SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2771-21

HELEN NISSENBAUM,

Plaintiff-Appellant,

v.

TRUSTEES OF PRINCETON UNIVERSITY and PRINCETON PLANNING BOARD,

Defendants-Respondents.

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Argued September 11, 2023 – Decided September 28, 2023

Before Judges Gilson, Berdote Byrne and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1405-21.

Bruce I. Afran argued the cause for appellant.

Gerald J. Muller argued the cause for respondent Princeton Planning Board.

Jonathan I. Epstein argued the cause for respondent Trustees of Princeton University (Szaferman, Lakind,

Blumstein & Blader, PC, attorneys; Jonathan I. Epstein and Jessica L. Peslak, on the brief).

PER CURIAM

Plaintiff, Helen Nissenbaum, a Princeton resident, appeals from a March 29, 2022 order dismissing her complaint in lieu of prerogative writs against defendants Trustees of Princeton University (Princeton) and Princeton Planning Board (Planning Board). After considering the record and the applicable law, we affirm.

We summarize the pertinent facts and procedural history, which are wholly undisputed. On July 2020, Princeton filed an application with the Planning Board for preliminary and final site plan approval for the construction of a 408-feet by 80 feet wide and 35-feet tall single-story building divided into two sections: the northern section would house 11,275 square feet of athletics operations space to support Princeton's athletic programs with an exterior equipment yard of 5,100 square feet and 22 feet tall; and the southern section would have 24,410 square feet of geo-exchange resources housing to heat and cool university buildings (TIGER facility) and also house equipment and electrical rooms at ground level with some limited mezzanine space for mechanical equipment and storage (collectively, the Project). The purpose of

the TIGER facility would be to "expand [Princeton's] capacity to deliver thermal energy to the campus without the use of fossil fuels."

The proposed site is approximately 4.5 acres within Block 50.01, Lot 18[1], and generally situated east of FitzRandolph Road between Faculty Road and the driveway serving 185 Broadmead Street. The proposed TIGER facility also includes space for occasional tours to educate the public and showcase the state-of-the-art geo-exchange technology.

In addition to the main building, the proposed plan has two Thermal Energy Storage Tanks (TESTs) to store water to be utilized to heat and cool the campus located on the south side of the Project site to allow for significant landscape screening. The heights of the TESTs, at 51 feet and 47 feet, 10 ½ inches, are well below the maximum building height of 100 feet. The site plan also included two MVA electrical transformers and a site generator on the south side.

[1] Lot 18, encompassing about 140 acres, is in Princeton's E-1 Education Zone, and is the location of a large part of the university athletic facilities: Jadwin Gymnasium, Caldwell Fieldhouse, Weaver Track Stadium, Powers Field, Princeton Softball Stadium at Strubing Field, Clarke Field, Finney Campbell Field, Particle Lab West and DeNunzio Pool.

Following a hearing, the Princeton Site Plan Review Advisory Board unanimously recommended the Planning Board approve Princeton's application as a "major site plan."

The Planning Board conducted a public hearing on five days over the course of three months. It heard lay and expert testimony concerning Princeton's effort to achieve carbon neutrality in the construction and overall design of the Tiger facility which showcased "leading-edge technology" and the operational noise levels at the nearest residential property lines, which would be below noise levels permissible under the New Jersey noise code. Princeton's counsel also clarified the Project did not entail drilling for wells or bores.

Princeton also presented preliminary and final site architectural, civil engineering, fire protection, stormwater and landscape plans; acoustical reports; memoranda; and exhibits.

Additionally, municipal officials and Board consultants presented reports and testimony that the Project was a permitted use in the E-1 Zone because "heating facilities and athletic facilities are obviously accessory uses on a [u]niversity campus." Testimony was also presented that confirmed the noise level was at a permissible level when the facility would be in operation. The Board heard and Princeton addressed public comments concerning the Project's

consistency with the neighborhood aesthetic, noise level, and the improvements made to keep operational sound below ambient levels.

Plaintiff opposed Princeton's application, expressing concern that the Project as designed would negatively impact the surrounding area, the TIGER facility was not a permitted accessory use in the E-1 Zone, and, as a result, the Board lacked jurisdiction. Plaintiff's counsel cross-examined both Princeton and the Board's witnesses but did not present expert testimony.

On May 20, 2021, after the record was closed, the Board adopted a Resolution memorializing its May 11, 2021 decision approving Princeton's preliminary and final site plans. The Board found "the proposed TIGER use [was] designed to serve additional heating and cooling demands of new buildings." The Board further found "[w]hile [the TIGER facility] is a state-of-the-art technology, it falls within the same category of prior-generation uses that serve the same purpose, power plants being the most obvious example, and ones clearly accessory to the primary educational uses, which they support." The Board concluded the TIGER facility is a permitted accessory use within an E-1 zoning district pursuant to Princeton Zoning Code §10B-263(d); and, accordingly, the Board had jurisdiction over the matter.

Thereafter, plaintiff filed a prerogative writs action challenging the Planning Board's resolution. Defendants filed answers to plaintiff's complaint.

After oral argument, Judge Robert Lougy entered a March 29, 2022 order and a comprehensive written statement of reasons, dismissing plaintiff's complaint with prejudice.

The judge explicitly "rejected plaintiff's claim that the Planning Board's decision finding that the TIGER facility [was] a permitted accessory use was arbitrary, capricious, or unreasonable or lacked sufficient evidence in the record to support this finding." The judge then concluded "the record contain[ed] sufficient documentary and testimonial evidence, and the Resolution ma[de] sufficient findings to support the Board's conclusion that the proposed TIGER facility satisfie[d] Section 10B-226(c)." The judge stated the "Board articulate[d] three reasons [in the Resolution] as to why the TIGER facility harmoniously relate[d] to its surroundings: the aesthetics of the building, the front of the building faces a [u]niversity road, and the facility's orientation toward other [u]niversity buildings."

The judge also determined the Planning Board reasonably delegated authority to engineering experts to monitor compliance and implement remediation measures if not in compliance with the noise standards and

conditions set out in the Resolution. Similarly, the Board properly delegated authority to its expert engineer to implement the noise compliance and remediation program imposed by Condition 15(i) of the Resolution. Lastly, the judge did not find the TIGER preliminary and final site plan application was incomplete or that the Board lacked jurisdiction.

On appeal, plaintiff iterates the arguments presented before the Planning Board: the TIGER geothermal plant is not a permitted accessory use; the Board improperly delegates its function concerning the adverse impacts of the facility to its engineer and Princeton's experts; the Board made inadequate and erroneous findings regarding the harmonious relation of the Project to Princeton Zoning Code § 10B-226(c); and the Board lacked jurisdiction over an incomplete application.

After reviewing the record, we affirm for the reasons stated by Judge Lougy, and we need not address plaintiff's contentions at length. We add the following comments.

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)).

"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)). Giving all due deference to the decision of a board, the trial court must determine whether the board's resolution is supported by "substantial evidence in the record." 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 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., 172 N.J. at 81 (alteration in original) (quoting N.Y. SMSA Ltd. P'ship v. Bd. of Adj. of Bernards, 324 N.J. Super 149, 163 (App. Div. 1999)). "Accordingly, we will not disturb a board's decision unless we find a clear abuse of discretion." Cell S. of N.J., 172 N.J. at 82. However, a planning board's conclusions of law are subject to de novo review. Nuckel v. Bor. of Little Ferry Planning Bd., 208 N.J. 95, 102 (2011).

Plaintiff argues Princeton requires a use variance for the Project under N.J.S.A. 40:55D-70(d)(1). We are not persuaded. Under Princeton Zoning Code 10B-263(d), "accessory use" is defined as "the use of a structure or lot or portion thereof, which use is customarily incidental and subordinate to the main use of the structure or lot."

"[A]n accessory use is implied as a matter of law as a right which accompanies a principal use." Shim v. Washington Twp. Planning Bd., 298 N.J. Super. 395, 401 (App. Div. 1997). "Zoning ordinances which permit 'customarily incidental' accessory uses to the main activity permit, by implication, any use that logic and reason dictate are necessary or expected in conjunction with the principal use of the property." Charlie Brown of Chatham, Inc. v. Bd. of Adj. for the Twp. of Chatham, 202 N.J. Super. 312, 323 (App. Div. 1985) (internal citation omitted).

Here, the principal use of a portion of the approximate five acres is for the TIGER facility and athletic operations. There is sufficient evidence in the record the Project's two-fold purpose of housing athletic operations and the TIGER facility which will provide heating and cooling for other university building serves as an accessory use to Princeton's main purpose as a post-secondary institution. As an accessory use, Princeton did not require a use variance. We

are satisfied the record sufficiently supports the judge's finding that the TIGER facility and athletic operations would be incidental and subordinate to Princeton as an accessory use.

Also, we are satisfied that the Board's resolution complied with the requirements of N.J.S.A. 40:55D-10(g) and provided the basis for the Board's decision. Because plaintiff did not present any opposing expert testimony at the hearing, the Board accepted the testimony of Princeton's expert witnesses and municipal staff and made findings based on the documents and testimony presented. Further, the resolution analyzed the site plans under § 10B-226 of the Municipal Code and concluded Princeton satisfied all statutory criteria.

To the extent not addressed, plaintiff's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1).

Affirmed.