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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the 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-3620-15T1

JOHN P. SHORT, JR., PATRICIA A. SHORT, DONALD P. SALESKI, MARY ANN SALESKI, JOHN M. LAVIN, COURTNEY B. CARVER, JAMES J. GARRITY and ROSEMARY A. GARRITY,

Plaintiffs-Appellants,

v.

BOROUGH COUNCIL OF BOROUGH OF AVALON and BOROUGH OF AVALON PLANNING/ZONING BOARD,

Defendant-Respondent,

and

JOHN ADAMS,

Defendant/Intervenor-Respondent.

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Argued March 21, 2017 – Decided June 27, 2017

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Docket Nos. L-0123-13 and L-35-14.

Robert A. Fineberg argued the cause for appellants.

Dean R. Marcolongo argued the cause for respondent(Nathan Van Embden, attorney; Mr. Marcolongo, on the brief).

Salvatore Perillo argued the cause for intervenor-respondent (Nehmad Perillo & Davis, P.C., attorneys; Mr. Perillo, on the brief).

PER CURIAM

Defendant-intervenor John Adams acquired Lot 1.15, Block 83, in the Borough of Avalon (Avalon) in 1985. Lot 1.15 fully conforms to Avalon's zoning regulations and fronts on Fourth Avenue, a public street. In 1989, Adams acquired a vacant lot, Lot 11, Block 83 (Lot 11), which does not front on any dedicated public street, is non-conforming in size and runs behind and perpendicular to Lot 1.15. In 2002, Adams conveyed Lot 1.15 to plaintiffs John P. Short, Jr., and Patricia A. Short, retaining ownership of Lot 11.

In June 2013, Adams applied for, and in July 2013 obtained from the zoning officer, a permit to construct a single-family house on Lot 11. The zoning officer concluded variances were unnecessary. Plaintiffs, along with Donald P. Saleski, Mary Ann Saleski, John M. Lavin, Courtney B. Carver, James J. Garrity and Rosemary A. Garrity, owners of properties in Block 83 that are either contiguous to, or in close proximity to, Lot 11

(collectively, plaintiffs), appealed the decision to defendant Borough of Avalon Planning/Zoning Board of Adjustment (the Board) pursuant to N.J.S.A. 40:55D-70(a).

The Board held a hearing, heard the testimony of the zoning officer, Jeffrey Hesley,[1] and considered the arguments of counsel. The Board defeated a resolution stating Hesley erroneously issued the permit by a vote of five to four.

Plaintiffs filed a complaint in lieu of prerogative writs against the Board, and the court permitted Short to intervene. Judge Julio L. Mendez heard arguments and reserved decision. On March 17, 2016, the judge filed an order denying plaintiffs' challenge and affirming the Board's decision, accompanied by a written statement of reasons, which we discuss in detail below. This appeal followed.

We apply "[t]he same standard of review" to the Board's decision as does the trial court. N.Y. SMSA, L.P. v. Bd. of Adjustment, 370 N.J. Super. 319, 331 (App. Div. 2004). A reviewing court can "set aside" a municipal board's decision "when it is 'arbitrary, capricious or unreasonable.'" Cell S. of N.J., Inc., v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002) (quoting Medici v. BPR Co., 107 N.J. 1, 15 (1987)).

[1] Hesley was also Avalon's Tax Assessor.

"[Z]oning boards, 'because of their peculiar knowledge of local conditions[,] must be allowed wide latitude in the exercise of delegated discretion.'" Price v. Himeji, L.L.C., 214 N.J. 263, 284 (2013) (alteration in original) (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)). A zoning board's decision "enjoy[s] a presumption of validity, and a court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion." Ibid. (citing Cell S. of N.J., supra, 172 N.J. at 81).

While we accord substantial deference to the factual findings of the Board, its conclusions of law are subject to de novo review. Wyzykowski v. Rizas, 132 N.J. 509, 518 (1993). "[A]lthough we construe the governing ordinance de novo, we recognize the board's knowledge of local circumstances and accord deference to its interpretation." Grubbs v. Slothower, 389 N.J. Super. 377, 383 (App. Div. 2007).

The issues before us, as they were before Judge Mendez, involve interpretation of several provisions of Avalon's zoning regulations, as well as a deed of easement from Avalon to Adams, executed and recorded in 2013 (the 2013 easement). The easement refers to a 1992 judgment, whereby the court granted "a right-of-way easement" to the owners of Lot 12, which is contiguous to Lot 11 and one lot further behind Lot 1.15. The judgment-easement was

twenty feet wide and 190 feet in length, and extended from Lot 12 along Lot 11 to Fourth Avenue.

The 2013 easement in Adams' favor was "co-extensive" with the court-ordered easement and explicitly anticipated Adams' construction of a "residence" on Lot 11. It imposed numerous conditions on the grant and use of the easement area, and required Adams to make various improvements, including paving the area. Plaintiffs focus on one particular contingency in the deed of easement:

> This Deed of Easement is contingent upon [Adams] obtaining all approvals from the State of New Jersey Department of Environmental Protection [DEP] as may be required by the Coastal Area Facilities Review Act ("CAFRA") <u>and such other permits and approvals as required by Borough Ordinances</u> within a reasonable period of time.
>
> [(Emphasis added).]

The parties executed the 2013 easement on August 12, 2013, several weeks after Avalon received and approved Adams' permit application.

Avalon's zoning regulations included a provision that authorized the issuance of construction permits for single-family homes on undersized lots if "[t]he applicant own[ed] no contiguous property"; the "lot [had] a minimum of forty . . . feet frontage"; and the "lot [was] in existence and appear[ed] on the Official Tax

Map of . . . Avalon prior to December 15, 1959." Borough of Avalon, Ordinance § 27-7.3 (the grandfather ordinance).

Plaintiffs contend that by its terms, the 2013 easement did not become effective until Adams obtained all necessary "permits and approvals," including a variance. In other words, they argue Adams could not obviate the need for a variance by relying on the 2013 easement, which was itself conditional.

Judge Mendez noted in his written opinion that plaintiffs challenged Avalon's grant of the 2013 easement in a companion lawsuit. The judge rejected that challenge and entered a separate order and opinion on June 29, 2014, granting Avalon summary judgment. That opinion clearly reflects that Avalon had adopted an ordinance granting Adams an easement in January 2013, some six months before he applied for the permit. In addition, the Board was provided with proof that DEP had issued a CAFRA permit, one of the conditions in the 2013 easement, in April 2013.

In his testimony before the Board, Hesley acknowledged that he had considered a request Adams made to construct a residence on Lot 11 years earlier and was prepared to deny the permit unless Adams obtained a variance. However, Hesley explained the reason for his change of position was the 2013 easement, whereby Avalon expressly granted Adams access to Lot 11 from Fourth Avenue. Hesley confirmed that the deed of easement was not executed until

August, but the governing body had approved the easement, with certain conditions, months earlier.

We conclude that a fair reading of the record demonstrates Avalon had passed an ordinance granting Adams access to Lot 11 months before he applied for the permit, and that Adams had otherwise complied with the conditions of the 2013 easement that required he obtain governmental approvals. Plaintiffs' challenge to the substance of the Board's decision, i.e., that Lot 11 satisfied the conditions for non-conforming lots in Avalon's grandfather ordinance, requires further discussion.

Judge Mendez summarized the extent of Lot 11's non-conformity, specifically: it was 5600 square feet, short of the 6000-square-foot minimum requirement of the zoning regulations; and it had forty feet of frontage on the easement, the minimum required for an approved "grandfathered" lot, but less than the minimum sixty feet required by Avalon's regulations. We agree with plaintiffs that Adams bore the burden of demonstrating Lot 11 was a pre-existing, non-conforming lot in order to reap the benefits of the grandfather ordinance. See, e.g., S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment, 373 N.J. Super. 603, 613 (App. Div. 2004) ("It is the burden of the property owner to establish the existence of a nonconforming use as of the

commencement of the changed zoning regulation and its continuation afterward.").

Plaintiffs argue that Adams was not entitled to relief under the grandfather provisions because he created his own "hardship." Although Adams did not presently own a lot that was contiguous to Lot 11, plaintiffs contend he previously owned lot 1.15, a fully conforming lot, which was contiguous.

Judge Mendez correctly rejected this contention based upon Jock v. Zoning Board of Adjustment, 184 N.J. 562 (2005). There, the Court explained, "merger takes place as a matter of law where adjacent substandard lots come into common legal title." Id. at 581 (emphasis added). Here, although both lots were in common legal title, Lot 1.15 was never substandard. As a result, the lots never merged.

Adams could not avail himself of the grandfather provisions of the ordinance if he created the hardship himself, i.e., caused Lot 11 to become non-conforming. However, "a self-created hardship requires an affirmative action by the landowner or a predecessor in title that brings an otherwise conforming property into non-conformity." Id. at 591. Adams took no affirmative action to create a non-conforming lot; Lot 11 was always non-conforming.

Plaintiffs argue that Lot 11 did not have forty feet of frontage required by the grandfather ordinance. Judge Mendez

rejected plaintiffs' contention, noting the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, broadly defined "street," see N.J.S.A. 40:55D-7, and Avalon's zoning regulations defined "lot frontage" as "[t]he horizontal distance across the lot measured along the front lot line." Ordinance, supra, § 27-3(c). In turn, the regulations defined the front lot line as "[t]he street line on which the lot fronts or abuts." Ibid. Judge Mendez rejected plaintiffs' various arguments regarding this portion of the grandfather ordinance, as do we. They lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Lastly, plaintiffs argue the historical record clearly demonstrates Lot 11 never existed and appeared as a forty by one-hundred-and-forty foot lot on Avalon's tax maps prior to 1959. It was error, therefore, to conclude Adams was entitled to the protections of the grandfather ordinance.

However, Judge Mendez relied upon the uncontested testimony of Hensley, who was intimately familiar with the historical record. Hensley testified that Lot 11 was comprised of three separately referenced tax lots, which numbers were changed when Avalon renumbered its tax map. Nevertheless, ever since 1930, the deeds in the chain of title that led to Adams all conveyed the property using the same metes and bounds description. Hensley testified that Avalon historically taxed Lot 11 as one lot.

The grandfather ordinance is entitled to a common-sense interpretation of its plain language in order to effectuate the intent of Avalon's governing body. DePetro v. Twp. of Wayne Planning Bd., 367 N.J. Super. 161, 174 (App. Div.), certif. denied, 181 N.J. 544 (2004). We agree that given the historical recognition of Lot 11 as a single lot since 1930, the Board appropriately concluded it was a lot that existed prior to 1959 and otherwise met the requirements of the grandfather ordinance.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION