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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-3915-15T1

MICHAEL F. EVERS,

Plaintiff-Appellant,

v.

THE ZONING BOARD OF THE CITY OF HOBOKEN and 136 PARK AVENUE, LP,

Defendants-Respondents.

Argued November 14, 2017 – Decided December 13, 2017

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4165-15.

Michael F. Evers, appellant, argued the cause pro se.

F. Clifford Gibbons argued the cause for respondent Zoning Board of Adjustment of the City of Hoboken.

John J. Curley argued the cause for respondent 136 Park Avenue, LP (John J. Curley, LLC, attorneys; John J. Curley, of counsel; Jennifer J. Bogdanski, on the brief).

PER CURIAM

Plaintiff Michael F. Evers appeals from a May 4, 2016 order dismissing his verified complaint in lieu of prerogative writ. We affirm.

The following facts are taken from the record. On July 16, 2013, the Zoning Board of Adjustment of the City of Hoboken (Board) adopted a resolution granting defendant 136 Park Avenue, LP (136 Park) bulk variances for height and maximum lot coverage to permit the removal of an existing structure and construction of a four story, one family dwelling with an accessory apartment. The accessory apartment would not be available for rent.

On December 6, 2013, Ann Holtzman, the City of Hoboken Zoning Officer, issued a certificate of zoning compliance for the property. Thereafter, 136 Park was approached by a potential buyer who wished to purchase the property without the accessory apartment. 136 Park contacted Holtzman to discuss amendment of the approved plans to eliminate the accessory apartment. The architectural revisions proposed by 136 Park did not alter any variances granted by the Board in the 2013 approval, nor were any variances or waivers required pursuant to the revised plans.

On October 21, 2014, Holtzman issued an amended compliance certificate to 136 Park, approving elimination of the accessory apartment. 136 Park obtained review and approval of its revised plans from the Building Department of the City of Hoboken.

On March 6, 2015, a final certificate of zoning compliance was issued for the property. On May 26, 2015, the Board requested the opportunity to review 136 Park's amended plans "without prejudice to any rights [136 Park] has based upon the Amended First Certificate of Zoning Compliance and Final Certificate of Zoning Compliance as well as [136 Park]'s substantial reliance on these documents in completing the project."

On July 14, 2015, 136 Park provided public notice of the amended plans at a special meeting of the Board. At the outset of the meeting, 136 Park and the Board conferred on the record and confirmed all limitations periods had expired with regard to the first and final compliance certificates. Following the meeting, a majority of the Board members present voted on the matter, ratifying Holtzman's issuance of the amended compliance certificate, memorialized in an August 18, 2015 resolution. On September 2, 2015, 136 Park obtained the certificate of occupancy for the property.

Plaintiff resides nearby the property. He alleged he learned of the amended plans while attending an open house in February 2015, and objected to the amended plans. From February 13, 2015, to October 1, 2015, plaintiff engaged in extensive email and fax correspondence with various administrative officials, including Holtzman, the chairman of the Board, the Hoboken corporation

counsel, members of the Hoboken City Council, and the Mayor of Hoboken. At no point did plaintiff appeal the amended first certificate, final certificate, or the certificate of occupancy within the statutory limitations periods required under N.J.S.A. 40:55D-72(a) or Rule 4:69-6(a).

On October 8, 2015, plaintiff filed a complaint in lieu of prerogative writ in this matter, challenging the amended first certificate. The trial judge heard oral argument and issued an order denying plaintiff's complaint with prejudice on May 4, 2016. This appeal followed.

We begin by reciting our standard of review. "[W]e apply the same standard as the trial court does when evaluating the decision of a board." D. Lobi Enters., Inc. v. Planning/Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009) (citation omitted). "A board of adjustment's determinations are presumed to be valid and will only be overturned if they are unsupported by the record and 'so arbitrary, capricious, or unreasonable as to amount to an abuse of discretion.'" Ibid. (citing Ocean Cty. Cellular Tel. Co. v. Twp. of Lakewood Bd. of Adjustment, 357 N.J. Super. 514, 521-22 (App. Div. 2002)).

"We accord 'substantial deference' to the decisions of a municipal board." Ibid. (citation omitted). "We may not substitute our judgment for that of a board." Ibid. (citing Cell

S. of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor Twp., 172 N.J. 75, 81 (2002)).

Plaintiff argues the trial court erred in applying the "time limit for appealing the actions of a zoning officer when it should have applied the time limits for appealing the actions of a zoning board by means of an action in lieu of prerogative writs." He contends "[t]he appropriate legal standard for determining the timely filing of an action in lieu of prerogative writs is [Rule] 4:69-6(b)(3)[,]" and therefore his action was not time-barred. We disagree.

N.J.S.A. 40:55D-72(a) states:

> Appeals to the board of adjustment may be taken by any interested party affected by any decision of an administrative officer of the municipality based on or made in the enforcement of the zoning ordinance or official map. Such appeal shall be taken within 20 days by filing a notice of appeal with the officer from whom the appeal is taken specifying the grounds of such appeal. The officer from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record upon which the action appealed from was taken.

Rule 4:69-6(a) provides: "No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule."

The Supreme Court has stated: "[B]etween statutory time limits, rules governing when an application is complete, and automatic approval provisions, the Legislature has created a seamless statutory scheme, the obvious aim of which is to assure speedy land use decisions and to protect against the lassitude and indolence that had previously taken hold." Amerada Hess Corp. v. Burlington Cty. Planning Bd., 195 N.J. 616, 630 (2008). "The [statutory] limit was clearly designed to insulate the recipient of a building permit or other favorable disposition from the threat of unrestrained future challenge." Sitkowski v. Zoning Bd. of Adjustment, 238 N.J. Super. 255, 260 (App. Div. 1990). The statutory limitation periods under N.J.S.A. 40:55D-72(a) and Rule 4:69-6(a) run from the date the interested party "knew or should have known of a building permit's issuance." Trenkamp v. Burlington, 170 N.J. Super. 251, 268 (Law Div. 1979).

The facts here demonstrate plaintiff acquired knowledge of the construction by 136 Park in connection with the amended first certificate on February 8, 2015. From this date, plaintiff had twenty days, until March 1, 2015, to file an appeal with the Board. Assuming plaintiff could file an action in lieu of prerogative writ challenging the issuance of the amended first certificate and the final certificate if he failed to file a timely administrative appeal to the Board, plaintiff failed to do so within the time

required by Rule 4:69-6(a). Plaintiff had forty-five days, until March 25, 2015, to file a complaint in lieu of prerogative writ action in the Law Division. If plaintiff sought to challenge the final certificate issued on March 6, 2015, he had until March 26, 2015, to file an appeal with the Board, or until April 20, 2015 to file a complaint in lieu of prerogative writ.

Instead, as the trial judge found, "[p]laintiff [] sought [an] administrative remedy by writing to: the Hoboken Zoning Officer, the Chairman of the Hoboken Zoning Board, the Corporation Counsel of the City of Hoboken, the Mayor of the City of Hoboken, and the members [of the] Hoboken City Council." Plaintiff sent informal correspondence to municipal officials asserting his claim of "a serious zoning compliance issue regarding the revisions to the originally approved project." Plaintiff then filed a complaint on October 8, 2015, challenging the variances and the validity of the amended zoning certificate and final zoning certificate after the statutory limitations period expired.

In his decision, the trial judge concluded:

> Plaintiff's assertions he communicated to the various officials in the City of Hoboken does not meet the time requirements set by statute and case law.
>
> There is no evidence before the Court of a notice of an appeal filed with the Hoboken Zoning Officer as required under N.J.S.A. 40:55D-72(a).

> Therefore, the appeal of the Zoning Officer's actions are time barred as a matter of law.
>
> As a result, it is unnecessary for the Court to review the actions of the Zoning Board which conducted a hearing on July 14, 2015 to review the Zoning Board Official of the amendment of the first certificate of zoning compliance which was dated October 21st, 2014.
>
> Therefore, the action in lieu of prerogative writs filed by plaintiff is denied.

We agree. Under both N.J.S.A. 40:55D-72(a) and Rule 4:69-6(a), plaintiff failed to timely comply with the time limitations periods to file an appeal or prerogative writ action. The limitation periods tolled before plaintiff filed his complaint in lieu of prerogative writ. Therefore, the trial judge properly denied plaintiff's challenge to the amended first certificate and final certificate.

Plaintiff argues the trial judge erred by denying his motion to supplement the record with evidence of his pursuit of administrative remedies. He asserts this evidence, if admitted, would have demonstrated he pursued a timely appeal. We disagree.

In his oral decision, the trial judge stated:

> It should be noted that after the filing of the verified complaint, plaintiff filed five motions with the pretrial Judge . . . .
>
> Amongst one of those motions filed by the plaintiff was the request to include the record of the plaintiff's timely action in

> pursuit of administrative remedies as evidence in this action.
>
> In said motion, plaintiff sought to introduce numerous documents. That motion was denied on February 19, 2016 by [the pre-trial Judge] who wrote in the order . . . "Motion is denied as premature; issue to be addressed in brief" . . . .
>
> The plaintiff, in his brief and reply brief, made reference to various documents, although no documents were attached.

Judicial review of a matter before a planning board or zoning board of adjustment may not consider documents outside the record. See Schmidt v. Bd. of Adjustment, 9 N.J. 405, 423 (1952); see also Peoples Tr. Co. v. Bd. of Adjustment, 60 N.J. Super. 569, 575-76 (App. Div. 1959) (stating "Judicial review of board of adjustment action is confined to the record made before the local board.").

Here, the trial judge's review of the Board's decisions was limited to the record below, including the July 14, 2015 proceedings of the Board, and its adoption of the Resolution on August 18, 2015. However, plaintiff did not seek to admit new evidence pertaining to the zoning certificates or the resolution. Rather, plaintiff sought to demonstrate his timely appeal of the Board's determination. Therefore, the trial judge should have granted plaintiff's motion.

Nevertheless, as we have noted, the documents and informal correspondence plaintiff sought to admit did not constitute a

validly perfected appeal in the form prescribed by N.J.S.A. 40:55D-72 and thus do not change the outcome. For these reasons, the failure to grant plaintiff's motion was harmless error. R. 2:10-2; State v. Macon, 57 N.J. 325, 340 (1971).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION