amount of proposed parking and questioned Guerra about the bulk variances sought by Engel Investments. After plaintiff's counsel rested, the Board opened the meeting. Some citizens in attendance expressed their concerns over the project.

The Board concluded the hearing and briefly discussed the project on the record. After discussion, the Board voted unanimously in favor of approval. A resolution memorializing the vote was subsequently adopted at the Board meeting held on September 4, 2014.

On October 14, 2014, plaintiff filed an action in lieu of prerogative writs challenging the Board's approval of the project. A hearing was conducted before Judge Karen M. Cassidy on November 10, 2015. On December 1, 2015, the judge issued an order upholding

the Board's decision. In a comprehensive statement of reasons, the judge determined there was more than an adequate basis for each bulk variance, and that the record from the July 10 meeting supported a finding that the Board's conclusions were not arbitrary, capricious or unreasonable. Plaintiff filed an appeal (A-1853-15).

## II.

At the July 23, 2015 hearing for Property II, the Board heard testimony from Engel, Kurus, Guerra, Christine Nazarro Cofone, a licensed professional planner, and Justin Taylor, a traffic engineer. Neither plaintiff, nor anyone on his behalf, appeared at the hearing.

Engel testified that the development involved the construction of a multi-story building containing thirty residential units. Engel addressed the number of proposed available parking spaces and acknowledged the need to provide new curbs, sidewalks and street trees along the frontage.

Kurus provided the Board with a detailed review of the proposed site plan, explaining the landscaping, storm water management, and access and egress. Kurus further testified that Engel Gardens would address and satisfy various conditions articulated in the July 15, 2015 report by Vinegra.

Guerra testified regarding the proposed building's configuration, the location and number of units, and the Americans with Disabilities Act (ADA) accessible units on the ground floor. Guerra noted that the proposed building did not require any bulk variances or design waivers.

Cofone testified that the proposed project satisfied a number of purposes under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -112. According to Cofone, the project provided adequate light, air, and open space, and significantly reduced the property's impervious coverage.

Taylor, who prepared the Traffic Impact Assessment (TIA) submitted by Engel Gardens, testified that the assessment analyzed the difference in traffic between the property's current use and the proposed use. Based upon the TIA, it was determined there would be no detrimental impact from the proposed development to the surrounding roadways, and that access to and from the proposed project would operate in a safe and efficient manner.

At the conclusion of the testimony, and after consideration of the TIA, the Board voted unanimously in favor of approval. A resolution memorializing the vote was subsequently adopted at the Board meeting held on September 3, 2015.

On October 22, 2015, plaintiff filed an action in lieu of prerogative writs challenging the Board's approval of the project

at Property II. A hearing was conducted on June 16, 2016, before Judge Cassidy. At the conclusion of the hearing, the judge entered an order affirming the Board's decision. In an oral decision, the judge held that the Board's conclusions were not arbitrary, capricious or unreasonable. The judge held the Board properly determined the project did not require variances, and was in compliance with all applicable codes and regulations. Plaintiff filed an appeal (A-4780-15).

Plaintiff raises the following points in appeal A-1853-15:

POINT I

THE TRIAL COURT ERRED IN UPHOLDING DEFENDANT PLANNING BOARD'S VARIANCE GRANTS.

POINT II

THE TRIAL COURT ERRED IN UPHOLDING THE PLANNING BOARD'S GRANT OF SITE PLAN APPROVAL, AS APPLICANT FAILED TO REQUEST NECESSARY VARIANCES.

Plaintiff adds the following points in a reply brief in appeal A-1853-15:

POINT I

THE SHORTENED REAR YARD VARIANCE WAS IMPROPERLY GRANTED.

POINT II

THE IMPERVIOUS COVERAGE AND OPEN SPACE VARIANCES WERE IMPROPERLY GRANTED.

POINT III

THE BOARD'S RESOLUTION APPROVING THE PROPOSED PARKING LAYOUT VIOLATES THE RESIDENTIAL SITE IMPROVEMENT STANDARDS, N.J.A.C. 5:21-4.16(B).

POINT IV

THE BOARD'S RESOLUTION APPROVING A FOUR[-]STORY BUILDING IN THREE[-]STORY R-3 MULTI[-]FAMILY ZONE WITHOUT A VARIANCE VIOLATES THE ELIZABETH ZONING ORDINANCE: THE LOFTS ON THE THIRD FLOOR CONSTITUTE A FOURTH STORY SINCE THEY ARE NOT "MEZZANINES."

POINT V

THE BOARD'S RESOLUTION APPROVING AN ELEVATOR BUILDING IN THE R-3 MULTI-FAMILY ZONE WITHOUT A USE VARIANCE VIOLATES THE ELIZABETH ZONING ORDINANCE.

Plaintiff raises the following point in appeal A-4780-15:

POINT I

THE TRIAL COURT ERRED IN UPHOLDING THE PLANNING BOARD'S GRANT OF SITE PLAN APPROVAL, AS APPLICANT FAILED TO REQUEST NECESSARY VARIANCES[ ].

"[W]hen reviewing the decision of a trial court that has reviewed municipal action, we are bound by the same standards as was the trial court." Fallone Props., LLC v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004) (citations omitted). "[W]hen a party challenges a zoning board's decision through an action in lieu of prerogative writs, the zoning board's decision is entitled to deference." Kane Props., LLC v. City of



Hoboken, 214 N.J. 199, 229 (2013). "The questions on appeal are only whether or not the action of the board was arbitrary, capricious or patently unreasonable, and whether it acted properly under the statute, that is, in accordance with the statutory standard." Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 54-55 (1998) (citation omitted).

The courts "will give substantial deference to findings of fact, [however,] it is essential that the board's actions be grounded in evidence in the record." Fallone, supra, 369 N.J. Super. at 562. Legal determinations are not entitled to presumption of validity and are subject to de novo review. Wyzykowski v. Rizas, 132 N.J. 509, 518-20 (1993).

Regarding the proposed project at Property I, the judge determined the proofs relating to the bulk variances sought by Engel Investments were in accord with the requirements outlined by N.J.S.A. 40:55D-70(c)(2). Specifically, the judge found that Engel Investments demonstrated that the proposed project: (1) related to a specific piece of property; (2) advanced the purposes of the MLUL by a deviation from the zoning ordinance requirement; (3) the variance was without detriment to the public good; (4) the benefits of the deviation outweighed any detriments; and (5) the variance did not impair the intent and purpose of the zone plan or ordinance. See Wilson v. Brick Twp. Zoning Bd. of Adjustment,

405 N.J. Super. 189, 198 (App. Div. 2009) (citations omitted). The judge held the Board properly analyzed and granted each variance requested by Engel Investments, and thus the Board's decision to grant the application was not arbitrary, capricious or unreasonable.

Regarding the proposed project at Property II, the judge reviewed the evidence and testimony submitted by Engel Gardens that formed the basis for the Board's determination that no variances were required. The judge held the Board properly considered the uncontested expert testimony from Guerra, Kurus, Cofone, Taylor, and Vinegra. The judge, after an analysis of the applicable zoning ordinances, concluded the Board's decision to grant the application was not arbitrary, capricious, or unreasonable.

Given our highly deferential standard of review, and having considered Judge Cassidy's thorough and well-reasoned decisions in light of the record and the controlling decisions of law, we discern no error.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION