
DANIEL ROE, KEVIN ROE, LINDA
BONGARDINO, JOHN BONGARDINO, and
THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC.

Plaintiffs,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY
DOCKET NO. L-8268-14

vs.

MONTVALE PLANNING BOARD and
MONTVALE DEVELOPMENT ASSOCIATES,
LLC

Defendants.

COURT'S DECISION

Meehan, J.S.C. (retired and temporarily assigned on recall)

This action in lieu of prerogative writs centers on properties commonly known as 300 Grand Avenue West and 159-161 Summit Avenue in Montvale, New Jersey. The properties are known as Block 2802, Lots 2 and 3 and Block 1002, Lots 3 and 5 ("the Properties") on the tax map. The Properties are located in an Affordable Housing – Planned Unit Development Zone ("AH-PUD") pursuant to Ordinance No. 2013-1364, which was adopted on April 30, 2013 following an amendment to the Borough of Montvale's Master Plan.

Block 2802, Lots 2 and 3 comprise of approximately 25.79 acres used for agricultural purposes, including a farm store. Block 1002, Lot 3 is improved with a single-family residence, and Lot 5 is vacant. The Block 1002 parcels are comprised of approximately three acres. All of the parcels, aside from Block 1002, Lot 3, are owned by Edward and Elaine DePiero or a member of the DePiero family. Block 1002, Lot 3 is owned by Katalin Deim.

In 2013, Defendant Montvale Development Associates, LLC (“MDA” or “the Applicant”) submitted an application to the Montvale Planning Board (“the Planning Board”) seeking approvals in connection with proposed development of the Properties. MDA sought approvals for a preliminary and final site plan, a planned unit development, an Environmental Impact Statement (“EIS”), and a soil movement permit. It was later determined that variance relief was also required.

On the Block 2802 parcels, MDA proposed to erect a 140,000 square foot Wegmans Supermarket anchor retail store and a five-building garden center. A café/restaurant would be located within the Wegmans. Patrons would be able to enter the café/restaurant from the street as well as from within the grocery store. The construction would be completed in two phases. For Phase One, MDA sought preliminary and final site plan approval, and a major soil movement permit. For Phase Two, MDA sought preliminary site plan approval. MDA also sought approval of the EIS for all proposed improvements

On the Block 1002 parcels, MDA sought planned unit development approval for transfer of the property to the Borough for construction by the Borough of a two-story multi-family building, which would contain thirty-two (32) units of low and moderate income housing with sixty-five (65) parking spaces.

Between August 6, 2013 and May 6, 2014, the Planning Board held thirteen (13) public hearings to consider the application. Eight individuals testified on behalf of MDA on planning, design, and traffic engineering. Douglas Bruce McCoach testified regarding site design and planning. McCoach is the Vice President of the international planning firm RTKL Associates and head of its planning and urban design division. McCoach is not a licensed planner in New Jersey. There was no other testimony offered.

MDA sought variance relief pursuant to N.J.S.A. 40:55D-70(c)(2) because the Wegmans Supermarket did not include a five foot landscaping strip, as required by Ordinance § 128-7.1(I). MDA presented the testimony of Peter G. Steck, a licensed professional planner, on this issue. The Planning Board granted the (c)(2) variance.

Pursuant to the Ordinance, construction of off-tract improvements in the form of road and intersection improvements are necessary. The County of Bergen calculated the cost of such improvements and attributed a certain percentage to the applicant. The applicant must pay the pro-rata share of the costs. MDA agreed to pay \$3 million towards off-tract improvements, as required by the County of Bergen. The roads requiring off-tract improvements are all county roads.

On July 15, 2014, the Planning Board adopted a resolution granting planned unit development approval, major soil movement permit approval, preliminary and final site plan approval, variance relief in connection with the construction of Wegmans, preliminary site plan approval for a garden center, and approval of the EIS for all proposed improvements.

Arguments of the Parties

Plaintiffs' Argument

Plaintiffs argue that the Planning Board made insufficient findings as to the AH-PUD ordinance requirements, and the approval is inconsistent with the Master Plan. Plaintiffs contend that MDA failed to establish that the application would result in the total completion of the entire development. There are no assurances that the affordable housing units will actually be constructed. Further, MDA did not seek site plan approval for the affordable housing project. MDA is only obligated to transfer property to the Borough for the construction of affordable housing, but the construction by MDA is not necessitated.

Plaintiffs also argue that the Planning Board impermissibly granted the application on a quid pro quo basis in exchange for MDA's offer to pay a significant portion of the off-tract improvement costs in excess of statutory limits. The Municipal Land Use Law requires that a developer's contribution for required off-tract improvements be limited to its pro-rata share. N.J.S.S. 40:55D-42. Developers cannot make gifts to municipalities in exchange for development approvals. Nunziato v. Edgewater Planning Bd., 225 N.J. Super. 124, 134 (App. Div. 1988). The Ordinance requires that the calculation for improvements costs be made in accordance with procedures. Plaintiffs contend that the Ordinance does not adequately provide a standard for determining costs, and no determination was made. Thus, plaintiffs argue the application was granted in violation of the MLUL.

Further, plaintiffs contend that the Planning Board improperly accepted Douglas Bruce McCoach as an expert. At the time of his testimony, McCoach was not licensed in New Jersey as a design professional. However, he is currently the Vice President of RTKL Associates, has experience in the field, and was formerly licensed in New Jersey as an architect. N.J.S.A. 45:14A-1 includes a licensure requirement for qualification as a professional planner in the State of New Jersey.

Plaintiffs also argue that the Planning Board failed to grant all required variances, and improperly granted a variance pursuant to N.J.S.A. 40:55D-70(c)(2). Plaintiffs assert that the Board did not account for the proposed restaurant as a principal use, which requires a variance pursuant to N.J.S.A. 40:55D-70(d). Plaintiff argues that the eat-in café at Wegmans constitutes a distinct, separate use apart from the supermarket that requires a variance. The restaurant has two entrances, one within the Wegmans and a separate entrance from outdoors. It also has separate checkouts and can hold many diners. Thus, according to plaintiffs, this is an overconcentration of restaurant uses in this lifestyle retail shopping center, and a use variance was needed from the Board of Adjustment. Further, the Planning Board did not compel the production of marketing reports that were used to determine parking and traffic needs in the area.

Plaintiffs also assert that the Planning Board improperly granted variance relief pursuant to N.J.S.A. 40:55D-70(c)(2). Landscaping beds are required to be adjacent to sidewalks that adjoin a parking area or access drive. Here, there are no such landscaping strips, and plaintiffs contend that there was no justification for the Planning Board to grant a variance for the strips, as the alleged deviation does not outweigh the detriments.

Accordingly, plaintiffs assert that the Planning Board's decision was arbitrary, capricious, and unreasonable.

Defendants' Argument

Defendants argue that the Planning Board made adequate findings of fact concerning MDA's request for planned unit development approval. The Board found that (1) each phase of construction was independent from the other phases; (2) the Borough will have full control over the properties for affordable housing via conveyance; (3) preliminary and final site plan approval

for Phase I complied with standards set forth in the Ordinance; and (4) the design controls set forth in the Ordinance would remain in effect for the eventual construction to occur as part of Phase II. The Board's findings, particularly concerning affordable housing, complies with N.J.S.A. 40:55D-45(e) and the terms of the Ordinance.

Defendants further argue that the requirement that MDA pay its pro-rata share for roadway improvements is lawful and reasonable. Defendants also contend that plaintiffs' challenge to the sufficiency of Ordinance 2013-1374 is barred by the entire controversy doctrine. In plaintiffs' prior action attacking the Ordinance, they did not allege that the mechanism by which Montvale could obtain a contribution for off-tract improvements was in violation of N.J.S.A. 40:55D-42. Thus, they are barred from raising that issue here. Further, the off-tract provisions of the Ordinance conform to the MLUL and MDA must pay the cost of improvements established by the County of Bergen. The Board applied the criteria set forth in the Ordinance when it conditioned approval upon MDA's payment of its pro-rata share of costs, which were to be calculated by the County. The MLUL sets forth the procedures for calculating improvement costs, and the Ordinance mirrors them.

Additionally, defendants argue the Planning Board's approval was based on competent, credible evidence. Douglas McCoach was not offered as an expert in the field of professional planning. Rather, he was offered as an expert in the field of site design and site master planning. However, "a witness may qualify as an expert by reason of study without practice or practice without study." Rockland Elec. Co. v. Bolo Corp., 66 N.J. Super. 171, 176 (App. Div. 1961). The fact that McCoach did not have a planning license in the state of New Jersey does not disqualify him from offering expert testimony. McCoach did not offer planning testimony in support of variances, and MDA retained a professional planner to handle technical details of the plan.

Defendants also contend that the application did not require a use variance. Plaintiffs contend that a use variance is needed due to the size and scope of the café/restaurant attached to the Wegman's anchor store. Defendants argue, however, that the Ordinance does not limit size or scope of restaurant areas. The absence of such a regulation indicates Montvale's intent to not limit the size of restaurants in the anchor store. Wyzykowski v. Rizas, 132 N.J. 509 (1993).

Further, a food preparation and consumption area is a permitted use. The definition of an anchor retail store is "a supermarket, and/or a maximum of four (4) lifestyle retail uses as defined below located in a single building, with a gross floor area of not less than 60,000 feet." Restaurants and cafés are considered to be lifestyle retail uses pursuant to the Ordinance.

Applicable Law and Analysis

Where a plaintiff has appealed an action of a Planning Board, the reviewing court applies the arbitrary, capricious, and unreasonable standard. See, e.g., Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296-97 (1965). Under this standard of review, the plaintiff has the burden of proving that the action of the board, in approving or denying the plaintiff's application was arbitrary, capricious and unreasonable, and a clear abuse of discretion by the Board. Allen v. Hopewell Twp. Zoning Bd., 277 N.J. Super. 574, 580 (App. Div. 1988); Jessler v. Bowker, 174 N.J. 478, 486 (App. Div. 1979). Further, the plaintiff also has to overcome the presumption that the factual determinations made by the board are valid. This is because the law is clear that a board's "factual conclusions are entitled to great weight and, like those of an administrative body ought not to be disturbed unless there is insufficient evidence to support them." Rowatti v. Gonchar, 101 N.J. 46, 51-52 (1985).

Thus, as long as the power exists for the local board or governing body to perform the challenged action and substantial evidence to support such action is contained in the record

below, the judicial branch of government has no power to interfere. Ibid. at 296. Consequently, “[e]ven when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved.” Kramer, supra, 45 N.J. 268 at 296–97. Thus, only where the court finds a local zoning determination to be arbitrary, capricious, or unreasonable that the court may set aside the board’s action.

Implicit within this standard is the presumption that local boards and governing bodies will “act fairly and with proper motives and for valid reasons,” and in accordance with their special familiarity and knowledge of local conditions. Id. at 296 (quoting Ward v. Scott, 16 N.J. 16, 23 (1954)). This unique “familiar[ity] with their community’s characteristics and interests...[makes local officials] the best equipped to pass initially on such applications. Ibid. (quoting Ward v. Scott, supra, 16 N.J. 16 at 23).

However, the deference accorded to the board does not also extend to the board’s determinations of law. While it is true that boards, as quasi-judicial bodies, are allowed to make certain legal conclusions, such legal determinations do not receive the same presumption of validity. See, e.g., Reich v. Fort Lee Zoning Bd., 414 N.J. Super. 483, 499 (App. Div. 2010). Rather, they will be subject to de novo review when challenged in the Law Division. See id.

In the instant matter, the court finds that the Montvale Planning Board’s actions were not arbitrary, capricious, or unreasonable for the reasons set forth below:

Transfer of Lots 3 and 5, Block 1002 for Affordable Housing is Proper

Plaintiffs contend that the Planning Board did not present sufficient findings to prove that the Borough of Montvale will actually build the affordable housing units. The court finds this argument to be without merit. Title to Block 1002 is required to be transferred to the Borough

prior to MDA's development of the property. Once the Borough owns and controls the land, there is assurance that affordable housing units will be built. This assertion is supported by the Ordinance. Further, plaintiffs have not provided evidence indicating that the Borough will not develop the affordable housing units. This court finds that this is one of the surest ways to ensure that the thirty two (32) units of affordable housing are built. In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015), commonly known as Mount Laurel IV, has urged the court to take steps to have affordable housing units built. This is one way of assuring that goal.

The Cost of Improvements was Properly Dealt With

The court also finds that MDA did not agree to pay the costs of off-tract improvements in exchange for the Board's approval. Pursuant to the Ordinance, MDA is required to pay for improvements, and there is no indication that the \$3 million amount is inappropriate. The County of Bergen has the responsibility to determine MDA's pro-rata share, and not the Planning Board. Further, there is a reimbursement provision in the Ordinance. Thus, pursuant to the Ordinance, if MDA overpays its pro-rata share, it will be reimbursed. There is no indication that there was a quid pro quo exchange.

The Planning Board resolution's approval in this matter did not establish the cost of the off-site improvements. That item is solely with the purview and authority of the County of Bergen. The roads involved with off-site improvements are all county roads. The County of Bergen, through its planning board, set the cost of these improvements. That decision by the County was never challenged. It is not appropriate to now find that the action of the County of Bergen is attributable to the Planning Board of Montvale.

McCoach's Testimony Does Not Make the Planning Board's Action Arbitrary,

Capricious or Unreasonable

The Montvale Planning Board appropriately relied on the testimony of Douglas McCoach. Firstly, it is important to note that plaintiffs did not object to Mr. McCoach's testimony at the hearing. Secondly, Mr. McCoach has the necessary skills and training to testify as an expert in the field design. He did not testify as a planning professional, and thus the fact that he is not currently licensed in the State of New Jersey is of no moment. "A witness may qualify as an expert by reason of study without practice or practice without study." Rockland Elec. Co. v. Bolo Corp., 66 N.J. Super. 171, 176 (App. Div. 1961). McCoach did not have a planning license in the state of New Jersey, he was qualified to offer expert testimony based on his vast experience.

A Use Variance is Not Required For the Café/Restaurant

The court finds that a use variance was not necessary in this instance. The Ordinance states that the anchor store must be "a supermarket and/or a maximum of four (4) lifestyle retail uses as defined below located in a single building, with a gross floor area of not less than 60,000 feet." Here, the anchor store is a Wegmans supermarket, which includes an attached café/restaurant. The issue of whether or not the café is a wholly separate or an integrated part of the Wegmans has no bearing on whether MDA requires a use variance because the anchor store meets the requirements of the Ordinance. The café/restaurant is included within the definition of an anchor store due to the "and/or" language. Accordingly, MDA acted appropriately in not applying for a use variance pursuant to Ordinance 2013-1364.

The Landscaping Variance Granted by the Planning Board is Proper

The Planning Board appropriately granted a single variance regarding the landscape strips. This variance is de minimus, as only one third of one percent of the total property area would require landscaping strips. MDA applied for this variance because it believed that the strips were

contrary to pedestrian activity. This is the only variance applied for and it was granted. The variance does not have a negative impact on the MLUL. No testimony has been offered to counter defendants' experts on this issue. Additionally, MDA has agreed to supplement the property with other green space and landscaping blocks. Thus, the Planning Board did not act arbitrarily or capriciously when it granted the variance.

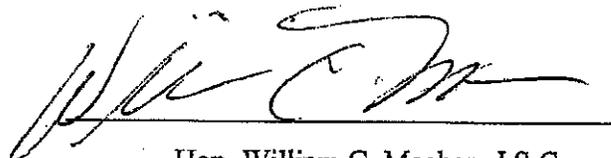
Plaintiff Showed No Need for MDA's Marketing Study

Lastly, the court finds that MDA did not have to disclose its internal marketing study to plaintiffs. The study is confidential, and would disclose sensitive information to plaintiffs. Thus, MDA did not have to provide a copy to plaintiffs, competitors of Wegmans. There was no special need by plaintiffs for this information. Plaintiffs never provided testimony to the Board on the traffic issue. The Planning Board heard testimony on this issue, and there was no need shown for the release of confidential information of Wegmans to a competitor.

Conclusion

In conclusion, the Court finds the Montvale Planning Board's decision and resolution were not arbitrary, capricious, and unreasonable. There were sufficient findings, the appropriate variance was granted. Accordingly, judgment is entered in favor of defendants Montvale Planning Board and MDA.

Dated: August 5, 2015



Hon. William C. Meehan, J.S.C.

(Retired and Temporarily Assigned on Recall)