SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2569-15T1

ROBERT KASH; JOSEPH MOSCO; KMK HOSPITALITY, INC., t/a METROPOLITAN CAFÉ; STEVE GOLDBERG AMERICAN HOTEL HOLDING CO., INC., t/a THE AMERICAN HOTEL; PATSY FEDERICI; DAVID FEDERICI; MIKE FEDERICI; JOHN FEDERICI; FEDERICI & SONS, INC., t/a FEDERICI'S; MIKE PAGE; RYAN JONES; TONY CIAFORDINI; J & G INNKEEPERS, INC., t/a COURT JESTER; JESUS LOPEZ; and CUBANISSIMO, L.L.C., t/a LITTLE BIT OF CUBA DOS,

Plaintiffs-Appellants,

v.

THE MAYOR and COUNCIL OF THE BOROUGH OF FREEHOLD; EXQUISITE CATERERS, L.L.C.; and 17-19 SOUTH STREET ASSOCIATES, L.L.C.,

Defendants-Respondents.

Argued March 23, 2017 – Decided May 5, 2017

Before Judges Lihotz, O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2814-15.

Edward F. Liston, Jr. argued the cause for appellants (Edward F. Liston, Jr., L.L.C., attorneys; Mr. Liston and Jeff Thakker, of counsel; Mr. Liston, on the briefs).

Paul H. Schneider argued the cause for respondents Exquisite Caterers, L.L.C. and 17-19 South Street Associates, L.L.C. (Giordano, Halleran & Ciesla, attorneys; Mr. Schneider and Afiyfa H. Ellington, on the brief).

Kerry E. Higgins argued the cause for respondents The Mayor and Council of The Borough of Freehold (McKenna, DuPont, Higgins & Stone, attorneys; Ms. Higgins, on the brief).

PER CURIAM

Plaintiffs appeal from a January 28, 2016 order upholding the resolution of the Mayor and Council of the Borough of Freehold, regarding parking in Freehold's Redevelopment Area. We affirm.

When the Borough of Freehold (Borough) adopted a Redevelopment Plan, pursuant to N.J.S.A. 40A:12A-1 to -49, in 2008, and amended the Redevelopment Plan by ordinance in 2013, it created an area subject to the Redevelopment Plan called Freehold Center Core (FCC). Under the Redevelopment Plan, the Borough Council acts as the redevelopment entity and "review[s] all concept plans provided by redevelopers and property owners" to determine whether the development and uses are consistent with the Redevelopment Plan. The dispute herein involves parking. The Redevelopment Plan requires deficiencies from parking requirements

in excess of ten parking spaces be addressed as an amendment to the Redevelopment Plan. The minimum required off-street parking spaces required for restaurants is "one parking space for every four seats for customers, plus one space for every two employees."

Defendant South Street Associates, L.L.C. owns 17-19 South Street (the property), and defendant Exquisite Caterers, L.L.C. (Exquisite) is the proposed tenant. Plaintiffs are various restaurants and businesses located in the FCC bordering a parking lot, known as the Market Yard Lot. The property is within the FCC and does not have its own parking.

On March 3, 2015, Exquisite applied for a zoning permit to allow a change of use for the property to operate a banquet hall. With the application for the zoning permit, Exquisite included a proposal to use a valet parking service. The valet service would park vehicles at an off-site location, the Stavola Lot. Exquisite presented a lease of the Stavola Lot for valet parking providing seventy spaces.

Under the Redevelopment Plan, Exquisite would have had to provide fifty-eight on-site parking spaces. A zoning officer denied Exquisite's application on March 31, 2015, and directed Exquisite to seek a determination from the Borough Council. Exquisite filed an application with the Mayor and Council for the

Borough of Freehold (Council) for a determination on the proposed parking plan and change in use.

Following public hearings held in May and June 2015, the Council's vote on approval of the proposed use of valet off-site parking resulted in a tie. The Mayor broke the tie, voting in favor of the application. The Council memorialized resolution 128-15 (resolution), approving the application, conditioned upon the lease for the Stavola Lot remaining in effect.

Plaintiffs filed a complaint in lieu of prerogative writs in the Law Division on July 27, 2015, challenging the resolution. Plaintiffs alleged the Council was required to amend the Redevelopment Plan, the Council erroneously approved the use of a lot outside the FCC, and violated the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, on three occasions. Plaintiffs also claimed the Mayor should have recused himself from voting because he owned a business within the FCC.

The judge rejected plaintiffs' arguments and issued an order upholding the Council's decision. The judge found the Mayor and Council, acting as the redevelopment entity, had determined an amendment unnecessary because Exquisite's proposal fit within the requirements of the Redevelopment Plan. The judge found the decision was not arbitrary, capricious, or unreasonable, and there

was sufficient evidence to support the decision that the off-site parking scheme did not violate the Redevelopment Plan.

The judge also found the Mayor's participation did not require recusal from the vote because he would not receive any "material or monetary gain as a result of the construction [of Exquisite]'s catering hall, than any other owner of a like-business could reasonably be expected to accrue."

Moreover, the judge found no violations of the OPMA. The Judge remanded the matter to the Planning Board "for site-plan approval and for a determination as to the feasibility of the parking plan set forth by" Exquisite. This appeal followed.

On appeal, plaintiffs argue the Council lacked authority to grant the resolution because the redevelopment entity does not have jurisdiction to "determine that a lot outside the redevelopment zone can be used to service a lot inside the redevelopment zone," which would usurp "the jurisdiction of the planning board or zoning board . . . under the Municipal Land Use Law." Plaintiffs conclude Council's adoption of the Resolution exceeded its legal authority and amounted to an amendment of the Redevelopment Plan that included the Stavola Lot in the FCC. We disagree.

When a municipal body interprets an ordinance, the reviewing court need not provide deference to the municipal body and can

review the ordinance anew. Cherney v. Matawan Borough Zoning Bd. of Adjustment, 221 N.J. Super. 141, 144-45 (App. Div. 1987) ("[W]e are guided by the traditional rule that the interpretation of legislative enactments is a judicial function, and not a matter of administrative expertise."). Municipal body actions are presumed valid when making discretionary decisions, N.Y. SMSA L.P. v. Bd. of Adjustment of the Twp. of Bernards, 324 N.J. Super. 149, 163 (App. Div. 1999), and a trial court cannot substitute its judgment for that of the municipal body unless it is proven the body's action was arbitrary, unreasonable, or capricious. See, e.g., Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor Twp., 172 N.J. 75, 81 (2002); Medici v. BPR Co., 107 N.J. 1, 15 (1987). However, appellate review is "plenary" when interpreting legislative enactments. Osoria v. W. N.Y. Rent Control Bd., 410 N.J. Super. 437, 443 (App. Div. 2009).

The Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -73, gives municipalities the authority to enact redevelopment plans. A redevelopment entity, designated by the governing body, can implement redevelopment plans. N.J.S.A. 40A:12A-8. Redevelopment projects must be awarded in relation to a redevelopment plan, adopted by the redevelopment entity, and pertain to an area determined to be in need of redevelopment or rehabilitation. N.J.S.A. 40A:12A-7. Amendments to the

redevelopment plan must go through the Planning Board, and then be adopted by the governing body. N.J.S.A. 40A:12A-7(f).

Here, the Council found the proposed valet plan provided sufficient parking and met the requirements of the Redevelopment Plan, thereby obviating the need for an amendment. Plaintiffs argue because the Stavola Lot is outside the FCC, the Council's determination usurped the Planning Board's authority. Plaintiffs assert the Stavola Lot could not be part of an application without an amendment to the Redevelopment Plan, and the resolution by the Council is therefore void.

The resolution and the trial judge's decision made clear Exquisite is still required to go through the Planning Board after the Council's decision. The resolution only determined Exquisite's proposal adequately addressed parking as required by the Redevelopment Plan and did not approve Exquisite's application to grant approval of the development by the Planning Board. The Council's actions did not usurp the power of the Planning Board, and the resolution is conditioned upon Exquisite satisfying any Planning Board requirements.

Plaintiffs' reliance on Rain or Shine Box Lunch Co. v. Bd. of Adjustment, 53 N.J. Super. 252 (App. Div. 1958), to show accessory uses "to a princip[al] commercial use, [are] considered to be the principle use," is misplaced. Rain or Shine involved

residential property, and preceded the enactment of the current Municipal Land Use Law.

Here, the Council determined the proposed plan provided sufficient parking. The Redevelopment Plan does not state anywhere that off-site parking is prohibited. Thus, it was within the discretion of the Council as the redevelopment entity to resolve. Exquisite provided sufficient evidence to show the parking plan would create more than enough parking spaces, seventy spaces where fifty-eight would be required, albeit off-site, including the signed lease agreement giving it exclusive use of the lot. Thus, we reject plaintiffs' argument defendant provided insufficient proofs.

Plaintiffs argue the Mayor and Council violated the OPMA by holding meetings in private. The OPMA requires meetings of public bodies "be open to the public at all times." N.J.S.A. 10:4-12(a). An exception to this requirement exists for the public body to discuss "pending or anticipated litigation . . . in which the public body is, or may become, a party, or matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." N.J.S.A. 10:4-12(b)(7).

If a public body meets with its attorney in a meeting covered by the attorney-client privilege, the meeting may be in private

and the minutes may be suppressed. Payton v. N.J. Tpk. Auth., 148 N.J. 524, 558 (1997). To invoke this exception to the OPMA, the subject for discussion "must be 'pending or anticipated litigation' itself." Burnett v. Gloucester Cty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 236-37 (App. Div. 2009) (quoting Houman v. Pompton Lakes, 155 N.J. Super. 129, 145 (Law. Div. 1977)).

Plaintiffs allege a violation occurred when the Council took a recess from a public hearing on May 4, 2015, to meet with its attorney. However, the record demonstrates the meeting was to discuss the "possibility of litigation" after the Council posed a procedural question to its attorney and plaintiffs' counsel inquired where an appeal of its decision would be filed. Thus, there is sufficient evidence to support the finding the meeting was held to discuss pending litigation with Council's attorney and, therefore, fell within the attorney-client privilege exception to the OPMA and no violation occurred.

Plaintiffs assert other meetings in violation of OPMA occurred, but no evidence in the record supports this claim. Plaintiffs argue they cannot have evidence of a meeting they "were not invited to," but contend their motion to have the meeting is strong evidence that the meeting occurred. As there is no evidence

in the record to support such meetings occurred, plaintiffs fail to establish any violation of the OPMA.

We reject plaintiffs' argument the resolution adopted by the Council is arbitrary because the resolution was prepared ahead of Council's vote and approved simultaneously with the split vote and therefore, cannot accurately reflect the Council's findings. Plaintiffs do not provide specific instances where the resolution differs from the Council's intended findings, nor do plaintiffs provide any evidence the resolution lacked adequate factual findings.

Finally, we reject plaintiffs' argument conflicts of interest tainted the Council's proceedings. First, plaintiffs contend two councilmembers who recused themselves due to potential conflicts of interest remained on the dais "as late as the third hearing," which plaintiffs assert was prejudicial. However, plaintiffs do not articulate how their remaining on the dais prejudiced the proceedings, merely speculating their participation "could have tainted the decision-making of the other Council Members." Moreover, plaintiffs raise this issue for the first time on appeal. We will not consider an issue not raised below, unless it concerns the jurisdiction of the trial court or matters of substantial public interest. Zaman v. Felton, 219 N.J. 199, 227 (2014); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Plaintiffs also argue the Mayor should not have cast the tie-breaking vote and instead should have recused himself because of his ownership of a business in the FCC. Plaintiffs cite N.J.S.A. 40A:9-22.5(d), which states:

> No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment
>
> [N.J.S.A. 40A:9-22.5(d).]

The determination that a conflict of interest exists depends on the facts of each particular case. Mountain Hill, LLC. V. Twp. Comm. of Twp. of Middletown, 403 N.J. Super. 146, 196 (App. Div. 2008) (citing Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258, 268-69 (1958)).

A conflict of interest exists if "the public official has an interest not shared in common with the other members of the public." Id. at 197 (quoting Wyzykowski v. Rizas, 132 N.J. 509, 524 (1993)). We have found local governments would be at a severe disadvantage if every possible conflict, "no matter how remote and speculative, would serve as a disqualification of an official." Id. at 196 (citing Van Itallie, supra, 28 N.J. at 268-69). However, direct or indirect personal or financial interest is

disqualifying. Id. at 195 (citing Wyzykowski, supra, 132 N.J. at 523). Our Supreme Court has recognized four instances where a conflict of interest can exist:

> (1) "Direct pecuniary interests," when an official votes on a matter benefitting the official's own property or affording a direct financial gain;
>
> (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;
>
> (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance . . .; [and]
>
> (4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.
>
> [Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 59 (1998) (emphasis added) (quoting Wyzykowski, supra, 132 N.J. at 525-26).]

The Mayor's alleged conflict arises from him owning a funeral home business located in the FCC. Plaintiffs note funeral homes are a permitted use in the property at issue. Plaintiffs argue having a banquet hall at this location benefits the Mayor's business because it prevents a competing funeral home from opening there, and a banquet hall benefits his funeral home business

because food cannot be served at a funeral home. See N.J.S.A. 45:7-61.1. Thus, plaintiffs assert the mayor had a conflict of interest when he cast the tie-breaking vote, voiding the Council's decision.

Plaintiffs' allegation of conflict is speculative. There is no evidence a competing funeral home ever sought this location, and there is no evidence the Mayor's business will benefit from having a banquet hall at the property. Therefore, plaintiffs have not demonstrated the Mayor's involvement in a funeral home business within the redevelopment disqualifies him from participation.

Affirmed.