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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1364-21**

**RIVERSIDE DEVELOPMENT  
STUDIES LLC,**

Plaintiff-Appellant,

v.

**NORTH BERGEN BOARD  
OF ADJUSTMENT and  
9001 RIVER ROAD LLC,**

Defendants-Respondents.

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Argued November 9, 2022 – Decided March 14, 2023

Before Judges Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law  
Division, Hudson County, L-0676-21.

Priscilla J. Triolo argued the cause for appellant  
(Bittiger Elias Triolo & Diehl PC, attorneys; Priscilla J.  
Triolo, of counsel and on the briefs).

John R. Dineen argued the cause for respondent North  
Bergen Board of Adjustment (Netchert, Dineen &  
Hillmann, attorneys; John R. Dineen, on the brief).

Ira E. Weiner argued the cause for respondent 9001 River Road LLC (Beattie Padovano, LLC, attorneys; Ira E. Weiner, of counsel and on the brief; Jason A. Cherchia, on the brief).

PER CURIAM

Plaintiff Riverside Development Studies LLC appeals from an order dismissing with prejudice its complaint in lieu of prerogative writs, in which it challenged the approval by defendant North Bergen Board of Adjustment (the Board) of an application by defendant 9001 River Road LLC (9001 River), for development of property in North Bergen.<sup>1</sup> Plaintiff primarily argues that it has standing; the Board acted arbitrarily, capriciously, and unreasonably in approving the application because its approval was not supported by substantial credible evidence or consistent with applicable law; and its purported claim under the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, should have been heard. We disagree and affirm.

I.

9001 River owns property located at 9001 River Road in North Bergen's R-1 Low-Density Residential District (the District), which included a "Townhouse/Attached Housing Overlay." Even though retail or commercial

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<sup>1</sup> The North Bergen Board of Adjustment was improperly pleaded as "Zoning Board of the Township of North Bergen."

uses were not permitted in the District, the property contained a liquor store and a commercial warehouse. On November 9, 2018, 9001 River filed with the Board an application seeking several variances in connection with the construction on the property of "an eight story [sixty-six]-unit residential building with one lower[-]level commercial retail area, with two levels of parking," which would replace the non-conforming liquor store and warehouse. The Board's initial hearing regarding the application took place on November 12, 2019. 9001 River's architect, engineer, and traffic expert testified. At the conclusion of the hearing, Board members expressed concerns regarding the size of the proposed building.

9001 River submitted revised plans, eliminating two residential floors and the commercial retail area and reducing the number of units to forty and the height of the building by over sixteen feet. The Board considered the revised plans at its June 22, 2020 meeting, during which 9001 River presented evidence and testimony from its architect, engineer, traffic expert, and planning expert. Plaintiff's counsel appeared at the hearing on behalf of unnamed "objectors" and cross-examined each of 9001 River's witnesses. To give plaintiff's counsel an opportunity to present witnesses, the Board continued the hearing to July 29, 2020.

At the July 29, 2020 hearing, plaintiff's counsel identified her client as "Riverside Development Studies, LLC" and described it as follows: "They are members that are residents of North Bergen, and they formed an LLC to examine the zoning laws and zoning applications in order to preserve their community." Board counsel inquired about their names, but plaintiff's counsel replied only that the members of the LLC would not be testifying that evening. Plaintiff's counsel presented a report from and the testimony of a professional planner. 9001 River's counsel cross-examined plaintiff's planning expert and re-called each of 9001 River's witnesses, whom plaintiff's counsel cross-examined again. The Board also heard from two members of the public. The Board scheduled another hearing on the application to consider additional revisions proposed by 9001 River and a requested report from a fire official.

The Board conducted another hearing on September 29, 2020. 9001 River presented testimony from its architect, who explained revisions 9001 River had made to its application to address concerns raised by a neighboring property owner and the fire official, and additional testimony from its other witnesses. The Board heard from its planner and engineer. Plaintiff's planner testified, and plaintiff's counsel had an opportunity again to cross-examine 9001 River's

witnesses. The Board gave the public an opportunity to speak, and one person spoke.

The Board's counsel then asked plaintiff's counsel if she had "any closing comments." She answered, "yes," and then asked the Board not to reach a decision until it had heard further from fire officials. In response, 9001 River's counsel pointed out the fire department already had provided a report but acknowledged that if the township's fire officials determined 9001 River was required to include in its plans a "command center," 9001 River would need to request additional variances. 9001 River's counsel agreed to a delay in the Board's vote for a consideration of that issue, stating "in light of [plaintiff's counsel's] comments today I don't want to go through a litany of having our professionals again for the fifth time come back and rehash the whole entire project" and asked "that we isolate the inquiry to the fire department to this question of the command center and it's either going to be yes, then we go right to a vote, or, no, and then we have to address the revised plans and possibly additional variances."

The Board's attorney indicated the Board was "very concerned about the issue of safety, access from Riverside Place and the command center" and that the Board would review those issues at an adjourned hearing, but the hearing

would be "limited in scope. We are not going to rehash what is revealed in that review of the reports, the issue of fire safety, do we lose parking spaces, fire command and specifically . . . access from Riverside Place." When asked whether she wanted to say something, plaintiff's counsel told the Board she "just wanted to make sure that you added Riverside Place because [9001 River's counsel] was focused on the command center, and rightfully so, as to whether or not those safety issues need modification. But also Riverside Place, that's all." The Board's attorney responded, "[o]kay." The Board agreed to seek confirmation from the township's fire officials on those subjects and to schedule another hearing limited to consideration of that additional input on October 7, 2020.

According to 9001 River and as found by the trial judge, the Board failed to add this matter to its October 7, 2020 meeting agenda and rescheduled the meeting for October 13, 2020, at 6:00 p.m. At the beginning of the October 13, 2020 meeting, the Board chairman stated notice of the meeting had been emailed to newspapers, advising of the special meeting. He also stated Board members, applicants, and attorneys had been mailed notice and a copy of the agenda had been posted in the township hall lobby for public inspection. The Board's attorney confirmed that the purpose of that meeting "was not to reopen this

matter for additional testimony but just to limit it to review of [the fire officials' reports] and if the Board had any questions with regard to these particular reports."

The chairman stated the fire officials had indicated in their additional reports that they were "satisfied that it is safe." The Board gave counsel an opportunity to be heard and Board members an opportunity to ask questions. The Board then voted unanimously to approve the application.

After the vote, plaintiff's counsel complained the Board had "neglected to allow any member of the public to speak on this before a vote was taken and failed to allow any closing argument." 9001 River's counsel responded that as discussed at the last hearing, the purpose of the hearing "was only to review the concerns raised by [plaintiff's counsel] and she had more than ample time to have expert testimony, and she gave her own opinion on this." He also stated he had sent plaintiff's counsel a letter regarding her representation, and she had provided "the name of a corporate entity which is listed in her name, has her business address and gives no indication as to interested parties in this." The Board chairman responded by stating the Board had "give[n] the public an opportunity to speak when we were hearing the case."

At the conclusion of the presentation of another application, a member of the public sought to speak on 9001 River's application, but the Board chairman stated that that application was "over" and that the Board had heard "[f]rom the public at the prior meeting where it was heard, and this meeting was just to get a clarification from the fire department report." Another member of the public also complained about the application and about not being heard. The Board chairman noted her objection and said, "there is really nothing else we can do about it."

On January 6, 2021, the Board adopted a resolution to memorialize its October 13, 2020 decision approving 9001 River's application. That resolution, however, was a draft containing information regarding another property. Accordingly, the Board adopted a corrected resolution during its March 3, 2021 meeting.

In that resolution, the Board rejected the testimony of plaintiff's planning expert, finding it incredible because his position "would require the Board to not consider significant swaths of land in the immediate vicinity of the subject property" and was "at odds with Purpose (D) of the Municipal Land Use Law [(MLUL), N.J.S.A. 40:55D-1 to -163], which requires municipalities to consider whether development will impact adjacent municipalities." The Board found



"the site is in dire need of redevelopment and [the application] represents an opportunity to enhance and revitalize a depressed and nonconforming commercial area." The Board characterized 9001 River's proposal as "reveal[ing] a development that can entirely accommodate on-site any negative parking considerations, drainage and storm water management consideration and bring fresh and improved residential usage to River Road."

The Board concluded the "D(5) density variance can be granted since it returns the property to a conforming residential use and all of the additional density can be accommodated within the site" and noted the proximity of the property to public transportation. Expressly considering the height of the building, the Board found "[t]he D(6) height variance can be accommodated because this sector of the existing zone and surrounding area is largely populated with equally high or higher structures . . . ." The Board decided the d(1) use variance could be granted because the "application propose[d] new residential development" while "eliminating the non-conforming uses." The Board "soundly determined that there is no substantial negative impact to the area" and that "the traffic impact would be minimal." The Board found the proposed development "promote[d] the general welfare" in accordance with the MLUL and that its benefits "substantially outweigh[ed] . . . any detriments."

On February 17, 2021, plaintiff filed a complaint in lieu of prerogative writs. Plaintiff identified itself as a limited liability company "with its principal office at c/o Bittiger Elias & Triolo PC, 12 Route 17 N., Suite 206, Paramus, New Jersey 07652," giving its counsel's address.

In the first, second, and third count, plaintiff asserted the Board's approval of 9001 River's application was "discriminatory, arbitrary, capricious and unreasonable," contending 9001 River had failed to prove its entitlement to variances pursuant to N.J.S.A. 40:55D-70(c) and (d) "for use, height, and floor area ratio as well as the ancillary 'c' variances and waivers," the Board had not acted in the best interests of the township or in accordance with the MLUL or the intent of the township's zoning ordinances and master plan, and the Board's decision was "without support on the record and directly contrary to the testimony of all professionals." In the fourth count, plaintiff faulted the Board's resolution as failing to include findings of fact and conclusions of law pursuant to N.J.S.A. 40:55D-10(g), not timely pursuant to N.J.S.A. 40:55D-10(g)(1) or (2), and otherwise infirm. Plaintiff did not include a count seeking relief based on a violation of OPMA. In a preliminary paragraph in its complaint, plaintiff asserted the Board had "failed and refused" to open the October 13, 2020 meeting to members of the public in violation of OPMA.

With leave of court, plaintiff filed an amended complaint in lieu of prerogative writs on March 31, 2021, "to address and include" the corrected resolution. In their answers, the Board and 9001 River pleaded as a separate defense that plaintiff lacked standing to bring this action.

The trial court conducted a hearing on August 12, 2021. In addition to addressing plaintiff's allegations, plaintiff's counsel responded to defendants' assertion that plaintiff lacked standing to bring this action. In an apparent effort to establish standing, plaintiff's counsel asserted with no support in the record that her "clients are residents of North Bergen." Also with no support in the record, plaintiff's counsel contended her "clients sought some type of protection through an LLC not to disclose their name[s] and address[es]" because "[t]he owner of the defendant company is a powerful man and a property owner."

The court subsequently issued an order and eighteen-page statement of reasons, denying plaintiff's application challenging the Board's decision and dismissing the complaint with prejudice. The trial court held the Board's decision was not arbitrary, capricious, or unreasonable and was supported by sufficient credible evidence, citing the detailed credible testimony of 9001 River's expert witnesses and the incredible testimony of plaintiff's sole witness. The court found plaintiff lacked standing because it had no property rights

affected by the application. Specifically, the court found plaintiff did not own property in the township, used as its business address its attorney's Paramus office, and was not a taxpayer in the township. The court held plaintiff's purported OPMA claim was time barred.

## II.

Appealing the court's order, plaintiff argues: (1) it had standing; (2) its challenge under OPMA and MLUL meeting requirements should have been considered; (3) the Board's decision was arbitrary, capricious, and unreasonable because it was not supported by substantial credible evidence and violated the intent and purpose of the MLUL and the township's zoning ordinance; (4) the resolution failed to meet the MLUL requirements; and (5) the court's decision failed to meet Rule 1:7-4(a). Unpersuaded by those arguments, we affirm.

### A.

We first consider whether plaintiff had standing under the MLUL to challenge the Board's approval of 9001 River's application. "Standing is . . . a threshold issue. It neither depends on nor determines the merits of a plaintiff's claim." Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 417 (1991); see also Edison Bd. of Educ. v. Zoning Bd. of Adjustment of Edison, 464 N.J. Super. 298, 305 (App. Div. 2020). As a threshold determination, "[a] lack of standing

. . . precludes a court from entertaining any of the substantive issues" raised by a litigant. EnviroFinance Grp., LLC v. Env't Barrier Co., 440 N.J. Super. 325, 339 (App. Div. 2015) (quoting In re Adoption of Baby T, 160 N.J. 332, 340 (1999)). We review de novo a trial court's standing determination because whether a party has standing is a question of law. Cherokee LCP Land, LLC v. City of Linden Plan. Bd., 234 N.J. 403, 414 (2018).

A party has standing if it can show "a sufficient stake and real adverseness with respect to the subject matter of the litigation [and a] substantial likelihood of some harm . . . in the event of an unfavorable decision." Id. at 423 (quoting Jen Elec., Inc. v. Cty. of Essex, 197 N.J. 627, 645 (2009)). "[W]e have accorded liberal standing requirements to those challenging the actions of land use boards in zoning cases, see, e.g., DePetro v. Twp. of Wayne Plan. Bd., 367 N.J. Super. 161, 172 (App. Div. 2004), . . . ." Edison, 464 N.J. Super. at 306. However, "the MLUL contains specific requirements for standing, both before the land use board and before the court." Ibid. Pursuant to N.J.S.A. 40:55D-4, before a municipal board or court, an "[i]nterested party" means

any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken under [the MLUL], or whose rights to use, acquire, or enjoy property under [the MLUL], or under any other law of this State or of the United States have been denied,

violated or infringed by an action or a failure to act under [the MLUL].

"Although the language is particularly broad it should be understood in the context of the MLUL generally. Thus, the use, enjoyment or right to acquire should always be evaluated in terms of the purpose of the MLUL . . . ." Edison, 464 N.J. Super. at 306 (quoting William M. Cox & Stuart R. Koenig, N.J. Zoning and Land Use Administration, § 18-2.2 at 357 (2019)). In MLUL actions, "standing requires that, in addition to establishing its 'right to use, acquire, or enjoy property,' a party must establish that that right 'is or may be affected.'" Cherokee LCP Land, LLC, 234 N.J. at 416-17 (quoting N.J.S.A. 40:55D-4).

Plaintiff failed to meet that standard. In its unverified pleading, plaintiff stated it had a principal office in Paramus, not North Bergen. It did not allege it or any of its members owned any property in North Bergen or that any "rights to use, acquire, or enjoy property" it or its members had would be impacted by 9001 River's application. N.J.S.A. 40:55D-4. Plaintiff's counsel's unsupported assertion during the trial court's hearing that her "clients are residents of North Bergen" is not enough to establish standing. Her assertion was not supported by any affidavit of anyone with personal knowledge or competency to testify about plaintiff's members' residency. See, e.g., R. 1:6-6 (if a party makes an application based on facts "not appearing of record, . . . the court may hear it on

affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify . . . .").

Counsel's unsupported assertion that her "clients" wished to proceed anonymously because 9001 River's owner is "powerful" also is not enough to establish that plaintiff had standing to bring this lawsuit. See A.A. v. Gramiccioni, 442 N.J. Super. 276, 284 (App. Div. 2015) (finding that "[a]bsent a statute or rule mandating anonymity in court proceedings, a litigant must show good cause to proceed anonymously or by pseudonym"). That the Board did not address 9001 River's challenge to plaintiff's standing during the proceedings before the Board does not constitute waiver or otherwise give plaintiff standing it does not have to bring an action in the trial court.

B.

Given that we affirm the trial court's holding that plaintiff lacked standing, we need not address plaintiff's remaining arguments regarding the Board's approval of 9001 River's application but do so in the interest of completeness.

We are "bound by the same standards as was the trial court" when reviewing the validity of a local board's decisions. Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 462 (App. Div. 2015) (quoting Fallone Props., LLC v. Bethlehem Twp. Plan. Bd., 369 N.J.

Super. 552, 562 (App. Div. 2004)). We review questions of law de novo because zoning boards have "'no peculiar skill superior to the courts' regarding purely legal matters." Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin, 233 N.J. 546, 559 (2018) (quoting Chicalese v. Monroe Twp. Plan. Bd., 334 N.J. Super. 413, 419 (Law Div. 2000)). A board is entitled to decide questions of credibility and can accept or reject testimony, expert or otherwise. TSI East Brunswick, LLC v. Zoning Bd. of Adjustment of Twp. of E. Brunswick, 215 N.J. 26, 46 (2013).

Zoning board decisions "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). Zoning boards have a "peculiar knowledge of local conditions" and should be "allowed wide latitude in the exercise of delegated discretion." Ibid. (quoting Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268, 296 (1965)). Consequently, "courts 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 Adjustment of N. Caldwell, 160 N.J. 41, 58-59 (1999).



The Legislature delegated to municipalities the power to regulate local land use through the MLUL. Zoning boards have the authority "[i]n particular cases for special reasons, [to] grant a variance to allow departure from regulations . . . to permit . . . a use or principal structure in a district restricted against such use or principal structure." N.J.S.A. 40:55D-70(d); Jacoby, 442 N.J. Super. at 463. "No variance . . . may be granted . . . without a showing that such variance or other relief 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." N.J.S.A. 40:55D-70. According to N.J.S.A. 40:55D-70, a board may grant a variance after an applicant has shown that positive and negative criteria in its application has been met. Price, 214 N.J. at 285-86. Positive criteria proves that the application promotes the general welfare, and negative criteria proves that the "variance can be granted without substantial detriment to the public good." Id. at 286.

The party challenging the action of a zoning board carries the burden of demonstrating the board acted arbitrarily, capriciously, or unreasonably. Dunbar Homes, Inc., 233 N.J. at 558. "A board acts arbitrarily, capriciously, or unreasonably if its findings of fact in support of a grant or denial of a variance are not supported by the record, or if it usurps power reserved to the municipal

governing body or another duly authorized municipal official." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013) (citations omitted). "Even when doubt is entertained as to the wisdom of the [board's] action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion . . . ." Price, 214 N.J. at 295 (quoting Kramer, 45 N.J. at 296-97).

We discern no abuse of discretion and nothing arbitrary, capricious, or unreasonable in the Board's approval of 9001 River's application. The Board set forth its findings in the twelve-page corrected resolution. As the trial court correctly found, the Board's decision was supported by substantial credible evidence, including the testimony of the multiple experts submitted by 9001 River. The Board acted within its discretion when it rejected as not credible the testimony of plaintiff's sole witness. The Board appropriately reviewed the positive and negative criteria. The Board and the trial court correctly considered applicable law. Given the standards we must apply in our review and the discretionary elements of that standard, we perceive no basis to reverse the trial court's decision rejecting plaintiff's challenge to the Board's approval of 9001 River's application.

C.

In its complaint, plaintiff alleged generally the Board had "failed and refused to open the [October 13, 2020] meeting to members of the public . . . to voice their objections and comments in violation of the OPMA . . . ." Even though plaintiff had not included in its complaint a cause of action seeking relief based on OPMA, the trial court considered plaintiff's allegation and rejected it as untimely. On appeal, plaintiff did not challenge the court's finding of untimeliness. Accordingly, we do not address that finding. See N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) (finding "[a]n issue that is not briefed is deemed waived upon appeal"). Instead, plaintiff argued that its challenge under OPMA and MLUL meeting requirements "should be considered," asserting its counsel "was not permitted to speak or do a closing argument" and that the public was not permitted to speak.

Under N.J.S.A. 40:55D-9(a) of the MLUL, a zoning board must conduct at least one monthly meeting and may schedule special meetings. Those meetings must be held on notice to the public. N.J.S.A. 10:4-12(a) of OPMA generally requires meetings of "public bodies" to be open to the public but does not "limit the discretion of a public body to permit, prohibit, or regulate the

active participation of the public at any meeting, except that a municipal governing body and a board of education shall be required to set aside a portion of every meeting . . . for public comment . . . ." See Kean Fed'n of Tchrs. v. Morell, 233 N.J. 566, 571 (2018) (finding "public bodies are given discretion in how to conduct their meetings" (citing N.J.S.A. 10:4-12(a))). The public-participation requirement does not apply to public bodies other than municipal governing bodies or boards of education. See Deegan v. Perth Amboy Redevelopment, 374 N.J. Super. 80, 86 n.1 (App. Div. 2005) (finding public-participation requirement applies to a "municipal governing body" but not "other municipal bodies such as a redevelopment agency" (quoting N.J.S.A. 10:4-12(a))). If a witness testifies during a zoning board meeting, "the right of cross-examination shall be permitted to all interested parties through their attorneys." N.J.S.A. 40:55D-10(d).

It is undisputed that the October 13, 2020 meeting was open to the public and on notice to the public. Pursuant to the procedure clearly outlined during the previous meeting, no witnesses testified during the October 13 meeting. Thus, no one was denied the right to cross-examine any witness under N.J.S.A. 40:55D-10(d) during that meeting. Plaintiff had the opportunity to cross-examine 9001 River's witnesses multiple times when they testified during

previous meetings. Contrary to plaintiff's assertion, its counsel had the opportunity to make a closing argument. The Board was not required to allow for public comment during the October 13, 2020 hearing but previously had permitted the public to comment on 9001 River's application. We perceive no procedural deficiency in connection with the October 13, 2020 meeting.

D.

To the extent we have not otherwise commented on them, we have considered plaintiff's other points and conclude they lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION