SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2309-19

800 SYLVAN AVENUE LLC,

Plaintiff-Appellant/
Cross-Respondent,

v.

THE PLANNING BOARD OF
THE BOROUGH OF
ENGLEWOOD CLIFFS,

Defendant-Respondent/
Cross-Appellant,

and

CARIN GEIGER,

Intervenor-Respondent.

———————————————————

Argued October 24, 2022 – Decided August 16, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9088-17.

Andy S. Norin argued the cause for appellant (Faegre Drinker Biddle & Reath LLP, attorneys; Andy S. Norin, of counsel and on the briefs; Angela R. Raleigh, on the briefs).

Joshua A. Zielinski argued the cause for respondent Planning Board of the Borough of Englewood Cliffs (O'Toole Scrivo, LLC, attorneys; Joshua A. Zielinski, of counsel; Lawrence S. Cutalo, of counsel and on the brief; Nicholas P. Whittaker, on the briefs).

Carin Geiger, respondent pro se.

PER CURIAM

We review cross-appeals from the trial court's denial of reconsideration of its January 17, 2020 order reversing a decision of the Englewood Cliffs Planning Board (Board). After the Board denied plaintiff 800 Sylvan Avenue LLC's application for a preliminary and final major site plan and subdivision with variances to renovate and build a commercial office and garage complex, plaintiff appealed to the Law Division. The trial court reversed the Board's denial and entered an order approving plaintiff's application in part. The trial court also remanded one of the plaintiff's variance applications to the Board for consideration as to whether plaintiff could demonstrate special reasons required for a variance under N.J.S.A. 40:55D-70(d). When both parties sought reconsideration of the initial order, the trial court denied it, finding the matter was moot because plaintiff reached a settlement agreement with the Borough of

Englewood Cliffs (Borough) to construct several hundred units of affordable housing on the property. For the reasons that follow, we affirm in part, vacate in part, and remand in part.

I.

A.

On the site of the former Unilever corporate campus, plaintiff owns an approximately twenty-eight-acre property located at 800 Sylvan Avenue in the Borough of Englewood Cliffs (Borough), consisting of three multipurpose interconnected buildings ("A," "B-2," and "B-3"). Two additional buildings ("B-1" and "C"), are owned by One Level Remainder LLC, and First Englewood Property LLC. Unilever continues to lease and occupy buildings B-1 and C. The property is currently used for general office space, research, and storage, and is located in the B-2 Limited Business District zone.

On May 17, 2017, plaintiff applied for a preliminary and final major site plan and subdivision approval with variances, pursuant to N.J.S.A. 40:55D-70(c) and (d). Plaintiff sought to: (1) subdivide the property into two lots with proposed Lot 1 comprising of the new office building (building A and B-3) and approximately 20.039 acres and proposed Lot 1.01 comprising of buildings B-1 and C and approximately 8.332 acres; (2) demolish building B-2 and demolish

portions of other structures on the lot to create two separate buildings; and (3) refurbish and rebuild approximately 266,655 square feet and construct an additional 26,069 square feet of office space and construct two new parking structures on proposed Lot 1. Plaintiff's application sought multiple (c) variances, as well as one (d)(6) variance. Plaintiff noted in its application that it did not believe any other (d) variances were required, but that if the Board, in its judgment, required additional (d) variances, plaintiff applied for those variances as well.

Specifically, plaintiff sought a height variance for the new office building. Buildings located in the B-2 zone are subject to a maximum height of thirty-five feet and two stories. While there was some dispute between plaintiff and the Board on how to calculate building height for purposes of the determining compliance with the ordinance, plaintiff ultimately stipulated it was seeking a (d) variance for the buildings' height.

Plaintiff also sought variances to construct two parking structures. The first parking structure, located immediately adjacent to the building, proposed two levels approximately twenty-four feet high, 181 parking spaces. Plaintiff proposed that the structure's upper level would be on a slope and "at the same exact elevation" as the main lobby entrance of the building. The second smaller

parking structure was proposed for the northeast side of the site and would be constructed only if required by the needs of a future tenant. The second structure also called for two levels with a proposed height of forty-five feet, and it would add a net thirty-four additional parking spaces.

The lower level would be "at the same grade as the existing grade immediately adjacent to it on the east" while the upper level would be at the same elevation as the surface parking structure to the immediate west. The Borough did not permit accessory buildings in its B-2 zone to be more than fourteen feet high. Zoning Ordinance § 30-7.2(c).

The deed notice for the subject property stated that the Board retained jurisdiction to allow front yard parking if needed. Accordingly, plaintiff asked the Board to grant parking variance relief pursuant to the deed restriction in its application.

The Borough's ordinances prohibited parking structures in the front yard and off-site parking for Lot 1.01. Zoning Ordinance § 30-7.2(a)(4) (prohibiting "accessory building[s] . . . in the front yard"); Zoning Ordinance § 30-7.2(a)(5) (prohibiting the construction of "accessory building[s] . . . for parking garages in the . . . B-2 . . . zone[]"); Zoning Ordinance § 30-10.1(e) (prohibiting "above grade parking[.]"); Zoning Ordinance § 30-10.2(f) (prohibiting off-street

parking in front yard); Zoning Ordinance § 30-10.1(g) (prohibiting off-site parking); and Zoning Ordinance § 30-10.1(i) (prohibiting "parking in the required front yard").

Because plaintiff was proposing a subdivision, it required variances for the total number of parking spaces for the property. The entire property was required to have 1,776 spaces, but plaintiff was proposing a total of 1,404 spaces. On Lot 1, plaintiff proposed a total of 977 spaces but 1,310 were required. Lot 1.01 required 466 spaces, but plaintiff proposed 156. Plaintiff proposed a reciprocal easement on Lot 1 with 270 parking spaces reserved for Lot 1.01. Plaintiff also requested other variances, including: fewer loading spaces than required; shorter parking stalls; shorter parking aisles; higher retaining walls; and a differently configured stormwater management system.

B.

The Board conducted a four-day hearing on: July 26, 2017; August 10, 2017; September 14, 2017; and October 12, 2017. It heard lay and expert testimony, took public comment, and considered evidence. Plaintiff called five witnesses: Senior Vice President of Normandy, Kris Bauman; architect John Gering; civil engineer Patricia Ruskan; planner John McDonough; and traffic

engineer William Lothian. The Board called planner Jason Kasler and traffic expert John Jahr.

At the October 12 meeting, plaintiff made alterations to the proposal in response to concerns expressed by the Board and members of the public. Among other things, plaintiff shifted the subdivision line to where it was originally proposed and agreed to demolish building B-2 within one year of perfecting the subdivision.

After the record was closed, the Board adopted a resolution memorializing its decision on November 8, 2017. Regarding the front yard parking, the Board found as follows:

> For a person standing on [Route] 9W, looking straight at the garage, the height differential from 9W would be approximately [seventeen] feet to the top level of the parking garage and another [twenty-five] feet to the top of the light structures. The Board found that this presented an issue as to visibility of the structure from Route 9W.

The Board further found "the structure as presented will be visible from 9W and could be placed in another location." The Board also found "[t]he proposed parking structure will necessitate a very dense population of Evergreen plantings in order to provide screening, which will delineate the two lots and impair the unified campus character of the site."

The Board found McDonough's "testimony did not adequately address the criteria for the granting of the subdivision and site plan." It also found plaintiff did not meet its burden of establishing a public benefit to warrant variance relief for off-site parking. The Board also credited its expert planner's opinion that the proposal was skewed in favor of modernizing Lot 1 but left Lot 1.01 with "severe under-parking . . . [and] to be modernized in the future."

The Board's resolution concluded plaintiff's application contravened the borough's ordinances and Master Plan, which "envisioned a campus-like setting on the subject site, and the subdivision with related variances would not effectuate that plan. The Board wishes to avoid other non-conforming subdivisions of the subject property." The Board cited the 2009 Master Plan Examination Report discussed dividing the B-2 zone into the B-2 zone and the B-5 zone. Kasler, who prepared the 2009 report, recommended "that the town should maintain a larger lot size in the B-2 zone . . . ." It also cited the subsequent 2016 Master Plan amendment, which "notes the significant difference in character between the northern segment of Sylvan Avenue, . . . and the southerly segment . . . ."

According to the Board, the testimony demonstrated the proposed subdivision was for the purpose of financing the project but plaintiff failed to

establish "it could not obtain financing without the subdivision, or that it even attempted to do so . . . ." The Board also took issue with the off-site parking because two-thirds of the parking for Lot 1.01 would be on Lot 1.

The Board concluded plaintiff "did not demonstrate that the public benefits of the subdivision outweigh the detriments." Regarding the off-site parking, the Board's resolution found plaintiff did not "meet its burden of demonstrating the 'positive' and 'negative' criteria to justify granting of the variances as is required by N.J.S.A. 40:55D-70(c)(2)." Regarding the second proposed parking structure, the Board also found plaintiff failed to demonstrate the benefits outweighed the detriments.

Ultimately, the Board denied the application, finding it

> does not conform to the requirements of the Borough, it is not consistent with the Master Plan and Zone requirements and may not be granted without substantial detriment to the public, safety, health and general welfare and will deter the efforts of the Borough to effectuate the general purposes of municipal planning.

C.

On December 22, 2017, plaintiff filed a complaint in lieu of prerogative writs challenging the Board's denial of their application on the grounds that it was arbitrary, capricious, and unreasonable. The complaint also alleged, among

other grounds, that the Board's findings were "incorrect as a matter of law." Carin Geiger,[1] a resident of Englewood Cliffs filed a motion to intervene, which the court granted on March 29, 2018.

After oral argument, the trial court issued an order accompanied by a written statement of reasons. The court reversed the Board's denial of plaintiff's application and granted the application. The court also ordered a limited remand for the Board to consider: (1) "whether [p]laintiff's proposed parking structures satisfy the special reasons required to obtain a variance pursuant to N.J.S.A. 40:55D-70(d)(1)[;]" and (2) "whether [p]laintiff is entitled to a modification of the . . . Board's prior condition of approval prohibiting parking in a portion of the front yard . . . as memorialized by a deed dated September 11, 1986 . . . ."

The court found the Board's "denial of [p]laintiff's subdivision application was arbitrary, unreasonable, and capricious . . . ." The court noted plaintiff's proposal would maintain the existing parking arrangement between Lot 1 and Lot 1.01 and that the reciprocal easement "would mirror" the rights in the Master Deed. The court also found the Board erroneously relied on the 2009 Master

[1] Geiger testified during the hearing. She addressed concerns about parking, trees, and lighting issues in plaintiff's application.

Plan Recommendation, which proposed larger lots in the B-2 zone because that recommendation was rejected in the 2016 amendment.

In addition, the court found plaintiff's proposal would not change the current parking arrangement. Although the court noted the Board's reliance on an issue arising should another occupant obtain Lot 1.01, it concluded that this claim "is without support in the record and ignores the legal effects of the easements which run with the land." The court noted that any new occupant would require business zoning approval from the Board.

Regarding the proposed parking deck, the court found "the ordinance as written requires all parking to be a[t] grade level and prohibits parking structures." The court determined the ordinance's language was unambiguous and required a (d) variance for which plaintiff had to "prove special reasons." Although the court remanded the issue for the Board's consideration, she noted the borough's expert testified the front yard was the only viable location for the structure and the chairman's comments regarding the structure's visibility from Route 9W "appear to be without support in the record."

The court determined no variance was required for surface parking because Zoning Ordinance § 30-10.1(h) allowed "off street parking not directly related to the building parking requirements" without Board approval. Because

there was nothing in the record supporting the proposition that the subdivision and easement would violate Zoning Ordinance § 30-10.1, the court found the Board's denial unreasonable.

The court found "that the property []as a whole has more than sufficient parking." Despite a possible future tenancy change in Lot 1.01, the Board's under-parking concerns were unfounded because of the proposed reciprocal easement. Also, although the court did not believe a (c)(2) variance was required, plaintiff nonetheless met the standard to obtain one. The court outlined the various benefits of plaintiff's proposal and reasoned the Board failed to present evidence to rebut these benefits.

Regarding the deed restriction, the court noted it was public record. It ordered the Board to consider the deed restriction on remand when evaluating the front yard parking structure issue.

Plaintiff filed a motion for reconsideration of the order, challenging the court's decision that the parking structure required a (d) variance, and requesting the court consider whether plaintiff was entitled to relief from the prior condition of approval as stipulated in the deed notice. Defendant cross-moved for reconsideration of the entire order. At oral argument, the court raised the issue of whether this matter would be rendered moot by the borough's pending

affordable housing litigation.[2] On January 17, 2020, the trial court found the cross-motions for reconsideration were moot because the court had both the affordable housing litigation and the planning board litigation before it simultaneously. The court also concluded the Borough was constitutionally non-compliant with its Mt. Laurel obligations. As such, it directed 800 Sylvan Ave to be rezoned for affordable housing and found the cross-motions for reconsideration to be moot.

Both parties appealed from the denial of reconsideration.

Plaintiff makes several arguments on appeal: the matter is not moot; the trial court erred in determining that the proposed accessory parking structures

---

[2] In re Borough of Englewood Cliffs, No. BER-L-6119-15 (Law Div. Dec. 22, 2015) (slip op. at 1). Plaintiffs intervened in a declaratory judgment action filed by the Borough to determine its compliance with ongoing Mt. Laurel obligations. In 2017, plaintiff filed a builder's remedy suit against the Borough seeking a court order zoning 800 Sylvan Ave for affordable housing. On October 8, 2020, plaintiff and the Borough reached a settlement agreement to rezone the property to "permit the construction of up to 450 units consisting of affordable units and market units, . . . on the portion of the 800 Sylvan Property, consisting of approximately [twenty] acres. . . ." That same day, the trial court entered a consent order memorializing the settlement agreement. The consent order also extinguished the deed restriction for the property stating, "there shall be no restriction upon the location of parking for vehicles on [the property] . . . ." On May 24, 2021, the court entered a final judgment in the action. On July 6, 2021, the Borough filed a notice of appeal challenging the settlement agreement.

require a (d) rather than a (c) variance; plaintiff satisfied (c) variance criteria for the proposed accessory parking structures and was entitled to a modification of the deed restriction prohibiting front yard parking. Defendant argues on cross-appeal that: the trial court was correct in determining the matter was moot, but if we decide the matter is not moot, the trial court erred when it reversed the Board and granted plaintiff's subdivision application and permitted off-site parking.

II.

We review a trial court's denial of a motion for reconsideration for abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). A motion for reconsideration is "primarily an opportunity to seek to convince the court that either 1) it has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence." Kornblueth v. Westover, 241 N.J. 289, 301 (2020) (quoting Guido v. Duane Morris LLP, 202 N.J. 79, 87-88 (2010)). Reconsideration "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion . . . ." Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010).

"When reviewing a trial court's decision regarding the validity of a local board's determination, 'we are bound by the same standards as was the trial court.'" 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)). Therefore "[w]e give deference to the actions and factual findings of local boards and may not disturb such findings unless they were arbitrary, capricious, or unreasonable." Ibid.

A zoning board's 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) (citing Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002)). Given all due deference to the decision of a board, the trial court must determine whether the board's resolution is supported by the "substantial evidence in the record" standard. Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 59 (1999). Additionally, the resolution cannot merely recite conclusory findings but must include a reasoned explanation, supported by the evidence presented. Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div. 1988).

"Because variances should be granted sparingly and with great caution, courts must give greater deference to a variance denial than to a grant." N.Y. SMSA, L.P. v. Bd. of Adjustment of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004) (citing Nynex Mobile Commc'ns Co. v. Hazlet Twp. Zoning Bd. of Adjustment, 276 N.J. Super. 598, 609 (App. Div. 1994)). Accordingly, the party challenging the denial of a variance "bears a heavy burden." Ibid. (quoting Pierce Ests. Corp. v. Bridgewater Twp. Zoning Bd. of Adjustment, 303 N.J. Super. 507, 515 (App. Div. 1997)). A Board's legal determinations, however, are not presumed valid and are reviewed de novo. Jacoby, 442 N.J. Super. at 462.

III.

A.

"An issue is 'moot when our decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'" Redd v. Bowman, 223 N.J. 87, 104 (2015) (quoting Deutshe Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 221-22 (App. Div. 2011)). In other words, "a case is moot if the disputed issue has been resolved, at least with respect to the parties who instituted the litigation." Enron (Thrace) Expl. & Prod. v. Clapp, 378 N.J. Super.

8, 13 (App. Div. 2005) (quoting Caput Martuum v. S. & S., 366 N.J. Super. 323, 330 (App. Div. 2004)).

Plaintiff relies on Price v. Martinetti, 421 N.J. Super. 290 (App. Div. 2011), in support of the argument that the appeal is not moot. In Martinetti, we held that a developer who obtains separate and distinct land use approvals for two projects on the same site does not forfeit the benefit of the first approval. Id. at 299-300. We found the board of adjustment failed to condition the subsequent approval on recission of the prior approval. The record showed communication between the developer and the municipality tending to prove the developer had not "abandoned" its prior approvals. Id. at 296-97. Further, the court examined the MLUL, and concluded "[t]here is nothing in those provisions indicating that a property owner who has obtained the variances required for one form of development loses the benefits of those variances simply by obtaining the variances required for a different form of development." Id. at 298.

The record before us is distinguishable. The developer in Martinetti had not entered into a settlement agreement with the municipality. Id. at 290. Here plaintiff has pursued appeals in both development projects.

On April 17, 2020, the trial court voided the borough's zoning ordinances and appointed a Special Hearing Officer to review and make recommendations

regarding the property. In the affordable housing litigation taking place simultaneously, the court approved a settlement agreement between plaintiff and the Borough to construct 450 units of affordable housing on the property, and also entered a consent order extinguishing the deed restriction at issue in this appeal.

It is undisputed that plaintiff cannot proceed with both projects. However, the presence of the ongoing affordable housing litigation does not mean plaintiff has forfeited the approval of its site plan and variance application as memorialized it the trial court's March 2019 order. The housing settlement agreement was not conditioned on plaintiff relinquishing its rights in this litigation. The settlement agreement also contains a provision acknowledging this litigation and agreeing to relinquish all appellate rights arising out of the affordable housing litigation. There are no other references to this matter in the settlement agreement.

The parties' acknowledgement that the planning board litigation continued while the parties settled the housing litigation shows they both expected to continue the planning board litigation, regardless of the housing litigation settlement. Where the settlement agreement in the affordable housing matter

did not require plaintiff to relinquish its right to pursue alternative development options on the property, we conclude this appeal is not moot.

B.

Defendant argues the trial court erred in approving the subdivision of the property because the Board's denial was amply supported by the record. We are not persuaded.

If a subdivision application meets the local ordinances and provisions of the MLUL, the Planning Board must approve it. Pizzo Mantin Grp. v. Twp. of Randolph, 137 N.J. 216, 229 (1994). N.J.S.A. 40:55D-48 states "[t]he planning board shall, if the proposed subdivision complies with the ordinance and [the MLUL], grant preliminary approval to the subdivision." The Pizzo Court found the MLUL

> evinces a legislative design to require consistency, uniformity, and predictability in the subdivision-approval process. The legislative scheme contemplates that a planning board's review of a subdivision proposal, including the layout of the entire design, must be made within the standards prescribed by the subdivision and . . . the zoning ordinances.
>
> [137 N.J. at 229.]

We turn to the borough's relevant land use standards. The purpose of the borough's subdivision ordinance is "to provide rules, regulations and standards

to guide land subdivision in the borough in order to promote the public health, safety, convenience and general welfare of the municipality." Zoning Ordinance § 15-2. Further, Zoning Ordinance § 15-8.1 states a "subdivision plat shall conform to design standards that will encourage good development patterns within the municipality."

The 2016 Master Plan Amendment states:

> the Limited Business area is principally intended to promote office development and is broken up into two distinct segments along Sylvan Avenue. The northerly segment possesses a different character than its southerly counterpart. It contains large corporate campus facilities for CNBC, Unilever and others which are well-suited to the large tracts located along the westerly frontage of Sylvan Avenue (the easterly frontage is undevelopable). The low-rise form of those campuses is appropriate considering the residential neighborhood located to the west and the substantial depth and frontage of each property. However, a more intensive development scheme (i.e., with buildings taller than [thirty-five] feet) would be challenging to implement without creating detrimental impacts on residential areas. Consequently, the current zoning scheme for the northerly segment of the Limited Business area – which encourages low-rise corporate campus uses – remains appropriate.
>
> [(Emphasis added).]

Taking the reasons for denial in sequence, the trial judge noted the 2009 Master Plan Examination Report, which proposed dividing the northern portion

of Sylvan Avenue into a B-5 and B-2 zone, "was never adopted nor codified." Instead, the court found the 2016 Amendment, which did not recommend any changes for the B-2 zone, should have controlled.

Next, the court found plaintiff met its burden to show various benefits to the community. The Board hearing record contains more than sufficient evidence demonstrating the benefits of plaintiff's proposal, including: aesthetic improvement along Sylvan Avenue; modernization of the property; a net increase of trees and green space to the site; and improved circulation throughout the property.

The Board's concern that plaintiff did not propose to improve Lot 1.01 is not dispositive. Unilever currently occupies the lot and will continue to do so for approximately another fourteen years. Plaintiff does not own Unilever, and there is no evidence in the record to suggest that Unilever needed to make any changes to its building. Plaintiff cannot modernize a structure it does not control.

Although the Board also expressed concern regarding a future tenant once Unilever's lease expires, the trial court noted:

> The record is unrefuted that the proposed [reciprocal easement agreement] would continue the use of the parking lot as it currently exists without issue. It would continue to provide onsite flexibility as to parking. The

> subdivision, together with the [easement] has no present or future effect on the parking. The [b]orough [e]ngineer's observation that the two uses presently extant, while they presently cohabitate, might not in the future is without support in the record and ignores the legal effects of the easements which run with the land.

As the trial court noted, plaintiff's proposal also included a reciprocal easement agreement, which would keep the current parking arrangements in place. The record supports the trial court's findings, and we affirm as to this question.

C.

Plaintiff contends that the trial court erred by applying a (d) variance standard to its proposed accessory parking structure variance standard. We are unpersuaded. The trial court found a plain reading of Zoning Ordinance § 30-7.2(a)(4) prohibited parking structures and further mandated that the surface parking be at grade level. Given the language of the ordinance, the court correctly concluded that plaintiff's application for a proposed accessory parking structure required a (d) variance analysis, including a showing of "special reasons." The trial court's analysis was sound, and we see no basis under our standard of review to disturb its order on this question. We express no opinion as to the outcome of plaintiff's parking application upon remand.

The deed restriction which prohibited parking was extinguished by the October 8, 2020 order. The record shows that the order is now recorded with the Bergen County Clerk, consequently it is of no further force and effect.

Finally, because this planning board litigation is not moot, we affirm the trial court's denial of reconsideration of its order granting plaintiff's planning board application. We also affirm in part the court's partial remand to the Board for consideration of plaintiff's proposed accessory parking structure application as a request for a (d) variance. However, we vacate the portion of the trial court's order remanding the deed restriction issue to the Board.

Affirmed in part, vacated in part, remanded in part. We do not retain jurisdiction.