SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5110-14T3

HOWELL ASSOCIATES, L.L.C.,

Plaintiff-Appellant,

v.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF HOWELL, TOWNSHIP COUNCIL OF THE TOWNSHIP OF HOWELL, TOWNSHIP OF HOWELL, LIS ENTERPRISES, L.L.C., and LEONARD I. SOLONDZ ENTERPRISES, L.L.C.,

Defendants-Respondents.

Argued January 24, 2017 – Decided June 15, 2017

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1368-14.

R.S. Gasiorowski argued the cause for appellant (Gasiorowski & Holobinko, attorneys; Mr. Gasiorowski, on the briefs).

Gary T. Hall argued the cause for respondent Leonard I. Solondz Enterprises, L.L.C. (McCarter & English, L.L.P., attorneys; Mr. Hall, on the brief).

Ronald J. Troppoli argued the cause for respondent Zoning Board of Adjustment of the Township of Howell (Law Offices of Ronald J. Troppoli, attorneys; Mr. Troppoli, on the brief).

PER CURIAM

Plaintiff, Howell Associates, L.L.C., filed a ten-count complaint in lieu of prerogative writs against defendants, the Zoning Board of Adjustment of the Township of Howell (the Board), the Township Council of the Township of Howell (the Council), the Township of Howell (the Township), LIS Enterprises, L.L.C., and Leonard I. Solondz Enterprises, L.L.C. (collectively, LIS). Plaintiff challenged the Board's approval of LIS's development application, which sought variances, design waivers and site plan approval.

The record before the Board established that LIS owns a multi-acre parcel of land in the Township located at the southeast corner of the Route 9 and Interstate 195 intersection (the Property). LIS submitted a development application to the Board, seeking to construct a four-story, 38,387 square-foot hotel that included 109 guest rooms, a 200-seat restaurant, a 400-seat conference center and banquet facility. The Property is located in the HD-1 zone, where permitted uses include restaurants and "entertainment uses," but not hotels, conference centers or banquet halls.

The Property had been the subject of a prior application. At the time of that submission, hotels were "conditional uses" permitted in the zone. The proposed prior development included a four-story hotel, along with a separate day care facility. In 2009, while the application was pending, the Township amended its zoning regulations and removed hotels as a recognized conditional use in the zone. The Board ultimately rejected the application.

The Board held hearings on LIS's application over nine sessions. Deliberations took place on November 25, 2013. We explain below in detail the events of that evening's vote. On December 9, 2013, the Board adopted a memorializing resolution granting LIS the necessary approvals.

Plaintiff filed a notice of appeal with the Council. The Council held no hearings and took no action on plaintiff's appeal. Pursuant to N.J.S.A. 40:55D-17(c), the Council's failure to act within ninety-five days affirmed the Board's decision. Plaintiff then filed its action in the Law Division.

In two orders, dated December 23, 2014, the late Paul A. Kapalko, J.S.C., denied plaintiff's request for partial summary judgment on count three of the complaint, which alleged improper conduct by the Board's chairman and collusion between the Board and the Township's mayor, and granted partial summary judgment to the Board on that count. The second order granted partial summary

judgment to LIS, dismissing counts eight, nine and ten of the complaint.[1] Judge Kapalko's February 6, 2015 order denied plaintiff's motion for reconsideration of the dismissal of count three. The judge's June 9, 2015 order affirmed the Board's actions and dismissed the balance of plaintiff's complaint. This appeal followed.

I.

We first address plaintiff's challenge to the vote taken by the Board on November 25, 2013. After conclusion of all testimony, the Board chairman, Stephen Meier, announced all nine Board members and alternates were present and "[e]ligible voters." In his closing statement, counsel for plaintiff alluded to comments made by Meier during the proceedings regarding "conditions as to the type of a hotel that is wanted" on the Property, and traffic and parking designs "necessary in order to make this [application] work." Counsel did not request then, or at any previous time, that Meier recuse himself from the proceedings.

[1] Counts eight and nine of the complaint alleged that, as a result of the chairman's conduct and collusion between LIS, the Board and the township, the Council's failure to act was not an affirmance of the Board's decision. Count ten alleged violation of 42 U.S.C.A. § 1983. On appeal, plaintiff has not asserted any specific argument in its brief with respect to this order. As a result, plaintiff has waived any challenge to the December 23, 2014 order dismissing counts eight, nine and ten of the complaint. Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014).

Nonetheless, before opening the matter for the Board's consideration, Meier announced he was "going to disqualify" himself, stating,

> I have put myself a number of times in this case as [counsel for plaintiff] brought up . . . . Rather than have something which you come back as a reason for appeal, we have alternates which can vote in my stead, which is . . . the best route to go at this point, not to complicate issues.

After some remarks from Board members, counsel for the Board recommended the chairman call for a vote on LIS's application for "a use variance, a height variance and preliminary site plan approval."

Board member Posch, an alternate, then made a motion to approve the application. Board member Borrelli seconded the motion. After a lengthy recitation of proposed factual findings and reasons for supporting the application, Borrelli said, "I move to grant the use and bulk variances and preliminary site approval." Four other Board members voted in favor of the application; only one Board member voted no. The Board's administrative officer did not call upon Borelli specifically to cast a vote. She confirmed Posch's vote was affirmative and reported the vote as "six yes

votes, [one] no vote."[2] Plaintiff's counsel did not object to the procedure nor seek clarification of the vote.

Plaintiff moved for partial summary judgement before Judge Kapalko, arguing Borelli never voted, and it was unclear whether chairman Meier disqualified himself, in which case Posch's vote as an alternate could be counted, or whether Meier simply abstained, in which case Posch was not permitted to move the resolution or vote. Plaintiff contended if Meier abstained, Posch's vote did not count, Borrelli never voted, and LIS failed to secure the five affirmative votes necessary to approve use or height variances. See N.J.S.A. 40:55D-70(d). Alternatively, plaintiff argued Meier's belated disqualification was the result of his improper and hostile conduct during the proceedings, including Meier's continued chairing of the meeting during the vote, thus tainting the Board's decision.

In opposing the motion and in support of its own motion for summary judgment, the Board furnished certifications from Borrelli and the Board's administrative officer. Collectively, they verified that Borrelli intended to, and believed he had, voted in the affirmative.

[2] The second Board alternate did not participate in the discussion or vote.

The Board also supplied Meier's deposition transcript, in which the chairman stated he disqualified himself because of "quite a number of arguments" he had with plaintiff's counsel during the hearings, and because he "caused [LIS] a tremendous amount of money by asking [it to] present a case much more involved than they had intended." Meier said suggestions he made to certain preliminary plans delayed LIS's presentation to the Board for more than one year.

Meier testified that the Board's attorney told him disqualification was not necessary, but he did so nevertheless. Despite disqualifying himself from the discussion and the vote, Meier did not "pass[]the gavel" to the vice-chairman because he did not think it was necessary and feared it would only delay the vote until after the New Year.[3]

In his thorough written opinion, citing Randolph v. Brigantine Planning Board, 405 N.J. Super. 215, 232 (App. Div. 2009), Judge Kapalko noted that "[w]here a board member participates in a proceeding from which he is later found to be disqualified, the proceeding is void in its entirety." The judge then cited appropriate case law and statutory law defining "when an interest requires disqualification of a board member."

[3] Meier intended to, and apparently did, resign from the Board at the end of the calendar year.

Distinguishing several cases relied upon by plaintiff, Judge Kapalko found

> there is no allegation . . . that Meier had any financial or personal interest in LIS and their application. Instead, [p]laintiff asserts that Meier should have been disqualified because his conduct at the hearing was so reprehensible that it 'tainted' the proceeding because he clearly had made up his mind prior to the vote. I am unable to find that the few references identified by [p]laintiff from the extensive record . . . rise to the level of conduct sufficient to merit disqualification.

Judge Kapalko further rejected plaintiff's assertion "that Meier made 'prejudicial rulings' against [it] and in favor of LIS." The judge concluded plaintiff failed to demonstrate "Meier had a disqualifying 'conflict of interest' at the time that he was participating in and running the meetings . . . or that he was required to recuse himself from the proceedings."

Judge Kapalko rejected plaintiff's assertion that Meier actually voted, and concluded Meier's action "had the legal effect of an abstention from voting in an attempt to avoid a subsequent appeal of the decision." Citing N.J.S.A. 40:55D-69, the judge concluded Meier's abstention meant, "Posch was not permitted to vote in his place." Judge Kapalko also concluded that although Borelli was not called upon during the roll call, he clearly intended to and did vote for approval. The judge found further

support that Borelli "was under the belief that he was counted as a 'yes' vote for purposes of the . . . [a]pplication" from the two certifications supplementing the record before the Board, noting plaintiff never objected to the supplementation. The December 23, 2014 order explicitly denied plaintiff's motion for partial summary judgment on count three of the complaint and dismissed count three.

Plaintiff's motion for reconsideration was supported by portions of the transcript from the November 25, 2013 Board proceedings. It contended that based upon Judge Kapalko's conclusion that Posch was an alternate, Posch had no authority to move the resolution in the first instance.

The judge relied upon N.J.S.A. 40:55D-69, which states: "Alternate members may participate in all matters but may not vote except in the absence or disqualification of a regular member. Participation of alternate members shall not be deemed to increase the size of the zoning board of adjustment established by ordinance of the governing body . . . ." The judge concluded Posch's moving the resolution for a vote was not the same as voting, but rather was "merely . . . a procedural device in order to formally place the subject of approval before the Board for final consideration and discussion." Judge Kapalko entered the February 6, 2015 order denying plaintiff's motion for reconsideration.

Plaintiff argues the Board's voting procedure was fatally flawed, did not result in the requisite five affirmative votes and Judge Kapalko "improperly substituted [his] judgment for that of [the] Board" chairman, using certifications filed in the litigation to "'clarify' the record." We reject these arguments and affirm substantially for the reasons expressed by Judge Kapalko. We add only the following.

"Under our common law, '[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.'" Grabowsky v. Twp. of Montclair, 221 N.J. 536, 551 (2015) (quoting Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993)). Additionally, the Legislature essentially codified the Court's holding in Wyzykowski by stating, "No member of the board of adjustment shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest." N.J.S.A. 40:55D-69.

"A court's determination 'whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case.'" Grabowsky, supra, 221 N.J. at 554 (quoting Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258, 268 (1958)). The record in this case is clear.

Plaintiff failed to establish Meier had any disqualifying interest in the application. Moreover, plaintiff's citation to those very limited portions of the record where Meier displayed a lack of patience or decorum fail to prove any personal bias in favor of the application, or that plaintiff suffered any prejudice. Lastly, plaintiff never objected to the Board's procedure at the time of the vote, never sought clarification and never objected to Judge Kapalko's decision to consider the supplemental certifications. We find no basis to reverse the orders dismissing count three of plaintiff's complaint and denying the subsequent motion for reconsideration.

II.

We next consider plaintiff's challenge to the Board's grant of use and height variances. Pursuant to the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, a zoning board of adjustment may "grant a variance . . . to permit . . . a use . . . in a district restricted against such use . . . or . . . a height of a principal structure which exceeds by [ten] feet or [ten percent] the maximum height permitted in the district." N.J.S.A. 40:55D-70(d)(1) and (6). A variance may be granted "[i]n particular cases for special reasons," the so-called "positive criteria," but only if the applicant can also demonstrate "that such variance . . . can be granted without substantial detriment to the public

good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance," the so-called "negative criteria." N.J.S.A. 40:55D-70(d); see also Price v. Himeji, L.L.C., 214 N.J. 263, 285-86 (2013) (explaining the positive and negative criteria).

The Board's resolution summarized the testimony offered by LIS, including the unsuccessful development proposals submitted during the prior twenty-five years and attempts to address the reasons for those rejections in the current application, as well as the testimony of LIS's experts, and expressly stated the Board's factual findings "were in substantial agreement with th[at] testimony." In contrast, the Board cited specific reasons why it was rejecting the expert testimony offered by plaintiff. See Omnipoint Commc'n, Inc. v. Bd. of Adjustment, 337 N.J. Super. 398, 418 (App. Div. 2001) (recognizing Board's ability to accept or reject any expert testimony presented).

The Board found the Property was particularly suitable to the "hotel/conference center/banquet facility use" because there was need for such a facility in the Township; the Property's proximity to two major highways "represent[ed] a particularly appropriate location for this proposed use"; the proposed use would generate less traffic that "retail or office uses permitted as of right in the HD-1 zone"; the particular physical characteristics of the

Property "constrained" the amount of developable area; and all of those factors "significantly distinguish[ed]" the property from others in the HD-1 zone, which applied to much of the Route 9 corridor.

The Board also found that LIS satisfied the "negative criteria," because the Township's Master Plan continued to recognize the need for a hotel; adjacent residents would be "screened" from the development by a "significant wooded buffer"; and the project would not have adverse traffic consequences or produce "any other impacts on the surrounding area."

As it did before Judge Kapalko, plaintiff argues the Board's grant of a use variance was arbitrary, capricious and unreasonable, because the Board's action usurped the legislative power accorded the Council, which had amended the zoning regulations in 2009 and eliminated hotels as a conditional use in the zone. Plaintiff also contends the banquet hall/conference center was not an "accessory use" of the hotel, but rather a separate non-permitted use that required its own use variance. Plaintiff further argues the Board improperly granted a height variance. Judge Kapalko rejected these arguments, as do we.

We set forth some well-known principles. "Our standard of review for the grant or denial of a variance is the same as that applied by the Law Division." Advance at Branchburg II, L.L.C.

v. Twp. of Branchburg Bd. of Adjustment, 433 N.J. Super. 247, 252 (App. Div. 2013). "[Z]oning boards, 'because of their peculiar knowledge of local conditions[,] must be allowed wide latitude in the exercise of delegated discretion.'" Price, supra, 214 N.J. at 284 (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., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002)).

While we accord substantial deference to the factual findings of the Board, its conclusions of law are subject to de novo review. Wyzykowski, supra, 132 N.J. at 518. Additionally, the level of deference given to a board's decision to grant a variance is less than the level of deference given for a denial of a variance. Saddle Brook Realty, L.L.C. v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 75 (App. Div. 2006) (citing Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 208 (App. Div. 1999)). "In evaluating a challenge to the grant or denial of a variance, the burden is on the challenging party to show that the zoning board's decision was 'arbitrary, capricious, or unreasonable.'" Price, supra, 214 N.J. at 284 (quoting Kramer, supra, 45 N.J. at 296).

Plaintiff argues the Township's decision in 2009 to remove hotels as a permitted conditional use in the HN-1 zone demonstrates the Board arrogated to itself the legislative power solely vested in the Council by the MLUL. See Price, supra, 214 N.J. at 285 (noting a zoning board "may not, in the guise of a variance proceeding, usurp the legislative power reserved to the governing body of the municipality to amend or revise the [zoning] plan" (alteration in original) (citations omitted) (quoting Feiler v. Fort Lee Bd. of Adjustment, 240 N.J. Super. 250, 255 (App. Div. 1990)), certif. denied, 127 N.J. 325 (1991)). However, every variance application, by definition, seeks a departure from the zoning regulations. The "criteria for determining when a variance grant constitutes an impermissible exercise of the zoning power . . . [is] 'whether the impact of the requested variance will be to substantially alter the character of the district as that character has been prescribed by the zoning ordinances.'" Feiler, supra, 240 N.J. Super. at 255 (emphasis added) (quoting Twp. of Dover v. Bd. of Adjustment, 158 N.J. Super. 401, 412-13 (App. Div. 1978)).

As Judge Kapalko noted in his comprehensive written decision, LIS's planning expert testified that the Township's Master Plan, last amended in 2010, continued to express the need for a full-service hotel in the HD-1 zone, even though the 2009 amendment to

the zoning regulations deleted "hotels" as a conditional use in the zone. Defendant's expert opined that this demonstrated the application was not at all detrimental to the Master Plan. In other words, the Board's decision to grant a use variance did not "shatter[]" or "wholly nullify" Howell's zoning scheme. Leimann v. Bd. of Adjustment, 9 N.J. 336, 342 (1952). Moreover, there was ample testimony regarding the overall character of the Route 9 corridor, which included many commercial and retail uses consistent with LIS's proposal.

Plaintiff further argues the Board's findings regarding the positive and negative criteria were conclusory and not otherwise supported by credible evidence. We disagree.

The positive criteria requires proof of "special reasons" for the grant of a variance, a term undefined by the MLUL, but interpreted as "tak[ing] its definition and meaning from the general purposes of the zoning laws." Price, supra, 214 N.J. at 285 (quoting Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 386 (1990)). "Special reasons" may exist "where the use would serve the general welfare because the proposed site is particularly suitable for the proposed use." Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95, 102 (2011) (quoting Saddle Brook Realty, L.L.C., supra, 388 N.J. Super. at 76 (citation omitted). "[I]n the context of the specific parcel, it means that strict adherence to

the established zoning requirements would be less beneficial to the general welfare." Price, supra, 214 N.J. at 287 (citing Kramer, supra, 45 N.J. at 290-91). "[T]he particularly suitable standard has always called for an analysis that is inherently site-specific." Id. at 288.

In this case, the Board conducted a "site-specific" evaluation of the evidence regarding the positive criteria and made multiple findings, relying extensively on the testimony of LIS's planning expert. It adequately explained why the Project's parcel of land, as opposed to other parcels within the HN-1 zone, made it particularly suitable for the use. In this regard, the Board's findings deserve our deference.

As to the negative criteria, the applicant must

> demonstrate, in accordance with the enhanced quality of proof, both that the variance "can be granted without substantial detriment to the public good" and that it "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance[.]" The showing required to satisfy the first of the negative criteria focuses on the effect that granting the variance would have on the surrounding properties. The proof required for the second of the negative criteria must reconcile the grant of the variance for the specific project at the designated site with the municipality's contrary determination about the permitted uses as expressed through its zoning ordinance.

> [Id. at 286 (citations omitted) (quoting N.J.S.A. 40:55D-70).]

Here, the Board specifically found that the development would not have any negative impacts on the surrounding community, both in terms of increased traffic and visual aesthetics. For reasons already discussed, citing the Master Plan's recommendation for a full-service hotel, the Board concluded the grant of this particular use variance did not undermine the general zoning scheme.

Plaintiff argues that because a hotel was not a permitted use in the zone, a conference center and banquet hall could not be accessory uses under Howell's zoning regulations, which limited accessory uses to permitted uses. Alternatively, it contends that even if the Board properly granted the use variance for the hotel, the conference center and banquet hall are not recognized ancillary uses, and, as a result, the Board permitted three separate uses on one parcel in violation of the zoning regulations.

As Judge Kapalko recognized, the issue posed a question of law to which he need not defer to the Board's interpretation. However, he concluded, as do we, that "the record clearly shows that the . . . Board considered the issue of whether this [a]pplication would require one or more use variances, and . . . determined that the proposal required only one, given its

interpretation of what constitute[d] a full-service hotel." We agree with the judge's assessment of the record.

Contrary to plaintiff's contentions, LIS's proofs repeatedly emphasized the unitary nature of the application, the fact that the conference center and banquet hall were physically connected to the hotel, and the justification for having such a facility, as opposed to a structure that only provided lodging. The Board specifically found the application was for a single use and conditioned its approval on a single operator controlling the facility, either directly or through sub-leases. These factual findings are entitled to our deference, and, seen in that light, the legal conclusion follows that only one use variance was necessary.

Lastly, plaintiff argues there was insufficient evidence to support the Board's grant of a height variance. We again disagree.

"[S]pecial reasons necessary to establish a height variance must be tailored to the purpose for imposing height restrictions in the zoning ordinance." Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 52 (App. Div. 2004). "[T]he board can, as part of granting a use variance, consider the other requested variances as ancillary to the principal relief being sought." Price, supra, 214 N.J. at 300.

Here, the project proposed a maximum height of fifty-four feet, as opposed to forty-five feet permitted in the zone. LIS's planning expert explained that the extra height was necessary to accommodate the number of hotel rooms, and that, in turn, was necessary to attract a first-class operator for the hotel. He explained that the increase in height would not negatively affect the surrounding community, and was necessary given the particular shape of the Property. The Board's resolution specifically incorporated this testimony in its findings. We cannot conclude the Board's grant of a height variance was arbitrary, capricious or unreasonable.

We affirm Judge Kapalko's December 23, 2014 order granting partial summary judgment, and the February 6, 2015 order denying reconsideration. Additional we affirm the judge's June 9, 2015 order that dismissed plaintiff's complaint.[4]

Affirmed.

[4] Plaintiff's final point on appeal, i.e., the Board's memorializing resolution was "conclusionary and deficient," lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).