SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2040-14T1

BRIGHT AND VARICK URBAN RENEWAL COMPANY, LLC,

Plaintiff-Respondent,

v.

JERSEY CITY PLANNING BOARD, JERSEY CITY ZONING BOARD OF ADJUSTMENT, THE MAYOR AND COUNCIL OF THE CITY OF JERSEY CITY, ROBERT BYRNE, in his official capacity as City Clerk, ANTHONY CRUZ, in his official capacity as Director, Housing Economic Development and Commerce and CITY OF JERSEY CITY,

Defendants-Respondents.

VAN VORST PARK ASSOCIATION, INC.,

Intervener-Appellant.

Argued October 13, 2016 – Decided May 4, 2017

Before Judges Alvarez and Manahan.[1]

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[1] Hon. Carol E. Higbee participated in the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-0499-14.

Cynthia A. Hadjiyannis and Renee Steinhagen argued the cause for intervener-appellant (New Jersey Appleseed Public Interest Law Center, Inc., and Ms. Hadjiyannis, attorneys; Ms. Steinhagen and Ms. Hadjiyannis, on the briefs).

Donna M. Jennings argued the cause for respondent Bright and Varick Urban Renewal Company, LLC (Wilentz, Goldman & Spitzer, P.A., attorneys; Ms. Jennings, of counsel and on the brief).

Jeremy Farrell, Corporation Counsel, attorney for respondent City of Jersey City (Michael Dougherty, Assistant Corporation Counsel, on the statement in lieu of brief).

Ganz & Sivin, LLP, attorneys for respondent Jersey City Planning Board, join in the brief of respondent City of Jersey City.

PER CURIAM

Van Vorst Park Association, Inc. (VVPA), appeals as interveners, the Law Division order granting respondent, Bright and Varick Urban Renewal Company, LLC (BV), approval of a construction site plan application, pursuant to N.J.S.A. 40:55D-46(c). We affirm.

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by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal shall be decided by two judges.

We recite the following facts as those relevant to our decision. On April 14, 2010, Jersey City (City), by resolution of its governing body, authorized the City's Planning Board (Board) to conduct a preliminary investigation and to hold a public hearing to determine if the property located at the intersection of Bright Street and Varick Street (Property) was in need of redevelopment or rehabilitation.[2]

On September 13, 2011, pursuant to N.J.S.A. 40A:12A-6(a), the Board held a public meeting to consider a report entitled "Report Concerning the Determination of Bright and Varick Study Area as an 'Area in Need of Redevelopment'" (Report) and the proposed redevelopment plan. The Property was the subject of the Report. The Board unanimously approved the Report and referred the Property's redevelopment designation to the City. The Board voted unanimously in favor of the redevelopment plan (Plan) and referred the Plan to the City for its adoption. During the meeting, no members of the public spoke in support of or objection to the Plan.

By resolution dated October 26, 2011, the City's governing body unanimously accepted the Board's referral to designate the Property as an area in need of redevelopment. At the same meeting,

[2] The Property at the intersection of Bright Street and Varick Street is Lot 32, Block 13902.

the City introduced a first reading of Ordinance No. 11-135 adopting the Plan. The Plan specifically permitted a maximum building height of 5 stories, established a 46,400 square foot building envelope, prohibited any subdivision of the existing single parcel, and did not require on-site parking. The Plan also provided that it "shall supersede all provisions of the Jersey City Land Development Ordinance (LDO) on matters that are specifically addressed herein." Thereafter, on November 9, 2011, the City's governing body approved Ordinance No. 11-135.

At a public meeting held on July 18, 2012, the City's governing body unanimously approved Ordinance No. 12-093 authorizing the Property's transfer to the Jersey City Redevelopment Agency (JCRA). On July 30, 2012, RushmanDillon Projects, LLC (RDP), BV's predecessor-in-interest, held its first meeting with the JCRA to discuss the Property's redevelopment. On August 1, 2012, the City's governing body unanimously adopted Ordinance No. 12-093, and subsequently transferred title of the Property to the JCRA on August 21, 2012. Thereafter, at a noticed public meeting held on October 16, 2012, the JCRA designated RDP as the redeveloper of the Property for the purpose of constructing an apartment building.

On February 19, 2013, the JCRA approved a Redevelopment Agreement with RDP that planned for the construction of a mixed-

use micro-housing project containing eighty-five residential units with possible commercial space on the ground floor. On August 13, 2013, the JCRA and BV executed the first amendment to the Redevelopment Agreement, providing that BV intended to build a multi-family residential project containing eighty-seven units with possible commercial space on the ground floor.

On August 16, 2013, BV filed an application seeking preliminary and final site approval to construct a five-story, eighty-seven unit multi-family residential building in accordance with the Plan and Redevelopment Agreement (Application). As part of the Application, BV sent a letter to the City's Zoning Officer, Nick Taylor, requesting confirmation that the Plan would proceed before the Board. On August 23, 2013, Taylor responded to BV confirming the Application would require the Board's approval.

On September 3, 2013, Jeffrey Wenger, the Principal Planner of the City's Planning Division, advised BV that the "application [was] nearing completion," but there were several items BV needed to submit before the Application could be considered complete. Wenger attached a checklist for BV's reference, specifically outlining twelve items that were not submitted. The checklist also noted that BV needed to submit plans for review agents and Board members when the planning staff specifically requested them.

On September 9, 2013, BV submitted eleven of the twelve additional items requested by Wenger. Wenger responded by letter on October 4, 2013, advising BV that the application was "substantially complete" and instructed BV to submit plans for agent review. In three subsequent emails, all dated November 6, 2013, Wenger requested several small alterations be made to the plans, however, he did not state that any of the information sent on September 9 was deficient or otherwise failed to meet the checklist requirements.

VVPA first became involved with the redevelopment process while BV was undertaking the steps required to complete the Application. On August 30, 2013, VVPA sent a letter to Mayor Steven Fulop and the City Council, specifically complaining that the "Redevelopment Plan [was] approved without public input" and requested that the Plan be reopened for further public discussion. VVPA sent several more communications to this effect over the next several months.

On November 27, 2013, the City's counsel sent a letter to BV regarding the Application. Specifically, the City's counsel expressed his belief that the density of the proposed project presented a problem, and that the City had "determined that there is an ambiguity with respect to what controls [density in] the redevelopment plan." Counsel also noted that the City requested

an official opinion from the zoning officer to determine whether the Application required additional approval.

On December 10, 2013, the City advised BV that the zoning officer had referred the density issue to the Board. As a result, the Application would not be scheduled to be heard at a public meeting until the density issue was "sufficiently addressed." In response, BV requested the issuance of a certificate indicating that the Board failed to timely act on the Application. On January 16, 2014, Anthony Cruz, Director of Housing Economic Development and Commerce, advised BV that the Application was denied due to the ambiguity surrounding the project's density.

On February 4, 2014, BV filed a seven-count verified complaint in lieu of prerogative writs requesting, among other things, an automatic approval and declaratory judgment confirming that there was no ambiguity with respect to the density issue in the Application.

The Law Division judge issued a written decision on August 29, 2014, concluding that due to the Board's failure to timely act on the Application in accordance with N.J.S.A. 40:55D-46(c), automatic approval was the appropriate remedy. The judge held that as BV supplied all required documentation requested by Wenger in September 2013, it was in compliance with the requirements for completing an application under N.J.S.A. 40:55D-10.3. The judge

further found that Wenger accepted the application as "substantially complete" in his October 4 letter. Further, the judge found there was no evidence in the record that supported that the Board's failure to act within the statutory deadline was due to any excusable bases. As such, the judge held that the Board was statutorily mandated to act on the Application within ninety-five days of October 4, 2013. Since the Board failed to act within that timeframe, the judge concluded automatic approval was the appropriate remedy.

On September 29, 2014, the City filed a notice of motion for reconsideration. On October 8, 2014, VVPA filed a notice of motion to intervene. The judge denied the motion for reconsideration by order dated October 24, 2014. Neither the City, the Board, nor any of the public official defendants appealed the orders. On December 5, 2014, VVPA's motion to intervene was granted by consent order. This appeal followed.

VVPA raises the following points on appeal:

POINT I

> AS A MATTER OF LAW, AUTOMATIC APPROVAL IS AN INAPPROPRIATE REMEDY WHEN THERE IS A SUBSTANTIAL QUESTION ABOUT WHETHER THE SITE PLAN IS IN ACCORDANCE WITH THE ZONING REGULATIONS.

POINT II

THE TRIAL COURT SHOULD NOT HAVE GRANTED AUTOMATIC APPROVAL OF THE REDEVELOPER'S SITE PLAN BECAUSE THE [NINETY-FIVE]-DAY TIME TO TAKE ACTION ON THE APPLICATION HAD NOT YET EXPIRED.

POINT III

IN GRANTING AUTOMATIC APPROVAL, THE TRIAL COURT APPROVED THE PROJECT'S DENSITY WITHOUT ANY RECORD ON THE PERMISSIBLE DENSITY HAVING BEEN MADE EITHER AT THE LOCAL BOARD LEVEL OR AT THE TRIAL LEVEL.

POINT IV

AUTOMATIC APPROVAL DISPROPORTIONATELY WEIGHS AGAINST THE PUBLIC INTEREST WHEN THE DENSITY REGULATIONS APPLICABLE TO THE REDEVELOPMENT PROJECT WERE NEVER THE SUBJECT OF A PUBLIC HEARING.

This appeal involves three interrelated statutory sources: (1) the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -72; (2) the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163; and (3) the Land Development Ordinance of Jersey City, Hudson County, New Jersey (LDO), Jersey City, N.J., § 345-1 (2016). We have previously held that "[b]oth the LRHL and the MLUL vest authority to decide site plan applications in the Planning Board." Britwood Urban Renewal, LLC v. City of Asbury Park, 376 N.J. Super. 552, 568 (App. Div. 2005). The LDO requires that the Board approve site plan applications in accord with the MLUL. Jersey City, N.J., § 345-7(B)(1)(b) (2016).

N.J.S.A. 40A:12A-4(a) of the LHRL empowers a municipal governing body to designate so-called "areas in need of redevelopment." To do so, the municipality first authorizes the city planning board to undertake a preliminary investigation of the area and hold a public hearing; both the investigation and the hearing are to assist the Board in its determination of whether the area is appropriate for redevelopment. N.J.S.A. 40A:12A-6(a). The determination that an area is in need of redevelopment is then adopted as a resolution by the municipality. Ibid.

Next, the municipality produces a redevelopment plan pursuant to N.J.S.A. 40A:12A-7(a), which lists the various types of information the redevelopment plan should contain. Among these are the plan's "relationship to definite local objectives as to appropriate land uses, density of population, and improved traffic and public transportation, public utilities, recreational and community facilities and other public improvements." N.J.S.A. 40A:12A-7(a)(1). The Plan shall describe its relationship to pertinent municipal development regulations as defined by the MLUL (here, the LDO). N.J.S.A. 40A:12A-7(c). The Plan supersedes any "applicable provisions of the development regulations of the municipality." Ibid.

Once the municipality has adopted the redevelopment plan by ordinance, potential developers submit their applications for

redevelopment to the municipal planning board, so that the application can be reviewed against local zoning ordinances adopted pursuant to the MLUL. N.J.S.A. 40A:12A-13.

Generally speaking, the MLUL informs how and when a redeveloper's site plan application becomes "complete." A site plan application "shall be complete . . . when so certified by the municipal agency or its authorized committee or designee." N.J.S.A. 40:55D-10.3. Once an application is "complete," "the planning board shall grant or deny preliminary approval within [ninety-five] days of the date of such submission." N.J.S.A. 40:55D-46(c). If no determination is made within ninety-five days, "the planning board shall be deemed to have granted preliminary approval of the site plan."[3] Jersey City, N.J., § 345-23(C)(2)(e). However, the application need not necessarily be "deemed complete," rather the plain language of the MLUL requires a submission to include the necessary documentation for the approval time under N.J.S.A. 40:55D-46(c) to trigger the

[3] The LDO does not directly impose this ninety-five-day window. Instead, the LDO provides that when an applicant simultaneously seeks preliminary and final major site plan approval, "[t]he time limit within which the Board shall act shall be the longest time permitted for either of the two approvals." Jersey City, N.J., § 345-23(E)(1) (2016). As a result, the ninety-five-day time period for preliminary approval from § 345-23(C)(2)(c) controls because it is longer than the forty-five-day time period provided for final approval under § 345-24(D)(3).

timeframe. N.J.S.A. 40:55D-10.3. In Jersey City, the Division of City Planning then reviews the application against the checklist to determine completeness. Jersey City, N.J., § 345-13(B) (2016). The City's checklist contains sixteen items plus an additional section for Engineering Completeness. Jersey City, N.J., § 345-31(E) (2016).

VVPA first argues that the court erred by granting automatic approval under N.J.S.A. 40:55D-46(c) because the Board did not have jurisdiction over the Application, and therefore, the ninety-five-day period did not begin to run. Specifically, VVPA points to LDO § 345-38(A)(1), which states "site plans . . . shall be submitted by the developer to the Planning Board of the City of Jersey City for review and approval so that compliance of such plans with the redevelopment requirements and objectives can be determined." (Emphasis added). Because the City alleged an ambiguity as to the density requirements in the November 27, 2013 letter, VVPA avers the Board lacked jurisdiction to hear the Application.

In furtherance of its argument, VVPA relies on Jersey Urban Renewal, LLC v. City of Asbury Park, 377 N.J. Super. 232 (App. Div.) certif. denied, 185 N.J. 392 (2005). In Jersey Urban Renewal this court addressed whether it is permissible for a redevelopment plan to explicitly add procedural checks in addition to those

provided by underlying municipal zoning ordinances. Id. at 235-39. The redevelopment plan at issue in Jersey Urban Renewal contained the following "procedural requirements":

> All construction projects within the redevelopment area shall receive comments from the [Board] prior to submission to the Mayor and Council acting as Redevelopment Agency for the City. Upon conceptual approval by the City of Asbury Park, the Mayor and Council, acting as the Redevelopment Authority, the matter shall then be submitted to the Planning Board for preliminary and final site plan approval, pursuant to statute.
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> [Id. at 236 (emphasis added).]

Jersey Urban Renewal claimed these additional procedural requirements were contrary to the MLUL and exceeded the authority given to municipalities by LRHL. Id. at 237. We disagreed.

By evaluating whether the plan's additional procedural requirements were "statutorily bereft," we concluded the imposition of additional criteria in a redevelopment plan is permissible. Id. at 238. We explained that such plans "simply impose[] upon plaintiff certain redevelopment criteria, not unlike development standards that are imposed by typical zoning ordinances." Id. at 239.

VVPA argues that the language of the zoning ordinance at issue here, LDO § 345-38(A), is akin to the language in the redevelopment plan in Jersey Urban Renewal which contained

specific requirements antecedent to approval in addition to the procedural antecedent inherent in every redevelopment plan. Our analysis of the two ordinances does not lead us to that conclusion. Unlike the ordinance in Jersey Urban Renewal, LDO § 345-38(A) did not impose additional jurisdictional predicates for approval of the Plan except for its referral to the Board for approval or denial pursuant to N.J.S.A. 40:55D-46(c). As such, VVPA's argument that the Board lacked jurisdiction based upon the language of the controlling ordinance is without factual or legal support.

VVPA next argues that the court erred by granting automatic approval under N.J.S.A. 40:55D-46(c) since the Application was never at a stage of completeness to trigger the ninety-five-day period. N.J.S.A. 40:55D-10.3 states "[a]n application for development shall be complete for purposes of commencing the applicable time period for action by a municipal agency, when so certified by the municipal agency." BV's Application was submitted on August 16. After receipt of the Application, the Board notified BV that twelve checklist items were missing.[4] In reply, BV submitted eleven of the twelve items on September 9. In a letter

[4] Twelve does not actually refer to twelve items out of the sixteen total categories on the checklist, as some items are subdivided. The missing items indicated in the September 3 letter were: Item 7, Item 8, Item 9B, Item 9C, Item 10A, Item 10C(9), Item 10C(18), Item 13N, Item 13O, Item 13P, Item 13T, and Item 13W.

accompanying their submissions, BV indicated the single outstanding item, Item 9B (review agent sets), would be submitted when "directed to do so by [p]lanning staff." On October 4, Wenger wrote to BV indicating its application was "substantially complete," and requested that Item 9B be submitted.

We review the decision of the trial court under an abuse of discretion standard, i.e., whether the decision was arbitrary, capricious or unreasonable. See Charlie Brown of Chatham, Inc. v. Bd. of Adjustment, 202 N.J. Super. 312, 321 (1985). When a court determines that a planning board has failed to act on an application that is deemed complete, it is fully within that court's power to grant automatic approval. Amerada Hess Corp. v. Burlington Cty. Planning Bd., 195 N.J. 616, 620 (2008). The MLUL requires a submission to include the necessary documentation for the Board's approval. N.J.S.A. 40:55D-46(c). Having complied with that requirement, the ninety-five-day period for approval is triggered. N.J.S.A. 40:55D-10.3.

In Amerada Hess, the Court emphasized that "automatic approval" statutes are to be strictly applied. The Court stated:

> To summarize, in enacting the MLUL and the CPA [County Planning Act, N.J.S.A. 40:27-6.7], the Legislature has made a value judgment that expeditious land use decisions are of such benefit to the public and applicants alike that the strong remedy of automatic approval is necessary and

> appropriate. We held in [Manalapan Holding Co. v. Planning Board of Hamilton, 92 N.J. 466, (1983)] that the time frames in the land use statutes are to be strictly applied, that automatic approval is the remedy for purposeful delay, and that it is only when government inaction is unintentional or inadvertent that the time frames are subject to relaxation. We reaffirm those principles here and add that the applicant unilaterally can neither extend nor waive the time limits in the CPA, and that a planning board cannot delay beyond the statutory limits without exposing itself to automatic approval.
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> [Amerada Hess, supra, 195 N.J. at 644.]

The Court identified "two scenarios that will satisfy the Manalapan exception" to the strict timetable in land use planning approval. Id. at 635. The Court noted:

> The first is delay caused by ordinary mishaps or mistakes, such as omitting the place of a board meeting, thus invalidating a public notice, [Precision Industrial Design Co. v. Beckwith, 185 N.J. Super. 9 (App. Div.), certif. denied, 91 N.J. 545 (1982)], or misfiling an application, [D'Anna v. Planning Board of Washington Township, 256 N.J. Super. 78 (App. Div.), certif. denied, 130 N.J. 18 (1992)]. The second category is delay caused by a reasonable misapprehension regarding whether there was a complete application pending before the board, for example where the board thought the application was barred by res judicata, [Allied Realty, Ltd. v. Borough of Upper Saddle River, 221 N.J. Super. 407 (App. Div. 1987), certif. denied, 110 N.J. 304 (1988)]; where the board believed that an application failed to satisfy the MLUL checklist and thus considered it incomplete, [Eastampton Center, LLC v. Planning Board of Eastampton, 354 N.J. Super. 171 (App. Div.

> 2002)], or where the board believed the consent of the property owner was necessary to perfect an application filed by a contract purchaser, [Fallone Properties, LLC v. Bethlehem Township Planning Board, 369 N.J. Super. 552 (App. Div. 2004)].
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> [Ibid.]

Despite VVPA's assertion, we do not find that the present appeal comes within either scenario. The Board decided to table and then deny a completed application because it wanted to address the density issue; a decision we conclude neither altered the completed status of the Application nor tolled the ninety-five-day timeframe. There was no "mistake" by the Board relative to notice of the meeting or misfiling of the Application. There was no "reasonable misapprehension" by the Board whether the application was complete. Wenger, despite some parsing of language, made the completeness determination. Thus, as the Law Division judge appropriately determined, BV was entitled to a hearing before the Board within ninety-five days of October 4, 2013 or was entitled to default approval.

VVPA further argues that automatic approval of the Application is inappropriate because the remedy is contrary to the public interest principally because the issue of density was never discussed at a public hearing. However, VVPA provides no support that a public hearing for that purpose was required. Pursuant to

the statutory scheme addressed above for redevelopment, the only public meeting required is one held before an area is deemed in need of redevelopment per N.J.S.A. 40A:12A-6(a). The statute provides, among other requirements, that there be public notice "for the purpose of hearing persons who are interested in or would be affected by a determination that the delineated area is a redevelopment area." As referenced above, that meeting took place after notice on September 13, 2011, wherein no member of the public appeared in support or opposition.

Finally, in balancing the equities between the public interest and the interest of the developer, the outcome weighs in favor of BV. There were numerous noticed public hearings during the redevelopment process at which no member of the public, including VVPA, appeared and objected regarding the issue of density or on any other basis. By contrast, BV complied with the requirements imposed by the controlling ordinance in the Application and was not advised by the Board to the contrary. As such, there was reasonable reliance on BV's part that the Application would be heard by the Board within the statutorily proscribed timeframe set forth in N.J.S.A. 40:55D-3; a statute intended to afford an applicant, such as BV, a measure of predictability.

Affirmed.