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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1978-22**

KBS MT. PROSPECT LLC,

Plaintiff-Appellant,

v.

**LAKWOOD TOWNSHIP
PLANNING BOARD, and
SUDLER LAKEWOOD LAND,
L.L.C.,¹**

Defendants-Respondents.

Argued May 29, 2024 – Decided June 12, 2024

Before Judges Sumners and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0153-22.

Bernard M. Reilly argued the cause for appellant (Gasiorowski & Holobinko, and Bernard M. Reilly LLC, attorneys; Ronald S. Gasiorowski, on the briefs).

John Joseph Jackson III argued the cause for respondent Lakewood Township Planning Board (John J. Jackson

¹ Improperly pled as Sudler Lakewood, LLC.

III & Associates, Attorneys at Law, LLC, attorneys; John Joseph Jackson III, of counsel; Jilian Lee McLeer, on the brief).

Anthony R. Todaro argued the cause for respondent Sudler Lakewood Land LLC (Faegre Drinker Biddle & Reath LLP, attorneys; Anthony R. Todaro, on the brief).

PER CURIAM

After a bench trial, plaintiff KBS Mt. Prospect, LLC appeals from a January 5, 2023 Law Division order entering final judgment dismissing its complaint in lieu of prerogative writs against defendants Sudler Lakewood Land, LLC (Sudler) and Lakewood Township Planning Board (Board). The trial judge's order affirmed the Board's approval of Sudler's application for a minor subdivision and final site plan. We affirm.

I.

We derive the pertinent facts and procedural history from the record. Sudler owned fifty-nine acres (the property) located on Block 1160, Lots 240 and 251, in Lakewood Township. The property was in an industrial M-1 zoning district and had frontage on Oak Street and Towbin Avenue, a partially improved public road. Lot 240 was approximately four acres with a pre-existing masonry warehouse and frontage along Oak Street. Lot 251 was approximately fifty-five acres with frontage along Oak Street and an unimproved portion of Towbin

Avenue. A large area of Lot 251 was designated protected wetlands subject to New Jersey Department of Environmental Protection restrictions. KBS owned an adjacent property.

In 2014, Sudler applied to the Board for a preliminary and final major site plan approval to construct two new warehouses on Lot 251 with a shared access U-shaped driveway and accessory improvements to the existing warehouse on Lot 240. After public hearings, the Board approved the application by resolution including Sudler's request for: a variance for a buffer; a design waiver for "providing sidewalks along the frontage" and street trees; and a design waiver "to allow two driveways per 275 feet of lot frontage."

In February 2021, Sudler applied for a minor subdivision and final site plan approval, "proposing to subdivide . . . Lot 251 and reconfigure . . . Lot 240 in order to create two additional lots." Sudler sought to divide Lot 251 into: Lot 251.01, approximately 7.7 acres; Lot 251.02, approximately 7.05 acres; and Lot 251.08, approximately 40.21 acres. Lot 240 was proposed to gain approximately 134 square feet. The existing buildings located on designated Lots 240, 251.01, and 251.02 remained unchanged. Newly proposed Lot 251.08 was unimproved and had a large section of wetlands. The application provided "no change" to the "[w]arehouse" use. In addition to the subdivision creating four separate lots,

Sudler's application also proposed access easements on Lots 240 and 251.01 permitting entry to Lot 251.08.

After Sudler's application was deemed complete, Sudler provided timely public notice. At the ensuing Board hearing, Sudler's counsel summarized the proposed subdivision, and its expert engineer Christopher Szalay testified. Counsel represented the application included only previously granted or preexisting variances and design waivers, proposed "[n]o new buildings," and planned for "absolutely nothing" to be "done to th[e] site." He clarified the application did not "in any way chang[e] what was . . . approved" in 2014. Counsel represented the application was filed "[b]ecause of financing." Further, it was represented that there were no current development plans. Sudler recognized any future development on the unimproved land would require another application before the Board. Szalay affirmed that he "agree[d] with everything" Sudler's counsel presented and addressed utilities and sidewalk placement.

KBS's counsel opposed the application but proffered no opposing expert. Counsel objected to the allegedly "partially completed engineering plans," arguing there was an "overuse of the property" and insufficient notice. He requested Sudler agree to "[n]ever use the proposed easements as a major egress,

and . . . only ingress and egress into the back property [Lot 251.08]." KBS opposed the subdivision because approving access easements "give[s] access to basically a [landlocked] piece of property." Because the application concerned the property's current use and Lot 251.08 was undeveloped, the Board rejected KBS's objections as unsupported and noted any future development of Lot 251.08 required a new application. The Board unanimously approved the application.

On December 14, the Board memorialized its approval of Sudler's minor subdivision and final site plans in Resolution SD#2480. The Board found:

1. The applicant seeks minor subdivision and site plans to subdivide Lots 240 and 251 in Block 1160 into 4 new lots. The proposed properties would be new Lots 240, 251.01, 251.02, and 251.08 as shown on the plans. Existing building will remain on proposed Lots 240, 251.01, and 251.02. Proposed Lot 251.08 would remain vacant. Minor site plans approvals are required to address the reduced sized properties.
2. The site is in the southern portion of the Township in the Lakewood Industrial Park, southwest of the airport. The land has frontage along the northern side of Oak Street and the eastern side of Towbin Avenue. Oak Street is an improved municipal roadway with a 60' wide right-of-way. Curb exists along Oak Street, but sidewalk does not. Towbin Avenue is partially improved along the site frontage but is mostly an unimproved roadway. Towbin Avenue has a 60' wide right-of-way.

3. The existing properties contain about 59 acres. Lot 240 is a rectangular site of about 4 acres with frontage on Oak Street and contains an existing one-story masonry building. Lot 251 is an irregular parcel of approximately 55 acres containing 2 large buildings. The building along Towbin Avenue is completed and occupied by a tenant. The building along Oak Street is nearing completion. A large portion of the tract is indicated as wetlands and part of critical wildlife habitat to be preserved under an existing [Coastal Area Facility Review Act (CAFRA)] Permit. Virtually all the wetlands will be located on the proposed large vacant lot. However, a couple of access easements are proposed for potential future development of a section void of wetlands.

4. Proposed Lot 240 would remain virtually unchanged in size containing 4.04 acres with frontage along Oak Street. The existing one-story masonry building will remain. Site improvements were recently constructed along the eastern property line in accordance with SP#2079. In addition to a minor conveyance, this property is part of the subdivision because an access easement is being proposed through the site. Proposed Lot 251.08 would contain 40.21 acres, remain vacant, and have frontage along the unimproved portion of Towbin Avenue. Proposed Lot 251.01 would become an "L" shaped tract and contain 7.70 acres with frontage along Oak Street. The 74,000SF building on this proposed lot is nearing completion. Proposed Lot 251.02 would contain 7.05 acres and have frontage along Towbin Avenue. This proposed site would contain the existing 40,000SF building. The proposed minor subdivision has been designed for all new lots to meet the minimum area requirement for the zone of 3 acres.

The Board granted the requested variances reasoning they were "pre-existing, unique conditions affecting the property which result[ed] in a hardship to" Sudler. Approval was conditioned on Sudler "resubmit[ing] th[e] entire proposal for re-approval should there be any deviation from the terms and conditions of th[e] resolution or the documents submitted as part of th[e] application, all of which are made a part hereof and shall be binding on the applicant."

KBS filed a complaint in lieu of prerogative writs seeking invalidation of the Resolution and to require Sudler to obtain a use variance for approval of the access easements to new Lot 251.08. The four-count complaint alleged: the Board did not have jurisdiction over the application, as the proposal required a use variance pursuant to N.J.S.A. 40:55D-70; Sudler's published notice was deficient because it failed to meet the requirements of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163; the application was "an improper effort . . . to circumvent . . . proper procedure"; and the Board acted arbitrarily and capriciously because "the proofs as presented . . . failed to address the zoning and planning issues" in the application. After a bench trial, the court issued a written decision and entered final judgment in favor of defendants, dismissing KBS's complaint with prejudice.

On appeal, KBS argues: Sudler's application required variance approval for a second principal use because the "two new sub roads on Lot 251.01" were for the "exclusive purpose" of providing vehicle access to Lot 251.08; the public notice was deficient; and the Board's approval was arbitrary, capricious, and unreasonable.

II.

"[W]e 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 Englewood Cliffs, 442 N.J. Super. 450, 462 (App. Div. 2015) (quoting Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)). "Like the trial court, our review of a planning board's decision is limited." Bd. of Educ. of Clifton v. Zoning Bd. of Adjustment of Clifton, 409 N.J. Super. 389, 434 (App. Div. 2009) (quoting Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998)). "[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). "We give deference to the actions and factual findings of local boards and may not disturb such findings unless they were arbitrary, capricious, or unreasonable." Jacoby, 442 N.J. Super. at 462.

"A board acts arbitrarily, capriciously, or unreasonably if its findings of fact . . . 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). 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." Simeone v. Zoning Bd. of Adjustment of E. Hanover, 377 N.J. Super. 417, 426 (App. Div. 2005) (quoting Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 58-59 (1999)). Further, planning boards are provided "wide latitude in the exercise of the delegated discretion" under the MLUL due to their particular "knowledge of local conditions." Berkely Square Ass'n v. Zoning Bd. of Adjustment of Trenton, 410 N.J. Super. 255, 263 (App. Div. 2009) (quoting Burbridge v. Township of Mine Hill, 117 N.J. 376, 385 (1990)).

It is recognized local board members are more "familiar with their communities' characteristics and interests" and are better suited to decide concerns on local zoning regulations. Pullen v. Township of S. Plainfield Plan. Bd., 291 N.J. Super. 1, 6 (App. Div. 1996). Determinations on questions of law

in land use matters are reviewed de novo. Bubis v. Kassin, 184 N.J. 612, 627 (2005).

Pursuant to N.J.S.A. 40:55D-10(e), the "[t]echnical rules of evidence shall not be applicable to" a municipal land use hearing. See also Baghdikian v. Bd. of Adjustment of Ramsey, 247 N.J. Super. 45, 49 (App. Div. 1991) (stating a local board "cannot be equated with courts" and the procedural safeguards employed in judicial proceedings should not be "imported wholesale" into land use board proceedings). "Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony." Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359 (2013) (quoting Weston v. State, 60 N.J. 36, 51 (1972)).

III.

KBS contends the Board erroneously approved Sudler's minor subdivision and final site plans because the two access easements constitute a second principal use requiring a use variance, under N.J.S.A. 40:55-70(d)(1). Specifically, KBS argues that because the access easements on Lots 240 and 251.01 were created for the benefit of vehicle access to newly created Lot 251.08, a use variance was necessary. "A use variance, as the term implies,

permits a use of land that is otherwise prohibited by the zoning ordinance."
Nuckel v. Borough of Little Ferry Plan. Bd., 208 N.J. 95, 101 (2011).

Before the Board, KBS argued the application proposed an "overuse of the property" because the "access easement[s] start[] on Oak Street [and] run[] along the parking area" to new Lot 251.08, impermissibly allowing vehicles "access from Oak Street." KBS's argument, that an additional principal use was created, is premised on the future use of Lot 251.08, and supposition that Sudler's "new Lot [251.08] was presumably to be used eventually for industrial/warehouse use with heavy trucks," and the "dual use of drive[way]s on Lots 240/251.01 [was] for access to . . . Lot 251.08."

We observe the MLUL defines subdivision as "the division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development." N.J.S.A. 40:55D-7. The Board considered KBS's argument regarding the possibility of future development on Lot 251.08 and its engineer advised, "If you are looking to forecast the future . . . [w]e do not have any issue with the minor subdivision at hand" because "it [is] compli[ant]." Contrary to KBS's argument regarding future use, the Board correctly noted the subdivision application provided for no improvements on Lot 251.08. Further, the Board considered that while Lot 251.08 was an independent parcel, it was

undisputed future development would require street frontage or variance approval for development of the property. See N.J.S.A. 40:55D-35 ("No permit for the erection of any building or structure shall be issued unless the lot abuts a street giving access to such proposed building or structure."). As the 2021 Resolution found, a portion of 251.08 abuts the unimproved portion of Towbin Avenue, a paper street.

Further, the Board accepted that Sudler's purpose for subdividing the lots was for financing and to provide each existing building with an individually designated lot. As the Board noted, Sudler's newly created Lot 251.08 is approximately forty acres of largely "not developable" wetlands. The 2021 Resolution found "[v]irtually all the wetlands will be located on the proposed large vacant lot. However, a couple of access easements are [included] for potential future development of a section void of wetlands." We observe the Board was permitted to consider the easements in reviewing a subdivision application, as KBS acknowledged, to ensure access for "fire or emergency" vehicles. See N.J.S.A. 40:55D-2(b); see also N.J.S.A. 40:55D-38(b)(2). The Board also noted "[t]here already exists access easement[s]." It appropriately considered that Sudler's application complied with N.J.S.A. 40:55D-50 and found use variances were not required. See N.J.S.A. 40:55D-50(a) (outlining

that a "planning board shall grant final approval if the detailed drawings, specifications and estimates of the application . . . conform to the standards established by ordinance"). The Board correctly determined its subdivision review under the MLUL was based on the present application and not on future potential development.

KBS's reliance on the New Jersey Supreme Court's decision in Nuckel to support that Sudler's application required a use variance is misplaced. In Nuckel, the Court considered whether "a driveway on an undersized lot that house[d] a nonconforming use, to service a hotel on an adjacent lot, [wa]s required to obtain variances" and determined the "driveway . . . constitute[ed] a new 'use' in and of itself." 208 N.J. at 97, 105. The proposed driveway on the non-conforming auto body shop's lot was a second principal use because its sole purpose was for the adjacent hotel's "use" rather than an accessory use for the existing business. Id. at 97.

Again, here, Lot 251.08 was not proposed for development and improvement. Despite KBS's contention that the facts are substantially like those of Nuckel, the access easements on Lots 240 and 251.01 did not change each lots' "use" in and of itself, as the Board was not approving a proposed use for Lot 251.08. See ibid. Notably, Lot 251.08 may never be improved, thus

there is no additional principal use. Therefore, a variance under N.J.S.A. 40:55D-70(d)(1) was not required.

The court correctly found, "an option for future access to the adjoining lot does not constitute a 'second principal use' on [L]ots 240 and 251.01." Further, "[t]here is no new development proposed for any of the lots created . . . , and the access is applicable if, and when, a development plan is proposed for new Lot 251.08." We note the 2021 Resolution granted the minor subdivision subject to "all representations made . . . by the applicant and/or its attorney and . . . expert." Moreover, the Board correctly determined any future development of Lot 251.08 required a "full site plan application," which "would have to come before the Board." The Board provided sufficient findings in its 2021 Resolution to grant Sudler's application and was within its authority to approve the easements under the MLUL. Thus, we concur a use variance was not required based on possible future development and the Board's action in approving Sudler's application was not arbitrary, capricious, or unreasonable.

KBS next contends the public notice was insufficient, thereby depriving the Board of jurisdiction over the application. KBS argues the notice failed to "inform the public of 'the nature of the proposed use' of the new large Lot 251.08" and of "any intended use of the new Lot." Further, KBS posits the

notice misrepresented "the boundaries for existing Block 1160[,] Lot 240 will not change" when the proposal increased Lot 240 by 134 square feet. The court found "public notice was adequate and consistent with the requirements of the MLUL" and the "Board had jurisdiction to consider this minor subdivision." We agree.

The MLUL requires that the public notice for a variance application include: (1) "the date, time and place of the hearing," (2) "the nature of the matters to be considered," (3) "an identification of the property proposed for development by street address," and (4) "the location and times at which" any supporting documents for application are available. N.J.S.A. 40:55D-11. The "[f]ailure to provide proper notice deprives a municipal planning board of jurisdiction." Shakoor Supermarkets, Inc. v. Old Bridge Twp. Plan. Bd., 420 N.J. Super. 193, 201 (App. Div. 2011).

It is clear "the MLUL's mandate in N.J.S.A. 40:55D-11 requir[es] notice of the 'nature of the matters to be considered' by the board." Pond Run Watershed Ass'n v. Township of Hamilton Zoning Bd. of Adjustment, 397 N.J. Super. 335, 351 (App. Div. 2008) (quoting Perlmart of Lacey, Inc. v. Lacey Twp. Plan. Bd., 295 N.J. Super. 234, 241 (App.Div.1996)). The notice shall "accurately identify[] the type of use or activity proposed by the applicant in

laymen's terms" with the purpose of fairly apprising of the plans to allow the public to determine whether to participate at the public hearing. Id. at 352 (quoting Perlmart, 295 N.J. Super. at 239). Further, we have "read the statute to require a 'common sense description of the nature of the application, such that the ordinary layperson could understand its potential impact upon him or her.'" Ibid. (quoting Perlmart, 295 N.J. Super. at 239).

KBS's notice provided the date of the Board's public hearing for Sudler's minor subdivision and final site plan application. The notice included a description of the lots involved, and identified the purpose of the application was "to subdivide the property currently designated as Block 1160, Lot 251 into three (3) lots: Proposed Lot A (40.21 +/- acres), Proposed Lot B (7.7 +/- acres) and Proposed Lot C (7.05 +/- acres)." While the notice misstated that the boundaries of Lot 240 would remain unchanged, it accurately described the permitted existing commercial warehouse uses located on each separate lot. As the court noted, the notice also included the variance relief requested regarding front yard setbacks for Lot 240, thus further alerting the public of Lot 240's involvement in the subdivision. As found in the Board's 2021 Resolution, "Lot 240 would remain virtually unchanged in size."

Our Court has stated that when the record establishes sufficient substantive notice was provided, a "minor error in the notice d[oes] not violate [N.J.S.A. 40:55D-11] nor deprive the Board of jurisdiction to act." Northgate Condo. Ass'n v. Borough of Hillsdale Plan. Bd., 214 N.J. 120, 143 (2013). The failure to notice of the minor increase in lot size did not preclude notice of the nature of the application. Further, the notice was not required to reference the terms of the prior 2014 Board approval. We conclude the notice was not "misleading to the public" and sufficiently described the application.

To the extent we have not addressed any of KBS's remaining arguments, it is because they lack sufficient merit to discuss 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