NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

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-4269-15T3

MAGDI MIKHAIL,

Plaintiff-Appellant,

and

KHALED SADEK,

Plaintiff,

v.

GLENN P.W. LAURITSEN, BOROUGH OF SOUTH RIVER, and BOROUGH OF SOUTH RIVER ZONING BOARD OF ADJUSTMENT,

Defendants-Respondents.

Argued January 18, 2018 – Decided May 22, 2018

Before Judges Nugent, Currier and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1591-15.

Anthony B. Vignuolo argued the cause for appellant Magdi Mikhail (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC, attorneys; Anthony B. Vignuolo, on the brief).

James J. Kinneally, III, argued the cause for respondent Borough of South River Zoning Board of Adjustment (Marriott Callahan & Blair, PC, attorneys; James J. Kinneally, III, on the brief).

James P. Nolan, Jr., argued the cause for respondents Glenn P.W. Lauritsen and Borough of South River (Gilmore & Monahan, PA, attorneys; Andrea E. Wyatt, on the brief).

PER CURIAM

Plaintiff Magdi Mikhail appeals from an April 25, 2016 judgment upholding the determination by defendant Borough of South River Zoning Board of Adjustment (the Board) declaring plaintiffs' nonconforming use extinguished and dismissing plaintiffs Magdi Mikhail and Khaled Sadek's complaint with prejudice.[1] Having concluded the Board could have reasonably reached its decision on adequate evidence in the record, we affirm.

I.

Plaintiffs are the owners of Block 150, Lot 2.01, located at 11-15 Main Street in the Borough of South River, New Jersey. Plaintiffs also own an adjacent parking lot designated as Block 150, Lot 5. Both lots are situated in a B-2 General Commercial zone.

[1] Plaintiff Khaled Sadek did not join in the appeal or submit a brief.

Lot 2.01 contains two buildings (collectively the Buildings). 15 Main Street (Building 15) is a two-story building consisting of a commercial space on the first floor and an office and apartment on the second floor. 11 Main Street (Building 11) is a three-story building and originally consisted of commercial space containing a bar and nail salon on the first floor and a boarding house on the second and third floors. Boarding houses are not permitted in a B-2 General Commercial zone. However, the boarding house in Building 11 was a pre-existing nonconforming use that was allowed to continue.

In 2010, plaintiffs applied for a use variance. In their application, plaintiffs proposed to combine the first floors of Building 11 and Building 15, creating a single first floor for the two buildings. The stated purpose for the variance was twofold: (1) to create a pizza restaurant on the first floor of the existing two and three story structures with parking in a separate lot; and (2) for the upper floors of Building 11 to continue as a boarding house. Plaintiffs requested a "B" use for both floors.

In its memorializing resolution (the Resolution), the Board indicated "[t]he existing boarding house is not a permitted use in the zone" and a use variance was required because "an intensification of the use is proposed at th[e] site." By applying for an expansion of a nonconforming use, the property owner

presented the existing use as nonconforming and did not contest the declaration of nonconformity.

On June 29, 2010, the Board granted the use variance and adopted a resolution which states, in part:

> [T]he Application of applicant Mikhail Magdi for use and bulk variances, and for preliminary and final site plan approval to permit a pizza restaurant, parking lot and the continued use of the second and third floors as a boarding house be and hereby is granted in accordance with the findings of fact and conclusions of law rendered above.

The resolution also lists specific conditions required to perfect the variance. It does not cite the statute section under which the Board granted the use variance. The Board later amended the Resolution but the amendment did not contain significant changes.

After the Board issued its resolution, plaintiffs started work on the property without perfecting the variance or obtaining required permits. Plaintiffs undertook major structural modifications of the Buildings, including the removal of load bearing walls between the Buildings to merge the structures, installing steel I-beams, and installing a concrete footing. Since plaintiffs completed this work without construction permits, defendant Glenn P.W. Lauritsen, acting in his capacity as the Borough's Zoning and Construction Officer, issued a stop work order in January 2012. After issuing the stop work order, the

State Department of Community Affairs directed Lauritsen to issue a permit to plaintiffs to allow stabilization of the Buildings, because the work plaintiffs had completed left it structurally unstable and unsound. Lauritsen issued the permit as ordered.

On October 29, 2012, Hurricane Sandy caused significant water damage to the first floor of the Buildings. Less than two months later, on December 24, 2012, a devastating fire caused serious damage to Building 11.

On December 26, 2012, Lauritsen issued a Notice of Unsafe Structure to plaintiffs requiring them to either demolish the structure or correct the unsafe condition by January 16, 2013. On December 27, 2012, plaintiffs hired Luis R. Perez, a professional engineer, to evaluate the structural integrity of Building 11. Perez issued a letter report the following day certifying Building 11 could be repaired.

On January 10, 2013, Bruce M. Koch, an engineer employed by CME associates, the engineering firm hired by the Borough, visited the site to evaluate the effects of the structural damage to the Buildings. On January 28, 2013, Koch issued a report containing his preliminary findings and recommendations for the Buildings. His principal conclusions were that "the [third] floor and the roof of 11 Main Street [had] been irreparably damaged by the fire and [could not], in [his] opinion, be salvaged" and "the second

floor area of 11 Main Street . . . [had] been irreparably damaged by the fire."

Lauritsen claims he visited the site with the Borough's Engineer shortly after the fire but does not give a specific date for his visit.[2] Lauritsen determined most of the damage was concentrated to the second and third floors of Building 11, noting "[t]he entire second floor needed a complete reconstruction" and "[t]he third floor was completely destroyed." Based on his observations, Lauritsen "determined that the structure needed to be completely reconstructed and virtually nothing in the structure was salvageable." Lauritsen further determined the structure was more than partially destroyed and informed plaintiffs they would need to apply for a variance to rebuild the boarding house.

On March 6, 2013, Lauritsen issued a Notice of Substantial Damage Determination to plaintiffs, indicating the Buildings must be brought into compliance with the flood damage-resistance provisions of the Borough's floodplain management regulations (Code Chapter 174) and the State Building Code. The notice did not specifically state the structure was more than partially destroyed or that a use variance would be required to reconstruct.

---

[2] Koch only visited the site twice: once in January 2013 and once in July 2015. Koch testified the only people with him in July 2015 were Nelson Hernandez, an engineer with CME, and Christopher Ling, a forensic architect.

Rather, it stated "the work required to repair [Building 11] constitute[d] substantial improvement of [Building 11]."

On June 10, 2013, Plaintiffs again retained Perez, who prepared a second report after the premises were cleared of debris. Perez opined for a second time that Building 11 could be repaired. On August 15, 2013, Perez sent a letter to the Borough's plumbing official to make clear the owners were not changing the use of or expanding the building.

After this second report, and throughout the rest of 2013, plaintiffs submitted a series of plans through their engineer and architect for reconstruction of Building 11.[3] After reviewing their submitted plans, Lauritsen issued a review letter to plaintiffs on September 13, 2013, in which he indicated the Board could not determine the entire scope of the work because there was too much information missing from the application. Lauritsen added an amended site plan would be required if plaintiffs were requesting a change from the Board's approval. He also indicated, because plaintiffs had not submitted a perfected site plan approval, he could not issue additional permits. Lauritsen

[3] The referenced plans and applications are not part of the appellate record.

repeated this position in another review letter dated December 17, 2013.

According to the Borough, plaintiffs failed to provide enough information to conduct any substantial evaluation of their applications. Specifically, the Borough concluded the drawings did not have enough detail for Lauritsen to determine what work would be performed. Plaintiffs were advised of the Borough's criticisms and resubmitted revised plans based on the Borough's comments, but the Board found plaintiffs had not sufficiently prepared the revised application.

On May 20, 2014, plaintiffs' then counsel, Kenneth Pape, notified the Board that expenses relating to the flood damage would delay construction of the proposed pizzeria. Pape further notified the Board that plaintiffs intended to proceed with the reconstruction of the second and third floor boarding house. On August 19, 2014, shortly after a meeting between Pape and the Board's zoning officer, engineer, planner, and solicitor, the Board's solicitor advised Pape:

> After discussing this matter it appears that the currently proposed renovations differ so substantially from what the Zoning Board previously granted, that a new Application must be made to the Zoning Board. While we did discuss the possibility of appearing before the Zoning Board for an amended approval, it was the consensus of the Board['s] professionals that the substantial

> change in the work proposed requires a new application, not an amendment to the previous approval.

In September 2014, the Borough requested an additional inspection to determine the present condition of the Buildings. In response, plaintiffs retained Perez to re-inspect the Buildings. Perez noted no changes since the last inspection or the fire and again found the building to be "repairable."

In November 2014, the Borough retained architect Anthony Iovino to prepare an architectural reconstruction estimate. In his report, Iovino opined the fire caused "vast damage to the property" including extensive structural, architectural, and mechanical systems damage. He estimated it would cost $1,362,120 for the reconstruction necessary to restore the building.

Also in November 2014, plaintiffs applied for an order to show cause against Lauritsen, the Borough, and the Board. The trial court denied the application.

On March 4, 2015, plaintiffs applied for a zoning permit to restore Building 11. On March 6, 2015, Lauritsen denied the application. Lauritsen's denial indicated plaintiffs would not be given any permits to rebuild the boarding house in Building 11 because it was not a permitted use in that zone and, for the first time, informed plaintiffs the more than partial destruction of the

boarding house had extinguished the pre-existing nonconforming use.

On March 16, 2015, plaintiffs filed a complaint in lieu of prerogative writs against the Borough and Lauritsen regarding their right to reconstruct the properties owned by them at 11-15 Main Street and 1 Reid Street, including the pre-existing nonconforming boarding house. In lieu of an answer, the Borough and Lauritsen filed a motion to dismiss the complaint, alleging plaintiffs failed to exhaust administrative remedies as they had not appealed Lauritsen's decision to deny the requested permits to the Board. The judge denied the motion, retained jurisdiction, and recommended plaintiffs file an appeal with the Board regarding the decision not to issue the permits.

On June 11, 2015, plaintiffs filed an appeal with the Board. Shortly thereafter, Lauritsen issued his "formal evaluation" of Building 11. In this evaluation, Lauritsen determined the more than partial destruction extinguished the pre-existing nonconforming use and indicated he made this determination shortly after the fire.

On July 22, 2015, Koch issued a supplemental structural re-evaluation report of Building 11. The report noted the upper portion of the masonry walls were in poor condition due to the removal of the completely destroyed roof and third floor ceiling

joists, the third floor flooring was in poor structural condition; the second floor ceiling framing was in poor structural condition, and the overall structural condition of the building was poor "since the building is more than partially destroyed."

The Board held hearings on July 28, 2015, September 17, 2015, and October 15, 2015. During the course of the hearings, plaintiffs presented the testimony of Christopher Ling, a forensic architect, and Thomas Winant, an engineer who specializes in structural monitoring assessment.

Ling testified that, on multiple visits to the site, he observed all four of the exterior walls were still standing and many of the interior walls, except on the third floor, were intact. Ling opined the Buildings were only partially destroyed. He based this determination on the percentage of Building 11 lost due to the fire in relation to the aggregate square footage of both Buildings and in relation to the square footage of just Building 11. Ling reasoned that, due to the amount of the remaining exterior walls and interior load bearing walls, the Buildings should not be considered substantially destroyed. Ling calculated twenty-one percent of Building 11 was destroyed, including the entire roof and interior load bearing walls of the third floor. He further conceded he did not consider damage caused by water, exposure to the elements, or any cause other than the fire itself.

Winant's testimony focused on whether Building 11 was repairable. He concluded the Buildings could be repaired but did not comment on whether either building was more than partially damaged.

In addition to plaintiffs' witnesses, the Board received documentary evidence and testimony from Lauritsen and Koch. Lauritsen testified regarding the chronology of events and his denial of plaintiffs' permit applications. He explained he did not issue any permits allowing plaintiffs to continue working on the Buildings "[b]ecause . . . the prior approvals and the final letters of compliance were not obtained and/or the site plan was not perfected." As to his statement in the September 2013 letter that "if a change from the approval [was] being requested . . . an amended site plan by the Borough of South River [would be] required," Lauritsen testified he included that language because "[t]he initial set of drawing[s] didn't even have enough detail for [him] to actually make a clarified review on whether or not they were going to perform the work downstairs or any exterior work." According to Lauritsen, there were no other plans submitted that were unambiguous. Lauritsen further testified he relied on reports from CME in determining the property was more than partially destroyed.

The Board also heard testimony from Koch. As documented by Koch in his July 2015 report: the roof had been completely removed, the third floor ceiling joists and studs were completely destroyed, part of the floor on the third floor was missing, the flooring still present was buckled and severely sagging, "[t]he visible interior faces of the main exterior masonry walls were charred throughout," the "load bearing clay tiles were severely damaged," every third floor window and window frame was destroyed, the front and rear walls were so damaged they required temporary bracing, the second floor ceiling joists were more than partially destroyed, there is a large hole in the second floor ceiling, approximately one-third of the remaining joists were irreparably charred, the other joists are damaged, the second floor wall studs are severely damaged and many were rotten, the second floor flooring was severely damaged, and there was a complete destruction and removal of the utilities, including electrical systems, plumbing, HVAC, and sewerage systems.

Based largely on his report, Koch testified the bricks and blocks were severely damaged by the fire, and Building 11 was "more than partially destroyed." In reaching this conclusion, Koch listed the components of a structure: exterior walls, roof, floors, windows, electric, plumbing, sewer, HVAC, interior walls, wall coverings, and floor finishes. Koch reasoned – because the

second floor of the former boarding house had only four exterior walls, and some of the ceiling joists, flooring, interior wall studs and windows, but no wall coverings, floor coverings, HVAC, plumbing, sewer, or electric — the boarding house was beyond partially destroyed.

On October 15, 2015, the Board denied plaintiffs' appeal and affirmed Lauritsen's denial of the permits and his determination that the pre-existing nonconforming use was extinguished. The memorializing resolution includes the following findings:

> 27. The primary area of damage from the fire was the second and third floor that originally housed the [boarding] house
>
> 28. The cumulative effect of the complete lack of roof, the complete lack of interior walls on the third floor, the extreme damage to the third level floor and second floor joists, the significant damage to the second floor walls, the complete lack of plumbing, heating and electric, the absence of windows, and the bowing of the front wall amounts to more than partial destruction.

Based on these findings, the Board concluded:

> 30. The question before the Board is not whether the building can be rebuilt; the Board finds that it can be rebuilt. The question before the Board is whether the [boarding] house has been more than partially destroyed.
>
> 31. The destruction of the second and third floors is more than partial destruction; the [boarding] house use is substantially totally destroyed.

On November 2, 2015, plaintiffs filed an amended complaint in lieu of prerogative writs, adding the Board as a party. Plaintiffs challenged the Board's decision, arguing it was not supported by substantial credible evidence, was arbitrary, capricious, and unreasonable, and was without legal or factual basis. The Board filed an answer to the amended complaint on December 22, 2015.

Following a hearing on March 29, 2016, the trial court issued an April 25, 2016 written decision and judgment upholding the decision of the Board and dismissing plaintiffs' amended complaint with prejudice.

In reaching this conclusion, the judge noted that because N.J.S.A. 40:55D-5 distinguishes between a nonconforming use and a nonconforming structure, his analysis should reflect this distinction as to the level of destruction of a nonconforming use. The judge determined the issue to be "whether the damage sustained by Building 11 so impacted the use of the second and third floors that the use as a boarding house [had] been extinguished." Damage to the structure as a whole was not the focus of his analysis.

The court further noted plaintiffs' "presentation focused more on the whole of the structure rather than the effect of the fire and subsequent weather damage to the use of the second and third floors as a boarding house." Because the upper two floors

sustained most of the damage caused by the fire, and because the second and third floors of Building 11 operated entirely independently of the use of the first floor, the court found there was more than partial destruction, and the pre-existing nonconforming use was extinguished.

The court also found the testimony proffered by plaintiffs' experts "did not take into account that Building 11 housed a mixed use, and that the majority of that structure housed a nonconforming use" and indicated "[t]he facts of this case are unlike Krul"[4] on which plaintiffs substantially relied. The court further determined there was insufficient proof to conclude Lauritsen or any Board official caused exacerbation of the fire damage. This appeal followed.

On appeal, Mikhail raises the following issues: (1) the trial should have reversed the Zoning Board's action as it was arbitrary, capricious, and unreasonable; and (2) the trial court erred by not determining the prior use variance for the property included the boarding house as a matter of law.

II.

"Our standard of review for the grant or denial of a variance is the same as that applied by the Law Division." Advance at

[4] Krul v. Bayonne Bd. of Adj., 122 N.J. Super. 18 (Law Div. 1972).

Branchburg II, LLC v. Branchburg Twp. Bd. of Adj., 433 N.J. Super. 247, 252 (App. Div. 2013). "Ordinarily, when a party challenges a zoning board's decision through an action in lieu of prerogative writs, the zoning board's decision is entitled to deference." Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 229 (2013). The Board's "factual determinations are presumed to be valid and its decision to grant or deny relief is only overturned if it is arbitrary, capricious or unreasonable." Ibid. (citing Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 385 (1990); Kramer v. Bd. of Adj., 45 N.J. 268, 296 (1965)). While the Board's factual findings are entitled to substantial deference, its legal conclusions are subject to de novo review. Nuckel v. Little Ferry Planning Bd., 208 N.J. 95, 102 (2011). "Because a board of adjustment's actions are presumed valid, the party 'attacking such action [has] the burden of proving otherwise.'" Cell S. of N.J. v. Zoning Bd. of Adj., 172 N.J. 75, 81 (2002) (alteration in original) (quoting New York SMSA Ltd. P'ship v. Bd. of Adj., 324 N.J. Super. 149, 163 (App. Div. 1999)).

The proper scope of judicial review is "to determine whether the board could reasonably have reached its decision." Davis Enterprises v. Karpf, 105 N.J. 476, 485 (1987) (citing Kramer, 45 N.J. at 285; Kessler v. Bowker, 174 N.J. Super. 478, 485 (App. Div. 1979)). A reviewing court "will not substitute its judgment

for that of a board 'even when it is doubtful about the wisdom of the action.'" Cell S. 172 N.J. at 81 (quoting Cellular Tel. Co. v. Zoning Bd. of Adj., 90 F. Supp. 2d 557, 563 (D.N.J. 2000)). "[C]ourts ordinarily should not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law." Lang v. Zoning Bd. of Adj., 160 N.J. 41, 58-59 (1999). "Accordingly, we will not disturb a board's decision unless we find a clear abuse of discretion." Cell S., 172 N.J. at 82 (citing Medical Realty Assocs. v. Bd. of Adj., 228 N.J. Super. 226, 233 (App. Div. 1988)).

When evaluating the evidence presented during hearings, "the Board 'has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal.'" Kramer, 45 N.J. at 288 (quoting Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (App. Div. 1960)); accord Allen v. Hopewell Twp. Bd. of Adj., 227 N.J. Super. 574, 581 (App. Div. 1988) (stating the Authority had the discretion "to accept or reject" the expert's opinions).

III.

Plaintiffs argue the Borough, in approving the "continued use of the second and third floors as a boarding house," treated the 2010 application to construct and operate a pizzeria as the

expansion of the non-conforming boarding house. Plaintiffs maintain the premises were treated as a single structure and, because the approved variance referred to an intensification of use as the reason a variance was required, the Resolution actually granted a use variance for the boarding house and they should be allowed to reconstruct as a matter of right.

In response to defendants' contention that this issue is not properly before this court, plaintiff argues this issue was sufficiently raised in the pleadings and oral argument as evidenced, in particular, by the judge's question: "If this was a D variance and the uses on the second and third floor are permitted by that variance, then why am I here, because then the building can be reconstructed?"

However, "[a]ppellate review is not limitless. The jurisdiction of appellate courts . . . is bound by the proofs and objections critically explored on the record before the trial court by the parties themselves." State v. Robinson, 200 N.J. 1, 19 (2009). "Generally, 'the points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review.'" State v. Witt, 223 N.J. 409, 419 (2015) (quoting Robinson, 200 N.J. at 19). We do not "consider questions or issues not properly presented to the trial court when an opportunity for such a presentation [was] available unless the

questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Selective Ins. Co. v. Rothman, 208 N.J. 580, 586 (2012) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1977) (citation omitted)). Thus, if an issue was never raised before the trial court, if its factual antecedents were never subject to the rigors of an adversary hearing, and its legal propriety was never ruled on by the trial court, the issue cannot be said to have been properly preserved for appellate review. Robinson, 200 N.J. at 18-19.

Plaintiffs did not raise or brief the issue of the Board granting plaintiffs a use variance for the nonconforming boarding house before the trial court. Although the trial judge briefly mentioned the issue in passing, he did not render a decision regarding the issue. Because it was not raised by the parties before the trial court or decided by the trial court, this issue was not preserved for appellate review.

IV.

Plaintiffs further argue Building 11 was only partially destroyed and not substantially destroyed as the Board held. Plaintiffs rely on the expert testimony and reports they provided at the hearings in making this claim. Plaintiffs contend, contrary to their extensive empirical data and tests founded on scientific standards, the Board relied on reports and testimony that were

devoid of any objective testing, standards, or evaluation systems in making its determination. Plaintiffs also argue the Board and Trial Court's analysis erroneously considered "only the damaged area which housed the non-conforming use as relevant to its consideration of the area destroyed."

Substantial evidence in the record supports the finding that the second and third floors were more than partially destroyed as a result of the fire and that the Board's decision was not arbitrary, capricious, or unreasonable. However, we reach this conclusion through a different analysis than the trial court. See State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (stating an appellate court is "free to affirm the trial court's decision on grounds different from those relied upon by the trial court").

Nonconforming uses are disfavored in New Jersey. Hay v. Bd. of Adj., 37 N.J. Super. 461, 464 (App. Div. 1955); see also Cox & Koeing, N.J. Zoning and Land Use Administration §27-1.1 (2018). However, N.J.S.A. 40:55D-68 permits the restoration or repair of a nonconforming structure in the event of a partial destruction thereof. A determination of the level of destruction of a nonconforming structure must be made on a case-by-case basis. H. Behlen & Bros., Inc. v. Kearny, 31 N.J. Super. 30 (App. Div. 1955); see also Motley v. Seaside Park Zoning Bd., 430 N.J. Super. 132,

144-45 (App. Div. 2013) (noting "partial destruction" and "total destruction" are not defined and must be determined by an individual analysis).

"The question 'what is total destruction' has been the subject of controversy since the enactment of the statute" as it is not defined in N.J.S.A. 40:55D-68. Cox & Koeing, §27-4; accord Motley, 430 N.J. Super. at 144-45. This court recently reinterpreted this standard in Motley. "In essence, the test of whether a nonconforming use or structure may be restored or repaired is whether there has been some quantity of destruction that surpasses mere partial destruction." Id. at 144.[5]

Plaintiffs rely heavily on Ling's calculation of the degree of fire damage; however, Ling's percentage of destruction estimates are not controlling. See id. at 147. "Instead, we must consider whether the destruction is so substantial in nature –

[5] Notably, "[a] 'rule of thumb' has developed in many municipalities in this State with respect to destruction of residential structures and accessory structures, viz: that if the foundation and at least two walls of the residential structure survives, a permit will issue because the destruction is only partial." Cox & Koeing, §27-4 (citing Motley, 430 N.J. Super. at 147). Buildings 11 and 15 are not residential structures. Moreover, this "rule of thumb" is not a legal standard. Motley, 430 N.J. Super. at 147. Whether to apply the 'rule of thumb' "is usually a decision made by the construction official in consultation with the zoning officer." Cox & Koeing, §27-4. Here, Lauritsen, the Borough's construction and zoning official, did not apply this non-legal standard.

qualitatively if not quantitatively – to surpass the 'partial' threshold that the statute expresses." Id. at 148.

Plaintiffs argue the damage to Building 11 should be measured by considering the building as a whole, not merely by the portion that contained the nonconforming use. In support of this contention, plaintiffs point to the language of N.J.S.A 40:55D-68, which states: "Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." (emphasis added). Plaintiffs maintain the plain language of the statute permits a nonconforming use to continue if the structure in which it is located is only partially destroyed. Plaintiffs argue if the Legislature intended extinguishment of a nonconforming use to turn on the destruction of the use itself, and not the associated structure, the statute would so reflect. We are unpersuaded by this argument.

The rules for statutory interpretation were summarized by the Court in DiProspero v. Penn, 183 N.J. 477, 492-93 (2005). In DiProspero, the Court instructed to first look to the statutory language as "the best indicator of [the Legislature's] intent." Id. at 492. If the plain language of the statute is clear and "susceptible to only one interpretation, then the Court should

apply that construction." Ibid.; accord Norman J. Singer & J.D. Shambie Singer, 1A Sutherland on Statutory Construction § 46:1, at 137-41 (7th ed. 2007) ("[W]here a statutory provision is clear and not unreasonable or illogical in its operation, a court may not go outside the statute to give it a different meaning.").

Despite the plain language of the statute, the trial judge reasoned because N.J.S.A. 40:55D-5 distinguishes between a nonconforming use and a nonconforming structure, a determination as to the partial destruction of either should reflect this distinction. To that end, the judge determined the issue to be "whether the damage sustained by Building 11 so impacted the use of the second and third floors that the use as a boarding house has been extinguished." This distinction is not reflected in the language of N.J.S.A. 40:55D-68.

Nonetheless, we reach the same result by applying the definition of "structure" under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -112, and interpretative case law. The MLUL defines "structure" as "a combination of materials to form a construction for occupancy, use or ornamentation whether installed on, above, or below the surface of a parcel of land." N.J.S.A. 40:55D-7. "The term 'structures' includes not only 'floors,' but garage and parking lots." Mountain Hill, LLC v. Zoning Bd. of Adj., 403 N.J. Super. 210, 221 n.2 (App. Div. 2008) (citing

N.J.S.A. 40:55D-3; N.J.S.A. 40:55D-7). Under this definition, distinct floors are considered separate structures. Consequently, under N.J.S.A. 40:55D-68, the upper levels of Building 11 are considered independent "structures" separate and apart from Building 11 as a whole.

Because distinct floors are considered separate structures, an analysis considering the destruction of only the second and third floors is appropriate. As elaborated by Koch in his July 2015 report and testimony, the damage to the second and third floors of Building 11 was severe and its overall structural condition was poor. In addition to other damage, Building 11 suffered the loss of its entire roof, damage to its bricks and blocks, complete destruction of the third floor ceiling joists and studs, and partial loss of the floor of the third floor. The second floor was also severely damaged. All that remained was the four exterior walls, and some of the ceiling joists, flooring, interior wall studs and windows, but no wall coverings, floor coverings, HVAC, plumbing, sewer, or electric. Compared to what remained, the second and third floors were more than partially destroyed.

Plaintiffs' proffered testimony focused only on the damage to Building 11 as a whole rather than the individual floors. As a result, the Board found plaintiffs' expert testimony less than

convincing. Plaintiffs' experts may have provided a more technical examination of the structure, however, their analysis was not germane to an analysis that should have focused only on damage to the second and third floors.

When evaluating the evidence, the Board had the discretion to accept or reject the testimony of witnesses and ascribe appropriate weight to their testimony and opinions. Consequently, the Board properly focused on the destruction of the second and third floors containing the boarding house rather than the damage to Building 11 in its entirety. The Board's findings and determinations are amply supported by substantial credible evidence in the record, including Koch's persuasive testimony. In particular, there is substantial evidence in the record that the nature and extent of the damage to Building 11 exceeds any reasonable notion of a mere partial destruction. We discern no basis to conclude the determination of the Board was arbitrary, capricious, or unreasonable. We further find the trial court properly upheld the Board's determination that the pre-existing nonconforming use was more than partially destroyed and, as a result, extinguished.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION