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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3201-22

SAMUEL LOEVINGER,

Plaintiff-Appellant,

v.

BOARD OF ADJUSTMENT OF THE TOWNSHIP OF LAKEWOOD and CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,

Defendants-Respondents.

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Submitted May 21, 2024 – Decided June 4, 2024

Before Judges Sumners and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0833-22.

Samuel Loevinger, appellant pro se.

Dasti, McGuckin, McNichols, Connors, Anthony, & Buckley, attorneys for respondent Board of Adjustment of the Township of Lakewood (Jerry J. Dasti, on the brief).

Vogel, Chait, Collins, & Schneider, attorneys for respondent Cellco Partnership D/B/A/ Verizon Wireless (Richard L. Schneider, of counsel and on the brief; David H. Soloway, on the brief).

PER CURIAM

Plaintiff Samuel Loevinger, self-represented, appeals from the May 12, 2023 Law Division orders granting summary judgment to defendants Board of Adjustment of the Township of Lakewood (Board) and Cellco Partnership D/B/A Verizon Wireless (Cellco). Loevinger challenges the dismissal of his action in lieu of prerogative writs claim, alleging the Board misrepresented his right to appeal the approval of Cellco's wireless communication facility to the trial court with an opportunity to present experts on the health effects of radio frequency emissions. Following our review of the arguments presented on appeal, the record, and the applicable law, we affirm.

I.

We view the following facts established in the summary judgment record in a light most favorable to plaintiff. See Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 549 (2022). On July 23, 2021, Cellco submitted an application seeking Board approval to construct twelve wireless communications antennas on the rooftop of an already-existing senior citizen housing facility. The plan included adding a generator on a concrete pad. Cellco sought a use variance,

N.J.S.A. 40:55D-70(d)(1), because the facility was in a residential office park zone that did not permit wireless communications. Cellco also requested a height variance, N.J.S.A. 40:55D-70(d)(6), because the proposed antenna height exceeded the sixty-five-foot ordinance height limit.

On October 20, 2021, the Board Engineer deemed the development application complete. Five days later, Cellco noticed Loevinger of the application for development hearing via certified mail. Although the application was originally scheduled for a hearing on November 8, the Board heard it on February 7, 2022.

At the hearing, Cellco presented three expert witnesses: radio frequency engineer David Stern, licensed architect Frank Colasurdo, and licensed professional planner William F. Masters. Stern testified the proposed wireless communications facility filled a cellular coverage gap, which would not otherwise be remedied. He explained the facility complied with FCC emission standards, specifying the site would be below the acceptable standards.

While six members of the public opposed the application expressing concerns that the facility "could cause cancer" and "put people in danger," no opposing expert was offered. Loevinger, who admittedly had previously objected on a similar topic before the Board, relayed his personal objections and

concerns stemming from "[t]wo different articles regarding the FCC regulations." At the conclusion of Loevinger's testimony, the following exchange occurred with the Board Chairman:

> [LOEVINGER]: If we want to . . . we are really unprepared, so we want to know if the [B]oard does approve, we want to know if we could carry with a professional.
>
> [CHAIRMAN]: If it does get approved you can sue the township and you could go to court. That's what you could do.
>
> [LOEVINGER]: Could we carry with a professional? No?
>
> [CHAIRMAN]: If the project gets approved you can take it to court. Okay?
>
> [(Emphasis added).]

Loevinger did not specifically request a reasoned continuance.

At the conclusion of the hearing, the Board approved the application. On March 7, 2022, the Board memorialized its approval in Resolution No. 4206. The Resolution explicitly addressed the objectors' health concerns, stating:

> Pursuant to 47 [U.S.C. §] 332, no local government or instrumentality thereof may regulate the construction of wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the FCC regulations concerning such emissions. Mr. Stern's testimony and

> report demonstrate compliance with such emission standards.

On November 7, 2022, Loevinger filed an eight-count amended complaint in lieu of prerogative writs seeking to reverse the Board's approval of Cellco's variance application. Defendants filed answers and thereafter filed separate motions for partial summary judgment.

On February 17, 2023, the court granted defendants partial summary judgment, concluding Loevinger was estopped from asserting his radio frequency radiation emissions health claims. Thereafter, defendants moved for summary judgment on Loevinger's remaining claims. Following argument, the court granted the motions.

On appeal, Loevinger argues, in a single point, the court erroneously granted summary judgment on his claim that the Board Chairman misrepresented his ability to present experts on radio frequency emissions before the trial court on appeal because material issues of fact existed.

II.

We review a trial court's summary judgment decision "de novo and apply the same legal standard" under Rule 4:46-2(c). See Crisitello v. St. Theresa Sch., 255 N.J. 200, 218 (2023). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in

favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). "A dispute of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Gayles by Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 22 (App. Div. 2021) (quoting Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017)). Insubstantial arguments based on assumptions or speculation are not enough to overcome summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995); see also Dickson v. Cmty. Bus Lines, Inc., 458 N.J. Super. 522, 533 (App. Div. 2019) ("'[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome' a motion for summary judgment." (quoting Puder v. Buechel, 183 N.J. 428, 440-441 (2005))).

"Like any other complaint, a prerogative writ complaint may be dismissed summarily" pursuant to Rule 4:46-2. Mitchell v. City of Somers Point, 281 N.J. Super. 492, 500 (App. Div. 1994). "When reviewing a trial court's [summary judgment] decision regarding the validity of a local board's determination, 'we are bound by the same standards as 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., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)). "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." Ibid. "[P]ublic bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. of Adjustment of Wall, 184 N.J. 562, 597 (2005).

Therefore, "[t]he proper scope of judicial review is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Ibid. Thus, a reviewing court must not substitute its own judgment for that of the local board unless there is a clear abuse of discretion. Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor Twp., 172 N.J. 75, 81-82 (2002). 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). It is within the Board's discretion to accept or reject expert testimony. See Klug v.

Bridgewater Twp. Plan. Bd., 407 N.J. Super. 1, 13 (App. Div. 2009). Determinations on questions of law in land use matters are reviewed de novo. Bubis v. Kassin, 184 N.J. 612, 627 (2005).

III.

Loevinger argues the court erroneously granted summary judgment because a question of fact exists regarding the Board Chairman's "misrepresentation of . . . procedure, which [Loevinger] reasonably relied upon." Specifically, Loevinger argues the Board's approval should be vacated and a rehearing is required for further testimony because the Chairman's comments were "an intentional misrepresentation" which "led to [a] justifiable misunderstanding" that experts could be retained and presented "to the [c]ourt." We are unpersuaded.

We begin by noting Cellco's application was filed on July 23, 2021. After the application was deemed complete on October 20, Loevinger was noticed of the application by certified mail five days later. While under N.J.S.A. 40:55D-12, Cellco was required to provide only ten-days' notice "prior to the date of the hearing," Loevinger had over three months to prepare for the hearing as the application was carried to February 2022. Additionally, the notice stated, "you may appear in person, by agent, or by attorney and present comments you may

have relative to the granting of this application. If you wish to view any part of the application, you may." Thus, Loevinger was provided ample time beyond the statutory requirement to review the application, prepare opposition, and retain an expert.

Addressing Loevinger's contention that the Chairman made an intentional misrepresentation, a review of his specific questions at the hearing is relevant. Loevinger asked if the application "get[s] approved," could he request the matter be carried for a professional. In response, the Chairman stated, "[i]f it does get approved you can sue the township and you could go to court." The Chairman responded to Loevinger's follow-up question, regarding whether he "[c]ould carry with a professional," that "[i]f the project gets approved you can take it to court." Loevinger had been advised earlier in the hearing, when he addressed the science behind the FCC standards, that "professional[s] . . . give testimony" before the Board "when it comes to these things." Loevinger acknowledged understanding "there is a federal law" and regulations. We conclude the exchange cannot reasonably be interpreted as the Chairman advising Loevinger that he would have an "opportunity to bring experts to the [c]ourt in opposition to the [a]pplication." Thus, no misrepresentation was made mandating reversal of the Board's approval.

Loevinger's further assertions that he was "repeatedly rushed" and "requested an adjournment" is belied by the record, which reflects he was given an opportunity to fully participate and failed to specifically articulate a reason for a continuance. A board is obligated to afford an interested party the opportunity to be heard and to cross-examine other witnesses. See N.J.S.A. 40:55D-4 & -10(d); see also Mercurio v. DelVecchio, 285 N.J. Super. 328, 334-35 (App. Div. 1995) (finding the denial of an objector's request for an adjournment was not arbitrary), certif. denied, 144 N.J. 377 (1996). We observe the Board, as evidenced by the resolution, recognized the application was "complete"; thus, a "failure to act within that time period, absent the consent to an extension by . . . [Cellco], could result in the application automatically being approved." See Mercurio, 285 N.J. Super. at 335; see also N.J.S.A. 40:55D-76(c) (failing "to act within the period prescribed shall constitute [board of adjustment] approval of the application"). Other than voicing his displeasure and disagreement with the FCC regulations, we observe Loevinger offered neither a legal basis to challenge the application nor a reason justifying a continuance.

The record evinces that the Board provided Loevinger a fair opportunity to be heard as evidenced by his statements regarding: his personal opposition

to the application; a neighbor's objection letter; and two articles on the applicable FCC regulations. At the hearing, Loevinger had the opportunity to expand on his health concerns regarding radio frequency emissions and cellular technology. Under the Municipal Land Use Law, 40:55D-1 to -163, the Board correctly balanced, providing each objector a fair opportunity to be heard, N.J.S.A. 40:55D-10(d), against the timely adjudication of the application in accordance with the completed zoning application time limitation, N.J.S.A. 40:55D-76(c). Notably, continuances are not required to "be granted in all instances, but only where it appears that the request is meritorious; that denial would probably be prejudicial to an interested party[;] and that depending on the overall facts, denial would probably constitute arbitrary and capricious action by the board." Cox & Koenig, <u>New Jersey Zoning & Land Use Administration</u>, § 18.5-1, at 265 (2024). We concur with the court that Loevinger was provided a sufficient opportunity to be heard. Further, the Board was not required to grant Loevinger additional time as he provided no explanation for failing to timely engage an expert.

We conclude the Board's actions were not arbitrary, capricious, or unreasonable as no misrepresentation was made. Loevinger had sufficient time to prepare opposition, an opportunity to be heard, and his arguments considered.

Because he did not exercise his right to prepare opposition, there is no merit to his appeal.

Affirmed.