SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3322-16T4

E. JOHN PENNINGTON, III,

Plaintiff,

and

TARA MERCOGLIANO AND JOHN MERCOGLIANO,

Plaintiffs-Respondents,

v.

PLANNING BOARD OF THE BOROUGH OF MONMOUTH BEACH,

Defendant-Appellant,

and

BOROUGH OF MONMOUTH BEACH, ZONING BOARD OF ADJUSTMENT OF THE BOROUGH OF MONMOUTH BEACH, UNIFIED LAND USE BOARD OF THE BOROUGH OF MONMOUTH BEACH (DBA PLANNING BOARD OF THE BOROUGH OF MONMOUTH BEACH), BENJAMIN MANN, JR., and ESTATE OF BENJAMIN MANN, SR., DECEASED,

Defendants.

Submitted February 26, 2018 – Decided May 3, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3065-14.

Michael A. Irene, Jr., attorney for appellant.

Post, Polak, Goodsell & Strauchler, PA, attorneys for respondents (Anne L. H. Studholme, of counsel and on the brief).

PER CURIAM

The Planning Board of the Borough of Monmouth Beach (Board) appeals the Law Division's March 10, 2017 final judgment that: 1) reversed the Board's June 24, 2014 resolution dismissing the development application of plaintiffs Tara and John Mercogliano[1] as res judicata; 2) remanded the matter to the Board to "hear the application 'on the merits'"; and 3) dismissed plaintiffs' complaint.[2] We set forth the procedural and factual history to place the arguments now raised in context.

This is the second time we consider an appeal involving the property in question. Our decision in Colao v. Zoning Board of

[1] Plaintiffs are contract purchasers from plaintiff Pennington.

[2] After the appeal was submitted on February 26, 2018, we asked whether the remand hearing, ordered nearly twelve months earlier and not stayed by any judicial order, had occurred. The Board's counsel advised there have been no further proceedings before the Board.

Monmouth Beach, No. A-4020-90 (App. Div. Dec. 19, 1991)[3], explained the unusual history of the lot in question, which was an undersized lot then, and remains so under the municipality's zoning regulations. Id. at 2. In 1984, the Board denied an application by plaintiff Pennington's predecessors in title for bulk variances pursuant to N.J.S.A. 40:55D-70(c)(1) and (c)(2) ((c) variances).[4] Id. at 1-2.

In 1990, the Board considered an application filed by James and Ellen Colao, and Monmouth Beach Estates, Inc., again seeking (c) variances to build a house on the lot. Id. at 1. The Board denied the request "based upon res judicata and upon the . . . conclusion plaintiffs had failed to establish entitlement to a variance." Id. at 2. The plaintiffs filed suit, and we affirmed the trial court's affirmation of the Board's action, concluding,

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[3] Although citing an unpublished opinion is generally forbidden, we do so here to provide a full understanding of the issues presented and pursuant to the exception in Rule 1:36-3 that permits citation "to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law." See Badiali v. N.J. Mfrs. Ins. Grp., 429 N.J. Super. 121, 126 n.4 (App. Div. 2012), aff'd, 220 N.J. 544 (2015).

(footnote continued next page)

(footnote continued)

[4] An applicant seeking a (c)(1) variance "must establish that the particular conditions of the property present a hardship." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 29 (2013). A (c)(2) "variance[] approval must be rooted in the purposes of the zoning ordinance rather than the advancement of the purposes of the property owner." Id. at 30 (citing Kaufmann v. Planning Bd. Twp. of Warren, 110 N.J. 551, 562 (1988)).

without deciding whether res judicata applied, that "the variance was properly denied on the merits." Id. at 2, 11.

On January 31, 2014, plaintiffs filed an application requesting (c) variances to construct a single-family house. The application sought relief from the minimum lot area required by the zoning regulations (15,000 square feet, with the property being only 7,500 square feet), and minimum lot width (100 feet, with the property being 50 feet). The Board held a public hearing on May 27, 2014.

In prefatory comments that focused on prior applications, of which plaintiffs were unaware when they submitted this application, the Board's counsel told the Board:

> [W]e have to deal with [res judicata] first. We give the Applicant the opportunity to present whatever they have on the issue of res judicata and not getting into the merits of the application.
>
> On its face, it's a problem. The Board can ask whatever questions they like. When you are done with that, . . . if you find the Doctrine of Res Judicata applies and bars the Board from hearing the application on the merits, the matter would be dismissed. If you find that the Doctrine of Res Judicata does not apply then you would proceed to hear the merits of the application. As part of that, we have to get into some of the issues as a merger.
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> . . . .
>
> This is a legal issue. The Board doesn't have any discretion to waive the principles

> of res judicata. . . . [I]t's supposed to [ac]cord finality to a decision. It's supposed to pre[v]ent multiple bites of the apple. No one is suggesting [the applicants] knew about this. It took us some time to find it, because all of the difficulties we've found because of [Super Storm Sandy].
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> . . . .
>
> The property owners now stand in the same shoes of those who acted back then. That's what [the Board has] to keep in mind.
>
> [(emphasis added).]

When one Board member inquired about plaintiffs seeking relief from a "self-created hardship," counsel advised that the Board need not "get[] in" to that issue unless it reached the merits of the application. Counsel identified "four criteria" contained in his earlier letter to the Board that determined whether res judicata barred consideration of the application on its merits.

Marc C. Leber, a licensed planner and certified municipal engineer, testified on plaintiffs' behalf, noting differences between the zoning regulations in 1990 and 2014, and changes to conditions surrounding the property. Although plaintiffs offered the testimony of owners of neighboring properties, who were presumably in favor of the application, to support an argument that surrounding circumstances had changed, the Board did not permit the testimony. Counsel advised the Board, "The issue is

whether this application is substantially similar to the one before."

Pennington testified that he was aware when he purchased the lot that he would need a bulk variance, but he was unaware that he would be bound by prior applications. He stated that the undersized lot was "created by" the municipality. When one of the Board members questioned Pennington's assertion, claiming the undersized lot was created by a subdivision, Board counsel said, "Hold on. Time out. . . . [I]t's not clear from the title search whether this lot was a product of a subdivision or not. We don't know. . . . [T]hat's something that if we get to the merits, we may have to get into."

Leber attempted to bring to the Board's attention that its refusal to consider the merits of plaintiff's application rendered the property inutile, citing Nash v. Board of Adjustment of Morris Township, 96 N.J. 97 (1984).[5] The Board's counsel advised, "Nash was not a res judicata case."

The Board's counsel framed the resolution for a vote: "Whether or not the Board is barred by the [d]octrine of [r]es [j]udicata of proceeding on the merits as a result of the criteria

[5] We express no opinion as to whether Nash had relevance to the application.

we discussed." The resolution passed by a six to two vote.[6] In its memorializing resolution, the Board found:

> [T]he subject property is the same property that was in question in the prior matters . . . in 1984 and 1990. The Board finds that the Zoning Board denied the respective 1984 and 1990 applications on the merits. As reflected in the 1990 Resolution, the Board finds that the 1990 application and the current application are the same; both pertain to the proposed development of the vacant, undersized lot at issue with a conforming single-family dwelling. The Board finds that the same parties, or their privies are at issue, and the Board notes that in 1990 as now, the applicants were contract-purchasers of the subject property. The dimensions of the property remain the same as in 1990. The zone remains the same. The lot dimensions required in the zone remain the same. The Board finds that there has been no significant change in the conditions surrounding the property. The Board rejects the assertion . . . to the contrary, and finds that the changes cited . . . are minor in nature and not dispositive on the issue of the applicability of the doctrine of res judicata. Indeed, even if the proposed house may be different from the dwelling proposed in 1990, the Board finds that same is of no moment, since each application involved a conforming dwelling. The Board finds that the relief that was denied in 1990 is the exact same relief sought by the applicant today.
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> As a result . . . , the Board finds that the 1990 application was denied on the merits (as was the "similar" application in 1984). The Board further finds that the 1990 application and the current application

[6] One Board member who voted affirmatively stated: "I don't think legally we can hear this." Another who voted affirmatively said: "I don't think we can hear it."

> pertain to the same property, require the exact same relief, involve the same parties or their privies, and that the circumstances and conditions surrounding the subject property remain substantially unchanged. As a result of all the facts and circumstances here at issue, the Board further finds that the doctrine of res judicata bars consideration of the subject application on the merits, and the Board hereby dismisses the application as a result thereof.

Plaintiffs appealed to the Law Division. In an oral opinion, Judge Lisa P. Thornton reasoned that whether res judicata barred consideration of plaintiffs' new application depended upon whether there was "a sufficient change in the application itself or in the conditions surrounding the property to warrant entertainment of the matter again." (citing Park Ctr. at Route 35, Inc. v. Zoning Bd. of Adjustment Twp. of Woodbridge, 365 N.J. Super. 284, 291 (App. Div. 2004) (quoting Allied Realty, Ltd. v. Upper Saddle River, 221 N.J. Super. 407, 414 (App. Div. 1987))). Although the Board "was under the impression that [it was] constrained to deny plaintiffs' application based on [the Board's] prior variance denials on the same lot," Judge Thornton concluded

> res judicata is not to be applied rigidly and the Board may grant a new hearing even in the absence of changed circumstances if an applicant presents good cause to warrant reconsideration.
>
> In the present case, plaintiffs argue that the neighborhood in question was ravaged by Superstorm Sandy[,] [a]nd that aesthetics and promotion of a "desirable visual

> environment" are appropriate reasons to consider the application anew.

The judge reversed and remanded the matter to the Board to consider plaintiffs' application on its merits. Notably, the order also provided:

> [T]he Board is instructed to hear the application "on the merits", and following a full hearing regarding the application, the Board may: (1) dismiss the application based on res judicata; or, (2) if the Board finds that res judicata does not bar a determination on the merits, then, proceed to either grant or deny the application on the merits, as the case may be, based upon the facts and circumstances at issue and applicable law.

The Board argues applying the doctrine of res judicata to dismiss plaintiffs' application without consideration of its merits was not arbitrary, capricious or unreasonable. We disagree and affirm.

Like the trial court, we apply a highly deferential standard of review to the Board's decisions, which "enjoy 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." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (citing Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002)). The Court recently explained what factors animate a land use board's decision whether res judicata bars consideration of a development application on its merits.

> If an applicant files an application similar or substantially similar to a prior application, the application involves the same parties or parties in privity with them, there are no substantial changes in the current application or conditions affecting the property from the prior application, there was a prior adjudication on the merits of the application, and both applications seek the same relief, the later application may be barred. It is for the Board to make that determination in the first instance.
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> [Ten Stary Dom P'ship, 216 N.J. at 39 (citing Bressman v. Gash, 131 N.J. 517, 527 (1993)).]

The Board's decision in this regard "should 'be overturned on review only if it is shown to be unreasonable, arbitrary or capricious.'" Bressman, 131 N.J. at 527 (quoting Russell v. Bd. of Adjustment of Tenafly, 31 N.J. 58, 67 (1959)).

In Allied Realty, we said:

> [T]he rule of res judicata does not bar the making of a new application for a variance . . . upon a showing that the continued enforcement of the restriction would frustrate an appropriate purpose. Changed circumstances or other good cause may warrant reconsideration by the local authorities. To hold differently would offend public policy by countenancing a restraint upon the future exercise of municipal action in the absence of a sound reason justifying such a static approach. The question for the municipal agency on a second application thus centers about whether there has occurred a sufficient change in the application itself or in the conditions surrounding the property to warrant entertainment of the matter again.
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> [221 N.J. Super. at 414 (emphasis added) (citations omitted).]

"That [this] requirement be liberally construed in favor of the applicant would be in accord with the purpose of boards of adjustment to provide the necessary flexibility to the zoning ordinance." Russell, 31 N.J. at 66.

Even in those cases where res judicata was applied appropriately to a second application, our jurisprudence has recognized a land use board's discretionary authority to decide whether to apply res judicata, or not, based on whatever terms it deems appropriate, including a full review of the application's merits. See, e.g., Home Builders Ass'n v. Paramus, 7 N.J. 335, 339-342 (1951) (included second hearing on application and board's view of the site); Charlie Brown of Chatham, Inc. v. Bd. of Adjustment, 202 N.J. Super. 312, 319-20, 327 (App. Div. 1985) (board heard full application).[7]

Although the "arbitrary, capricious, or unreasonable" standard requires us to be "deferential" to the administrative decision, the standard "does not lack content." In re Proposed Quest Acad. Charter Sch., 216 N.J. 370, 385 (2013). Indeed, in considering if the agency's decision was arbitrary, capricious or

[7] Indeed, although the Board's 1990 resolution denying Colao's application is in the record, and although the Board applied res judicata at that time based upon its denial of the earlier 1984 application, it also reached the merits of the 1990 application after a full hearing.

unreasonable, we inquire "whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law." Id. at 385-86 (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).

Here, the Board did not summarily apply res judicata, as did the board in Allied Realty, 221 N.J. Super. at 414. However, our review of the record before the Board convinces us, as it did Judge Thornton, that the Board did not comprehend it possessed broad discretionary authority to consider whatever testimony it thought was appropriate and did not necessarily have to first decide whether res judicata applied without hearing the merits of plaintiffs' application. This included potential testimony regarding changes in the surrounding community during the twenty-four years since the last application was denied, the level of support among surrounding property owners, who witnessed this lot lay fallow for more than three decades, and Leber's testimony regarding the lot's creation, i.e., whether its non-conformity preceded enactment of the municipality's zoning regulations, and what, if any, impact that may have upon the Board's decision to ultimately grant a variance.[8] See Fred McDowell, Inc. v. Bd. of

[8] We note, without considering its implications, plaintiffs' extensive argument in their complaint and before us regarding the creation of the lot, and the issues of merger and self-created hardship, see, e.g., Jock v. Zoning Bd. of Adjustment, 184 N.J.

Adjustment Twp. of Wall, 334 N.J. Super. 201, 222 (App. Div. 2000) ("We deem it appropriate for the Board to have considered the nature of development in the surrounding area since the zoning ordinance, as well as the opportunity of neighboring property owners to assess the apparent use of the subject property."); Mazza v. Bd. of Adjustment of Linden, 83 N.J. Super. 494, 496 (App. Div. 1964) (emphasis added) (board has discretion to reject res judicata "[e]ven if the application is closely similar to a previous one, or identical with it but it is alleged that the surrounding circumstances have changed or that experience has shown the prior denial was error").

Affirmed.

562, 590-91 (2005), and their contention that the prior application(s) failed to correctly raise these issues.