NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2134-14T1
A-4630-14T1

THE STOP & SHOP SUPERMARKET COMPANY, LLC,

Plaintiff-Appellant/
Cross-Respondent,

v.

THE COUNTY OF BERGEN; THE BERGEN COUNTY PLANNING BOARD; AND THE COUNTY OF BERGEN DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT,

Defendants-Respondents/
Cross-Appellants.

THE STOP & SHOP SUPERMARKET COMPANY, LLC,

Plaintiff-Appellant,

v.

THE BERGEN COUNTY BOARD OF CHOSEN FREEHOLDERS, THE BERGEN COUNTY PLANNING BOARD, AND INSERRA SUPERMARKETS, INC.,

Defendants-Respondents.

Argued November 9, 2016 - Decided April 6, 2017

Before Judges Ostrer, Leone, and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-7943-14 and L-9333-14.

John R. Edwards, Jr. argued the cause for appellant (Price, Meese, Shulman & D'Arminio, P.C., attorneys; Mr. Edwards, Gail L. Price, Kathryn J. Razin, and David J. Reich, on the briefs).

Frank P. Kapusinski, Assistant Bergen County Counsel, argued the cause for respondents the County of Bergen, the Bergen County Planning Board, and the County of Bergen Department of Planning and Economic Development (Julien X. Neals, County Counsel, attorney; Mr. Kapusinski, of counsel and on the briefs).

Edward J. Florio argued the cause for respondent the Bergen County Board of Chosen Freeholders (Florio, Kenny, Raval, L.L.P., attorneys; Mr. Florio, of counsel and on the brief; Paul Samouilidis, on the brief).

John J. Lamb argued the cause for respondent Inserra Supermarkets, Inc. (Beattie Padovano, LLC, and Wells Jaworski Liebman, LLP, attorneys; Mr. Lamb, Ira E. Weiner, and James E. Jaworski, of counsel and on the brief; Daniel L. Steinhagen, on the brief).

PER CURIAM

Plaintiff the Stop & Shop Supermarket Company, LLC (Stop & Shop) opposed the site plan application of defendant Inserra Supermarkets, Inc. (Inserra) for the construction of a ShopRite supermarket along a county road. Stop & Shop objected to the

application before defendant the Bergen County Planning Board (County Planning Board) and then appealed its approval of the site plan to defendant the Bergen County Board of Chosen Freeholders (Board of Freeholders). When the Board of Freeholders affirmed, Stop & Shop filed a complaint in lieu of prerogative writs in the Law Division, which affirmed on May 12, 2015. Stop & Shop challenges that decision in appeal A—4630-14.

Stop & Shop filed an action for declaratory relief against the County Planning Board, defendant the County of Bergen (County), and defendant the County of Bergen Department of Planning and Economic Development (DPED) (collectively the "OPRA defendants"). Stop & Shop alleged a violation of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The Law Division dismissed that action on November 26, 2014. Stop & Shop challenges that decision in appeal A-2134-14. We hold that OPRA litigation is authorized to allow a party who is denied access to records to obtain access to those records, and counsel fees are authorized under OPRA if the litigation causes the production of those records. Because Stop & Shop had already obtained the records before it filed its declaratory judgment action, that action was moot and it is not entitled to counsel fees.

We listed the two appeals back-to-back and now consolidate them for the purpose of this opinion. We affirm.

I.

On June 14, 2011, Inserra submitted an application for site plan approval to the County Planning Board in which Inserra proposed "remov[ing] 2 existing buildings and develop[ing] the site with 1 new building," namely a ShopRite supermarket, on a 7.4-acre site which has frontage on Greenwood Avenue and Wyckoff Avenue, a county road. The site previously housed a Stop & Shop supermarket, which relocated to a larger store in the adjacent Boulder Run Shopping Center, owned by Munico Associates. The Stop & Shop is on Greenwood Avenue where it intersects with Godwin Avenue, another county road.

While the application was pending before the County Planning Board, the Planning Board of the Township of Wyckoff (Township Board) reviewed Inserra's site plan application. Stop & Shop objected to Inserra's application, raising traffic safety concerns in numerous meetings. On February 12, 2012, the Township Board approved the site plan, stating:

> The Board has carefully evaluated the significant amount of traffic testimony offered by [Inserra's traffic] expert, [Stop & Shop's traffic] expert, and its own traffic consultant and concludes from the testimony and evidence that there will not be an unreasonable impact upon adjoining properties, the surrounding neighborhood or

> the Township at large due to approval of the application.

The Law Division upheld the Township Board's approval. We affirmed the Law Division, stating "[t]he traffic issues surrounding the development applications received extensive treatment during the hearings before the [Township] Board. In the end, the [Township] Board [permissibly] accepted the testimony from Inserra's experts regarding the traffic circulation and not the contrary opinions from the experts for the objectors." Munico Assocs., L.P. v. Inserra Supermarkets, Inc., No. A-0701-14 (App. Div. Aug. 18, 2016) (slip op. at 17).

Meanwhile, the County Planning Board held a hearing on April 8, 2014, and heard testimony from Inserra's engineering and traffic experts. Stop & Shop briefly cross-examined Inserra's traffic expert but presented no witnesses. The County Planning Board approved Inserra's application on May 13, 2014. Stop & Shop appealed to the Board of Freeholders. On August 20, 2014, the Board of Freeholders affirmed the County Planning Board's approval of the site plan.

Stop & Shop challenged that decision, filing a fourteen-count complaint in lieu of prerogative writs in the Law Division. The Law Division dismissed eleven counts on Inserra's motions for partial summary judgment. On April 28, the Law

Division held a trial on the remaining counts. On May 12, 2015, the Law Division affirmed the Board of Freeholders' decision.

Before that decision, Stop & Shop filed a complaint in lieu of prerogative writs on August 18, 2014, seeking a declaratory judgment that the OPRA defendants violated OPRA. They filed a motion to dismiss pursuant to Rule 4:6-2(e), which the Law Division granted on November 26, 2014.

Stop & Shop appeals the decisions of the Law Division.

II.

We first address appeal A-4630-14. Under the County Planning Act (CPA), N.J.S.A. 40:27-1 to -8, a county planning board may review site plans for land development along county roads. N.J.S.A. 40:27-6.6(a). We apply the same standard of review to the actions of a county planning board under the CPA as we apply to the review of a site plan by a municipal planning or zoning board under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163. See Builders League of S. Jersey, Inc. v. Burlington Cty. Planning Bd., 353 N.J. Super. 4, 23-24 (App. Div. 2002) (equating the policy considerations governing the MLUL and the CPA); see also Amerada Hess Corp. v. Burlington Cty. Planning Bd., 195 N.J. 616, 639 (2008).

"In reviewing a planning board's decision, we use the same standard used by the trial court." Bd. of Educ. v. Zoning Bd.

of Adjustment, 409 N.J. Super. 389, 433 (App. Div. 2009). "Ordinarily, when a party challenges a zoning board's decision through an action in lieu of prerogative writs, the zoning board's decision is entitled to deference." Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 229 (2013). Indeed, zoning boards, "'must be allowed wide latitude in the exercise of delegated discretion'" "'because of their peculiar knowledge of local conditions.'" Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (citation omitted). The board's "factual determinations are presumed to be valid and its decision to grant or deny relief is only overturned if it is arbitrary, capricious or unreasonable." Kane, supra, 214 N.J. at 229. We must hew to our standard of review.

A.

"[T]he executive and legislative powers of the county [are] vested in th[e] board of chosen freeholders," N.J.S.A. 40:20-1, which "may create a county planning board," N.J.S.A. 40:27-1. "The governing body of any county having a county planning board may provide for the review of site plans for land development along county roads . . . and for the approval of such development . . . limited for the purpose of assuring a safe and efficient county road system." N.J.S.A. 40:27-6.6. "Such review and approval shall be in conformance with procedures and

standards adopted by resolution or ordinance as appropriate of the governing body." Ibid. Those limited procedures include:

> [t]he requirement of physical improvements subject to recommendations of the county engineer relating to the safety and convenience of the traveling public, including . . . highway and traffic design features as may be deemed necessary on such county road or roads in accordance with the engineering and planning standards established in the site plan review and approval resolution or ordinance of the governing body.
>
> [N.J.S.A. 40:27-6.6(c).]

The Board of Freeholders created the County Planning Board and adopted the Bergen County Review Resolution (Review Resolution). Stop & Shop claims that in approving Inserra's site plan, the County Planning Board and the Board of Freeholders failed to provide a safe county road system and violated the Review Resolution.

Stop & Shop first argues Inserra's application violated the Review Resolution by not providing for an acceleration lane, deceleration lane, or separate right-turn ramp on Wyckoff Avenue. Stop & Shop failed to raise this argument before the County Planning Board, instead raising it for the first time before the Board of Freeholders. In any event, the argument lacks merit.

The Review Resolution provides "[a] 13-foot-wide and 300-foot long acceleration lane and a 200-foot long deceleration lane shall be provided wherever possible in order to accommodate safely and efficiently the traffic generated by a site designed to serve . . . [a] business or commercial use that occupies a site of more than 4 acres of land." (emphasis added).

It is uncontested that Inserra's site is designed to serve a commercial purpose, that the site is more than four acres, and that it is not possible to have an acceleration lane or a deceleration lane because the site has only fifty-one feet of frontage along Wyckoff Avenue.

The Review Resolution provides:

> In instances where the site has insufficient frontage along the County road to accommodate the required length of the deceleration lane or the acceleration lane, the lane that cannot be accommodated may be replaced with a separate right turn ramp. The . . . ramp[] shall be designed and installed in accordance with the construction specifications and approvals of the County Engineer.
>
> [(emphasis added).]

Stop & Shop argues Inserra's application was improper because it did not and could not include a separate right-turn ramp meeting the County engineer's specifications. However, "[t]he use of the word 'may' generally conveys that an action is permissive, not mandatory." Myers v. Ocean City Zoning Bd. of

Adjustment, 439 N.J. Super. 96, 101 (App. Div. 2015). Thus, "[t]he use of the word 'may' indicates that the [Planning Board] has discretion in determining whether any of the enumerated remedies is appropriate." See Brenner v. Berkowitz, 134 N.J. 488, 510 (1993) (emphasis added). Therefore, the Board of Freeholders permissibly read the Review Resolution as authorizing it to choose not to replace the impractical acceleration and deceleration lanes with a separate right-turn ramp.

We recognize "a court is not bound by an agency's determination on a question of law, and the court's construction of an ordinance under review is de novo." Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 561 (App. Div. 2004) (citation omitted). Nonetheless, "we give deference to a municipality's informed interpretation of its ordinances." DePetro v. Twp. of Wayne Planning Bd., 367 N.J. Super. 161, 174 (App. Div.), certif. denied, 181 N.J. 544 (2004). Thus, the Board of Freeholder's "informal interpretation of [its] ordinance is entitled to deference." Bubis v. Kassin, 184 N.J. 612, 627 (2005).

Inserra proposed having only an entrance on Wyckoff Avenue, thus obviating the need for an acceleration lane. Inserra also proposed having other entrances and the exits on Greenwood

Avenue. We cannot say it was arbitrary, capricious, or unreasonable for the Board of Freeholders to approve those proposals without requiring a separate right-turn ramp for the Wyckoff Avenue entrance.[1]

Stop & Shop argues the proposed exit onto Greenwood Avenue would cause patrons to drive across Greenwood Avenue and through the parking lots of a grammar school and a Y.M.C.A. to avoid the intersection of Greenwood and Wyckoff Avenues. Stop & Shop cites documents it presented to the Township Board, where Stop & Shop made traffic the subject of a series of contested hearings. However, the Township Board found no unreasonable impact to adjacent properties and the surrounding neighborhood.

"County Planning Board jurisdiction, in sharp contrast to the plenary zoning and planning authority accorded to municipalities under the MLUL, is limited depending on whether the proposed project . . . abuts a county road[.]" Builders League, supra, 353 N.J. Super. at 11 (citation omitted). Here, the County Planning Board's jurisdiction required it to consider only the effect of the project on the county road, not on the local streets and parking lots considered by the Township Board.

[1] The County also reserved its right to prohibit left turns into that entrance.

Stop & Shop next argues Inserra's site plan was unsafe without the installation of a traffic signal at the off-site intersection of Wyckoff Avenue and Greenwood Avenue, currently controlled by a stop sign on Greenwood Avenue. At the hearing before the County Planning Board, Jay Troutman, Jr., a licensed professional engineer, testified that Inserra's application sought to "re-occupy[] a site that already exist[ed] that was generating traffic." He stated:

> You're talking about no additional retail space being added to the retail – area. In fact you're talking about a reduction of retail.
>
> . . . .
>
> We did a study of Wyckoff and Greenwood. Basically, what we found is that this could be a potential candidate for a traffic signal. There are numbers there that would indicate it could be signalized. But that is not a reason to go and install a traffic signal. There are many other things that need to be considered.

In particular, Troutman noted the site previously operated with "70,000 square feet of retail [space] without traffic signals on either end of Greenwood" and processed traffic with "[n]o documented safety issues or crashes associated with this site."

Troutman also testified there are several options for customers exiting the Inserra site because "Greenwood connects between two county roads." As a result, "you don't necessarily

have to force traffic from this site to try to make left turns out on the county road, and that would be probably the biggest thing [for] the traffic signal to cure, if you had no other way to get lefts out. But you have a lot of flexibility here." Ultimately, Troutman recommended the traffic at Greenwood and Wyckoff Avenues be monitored, subject to future traffic studies after the project started operating.

Stop & Shop notes that before the Township Board, Troutman initially proposed a traffic signal be installed at the Wyckoff-Greenwood intersection. However, a County traffic engineer recommended against signalization due to "conflicting movements and a railroad crossing" just south of the intersection. The same engineer stated "[a] corridor improvement with Railroad pre-emption and signal coordination are required to be done before adding any trips to the corridor" and that "[a] traffic impact study of all the impacted intersections is required." Stop & Shop maintained the traffic signal needed more study and review before site plan approval by the County Planning Board.[2]

The County Planning Board decided not to "delay approval of this project with a tenuous impact on the County road, where the building area on the property is proposed to be substantially

[2] Stop & Shop claims it was precluded from providing any testimony regarding the traffic signal. In fact, Stop & Shop declined to present testimony before the County Planning Board.

changed" from about 71,000 square feet to about 65,502 square feet, and the suggested traffic signal would be off-tract. The County Planning Board also decided it would not "impose on a single applicant of a single property the construction of a traffic signal without a substantial study of this intersection and the surrounding road system, including the nearby railroad."

> Nevertheless, the Board still agreed to impose a requirement for a traffic improvement study in the area and has required the Applicant to be responsible for same, with the Applicant's consent. Moreover, irrespective of that study, the Applicant has already agreed, in the [Township Board] resolution, to pay its pro rata share of the traffic light or traffic improvements — if they are determined to be necessary . . . . The Applicant again reiterated to the [County Planning] Board that it will pay its pro rata share[.]

The Board of Freeholders found a pro rata contribution was appropriate by analogizing to the MLUL, and ordered Inserra to deposit into escrow $175,000 to be applied toward the cost of any subsequently-ordered improvements for the intersection. Under these circumstances, it was not arbitrary, capricious, or unreasonable to require such a study, under actual conditions after the project was operational, before determining whether a traffic signal was necessary and in order to determine Inserra's pro rata share.

Stop & Shop contends that by allowing Inserra to agree to make this contribution, the Board of Freeholders improperly relied on the MLUL. Under the MLUL, municipalities may "require[e] a developer, as a condition for approval of a subdivision or site plan, to pay the pro-rata share of the cost of providing only reasonable and necessary street improvements . . . located off-tract but necessitated or required by construction or improvements within such subdivision or development." N.J.S.A. 40:55D-42. Under that provision, a developer can agree or be required to pay its pro rata share but not "an amount that is disproportionate to the benefits conferred on the developer" in order "to insure that other landowners do not enjoy a free ride." Toll Bros., Inc. v. Bd. of Chosen Freeholders [Toll Bros. II], 194 N.J. 223, 244-45 (2008).

Although the CPA does not contain a similar provision, the MLUL's provision "codifies pre-MLUL case law." Id. at 243-44. We have ruled "[t]he same policy considerations that govern N.J.S.A. 40:55D-42, pertaining to townships, also apply to the powers conferred upon counties and county planning boards." Toll Bros., Inc. v. Bd. of Chosen Freeholders [Toll Bros. I], 388 N.J. Super. 103, 122 (App. Div. 2006), rev'd on other grounds, 194 N.J. 223 (2008); accord Squires Gate, Inc. v.

County of Monmouth, 247 N.J. Super. 1, 8 (App. Div. 1991) (citing Divan Builders, Inc. v. Planning Bd., 66 N.J. 582 (1975)). "Contribution toward [off-tract] improvements may be required when the improvement is made necessary by the development's impact upon the area," but "a developer may not be saddled with a disproportionate share of the cost of the improvement." Toll Bros. I, supra, 388 N.J. Super. at 122. In Toll Bros. II, supra, no party "challenged that aspect of the [Toll Bros. I] ruling," so the Supreme Court did not address it. 194 N.J. at 243 n.1. Thus, Inserra could agree to make such a contribution if the County later determined a traffic signal was necessary.

Stop & Shop argues the County Planning Board should have required Inserra to immediately install the traffic signal and to impose the entire cost on Inserra. The MLUL permits a municipality "to require that the work be done at the expense of the developer," but "only where appropriate local legislation permits the imposition and when it is fair and equitable that this be done." Toll Bros. II, supra, 194 N.J. Super. at 245 (quoting Divan, supra, 66 N.J. at 599). Stop & Shop failed to show either precondition. In any event, even if "the entire obligation of installing off-tract improvements may, in appropriate circumstances, be imposed on a developer initially,

the ultimate cost to the developer is limited to its pro-rata share." Ibid.

Stop & Shop argues Inserra should have been required to immediately install a traffic signal because the intersection of Greenwood and Wyckoff Avenues was already a failed intersection needing a traffic signal as "[i]ts current traffic demands exceed its current capacity." Stop & Shop's argument only highlights the unfairness and inequity of requiring Inserra to immediately install and pay for a traffic signal to fix an alleged problem caused not by Inserra's unbuilt project but by the traffic for existing properties in the area. "[A] municipality may only demand contributions for off-tract improvements 'that [were] necessitated by the development itself, or [were] a direct consequence of the development.'" Id. at 244 (citation omitted).

"[A] public entity has flexibility in its method of imposing conditions." Id. at 245. Under these circumstances, we cannot say it was arbitrary, capricious, or unreasonable for the County Planning Board and Board of Freeholders to accept Inserra's commitment to pay its pro-rata share of any traffic improvements its development made necessary, as determined by a traffic study after the project was completed.

B.

Stop & Shop next argues the County Planning Board improperly considered net opinions. However, Stop & Shop did not raise that objection at the hearings before the County Planning Board and the Board of Freeholders. In any event, it is meritless.

The net opinion rule dictates "an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011). Accordingly, "the net opinion rule 'requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion.'" State v. Townsend, 186 N.J. 473, 494 (2006) (citation omitted).

"The net opinion rule is a 'corollary of'" N.J.R.E. 703, "'which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Townsend v. Pierre, 221 N.J. 36, 53-54 (2015) (citation omitted). The rules of evidence do not apply in administrative proceedings. N.J.R.E. 101(a)(3); see also N.J.S.A. 40:55D-10(e). Nonetheless, the policy of the net opinion rule has been applied in land use cases. E.g., New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 160 N.J. 1, 16 (1999); Bd. of Educ. v. Zoning Bd. of Adjustment, 409 N.J.

Super. 389, 435 (App. Div. 2009). Even assuming the net opinion rule applies in a county planning board hearing, we reject Stop & Shop's contentions.

First, Stop & Shop claims Troutman's testimony was a net opinion. However, Troutman based his conclusion on (1) the history of the site, which has no documented safety issues or crashes associated with it, (2) his study of Wyckoff Avenue and Greenwood Avenue, and (3) patrons' ability to use Greenwood Avenue, situated between two county roads, to exit. Accordingly, Troutman's testimony was sufficiently supported and was not a net opinion. Moreover, it was sufficient evidence to support the decision reached by the County Planning Board.

Second, Stop & Shop claims the Joint Report was a net opinion. However, the Joint Report was not introduced as an exhibit before the County Planning Board. Rather, the Joint Report was an internal document prepared on behalf of the County Planning Board by the DPED and the County Engineer's Office simply listing potential requirements and conditions for approval of Inserra's site plan. As an internal document by staff to an adjudicatory body, it was not evidence, was not introduced or admitted before the County Planning Board, and was not an expert opinion, and thus was not subject to the net

opinion rule. Stop & Shop admits that "[i]f it is not considered evidence, that limited issue is moot."[3]

C.

The Board of Freeholders held a hearing on July 16, 2014. At that hearing, the Board of Freeholders heard argument from Inserra and Stop & Shop and received written submissions. Stop & Shop asked to introduce numerous exhibits it introduced before the Township Board but had not offered before the County Planning Board. The Board of Freeholders agreed to consider those exhibits over Inserra's objection.[4]

On August 20, 2014, the Board of Freeholders approved a resolution affirming the County Planning Board. The chairman of the Board of Freeholders said "I think we said everything that

---

[3] In any event, defendant did not object before the County Planning Board and cannot show plain error. Stop & Shop subsequently submitted the Joint Report as an exhibit to the Board of Freeholders. Stop & Shop "is barred by the doctrine of invited error from contesting for the first time on appeal the admission of the" Joint Report it offered to the Board of Freeholders. N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342 (2010).

[4] Inserra argues we should disregard those exhibits because Stop & Shop did not introduce them before the County Planning Board. Under the MLUL, an appeal "shall be decided by the governing body only upon the record established before the board of adjustment." N.J.S.A. 40:55D-17(a); see also N.J.S.A. 40:55D-17(d). We need not decide whether a similar limitation should be inferred under the CPA because the Board of Freeholders upheld the County Planning Board despite considering those exhibits. Inserra concedes the exhibits "made no difference in the result."

we wanted to say . . . and heard everything that we wanted to hear, and read everything that was sent to us, and we have decided to affirm."

Stop & Shop argues the Board of Freeholders violated the Open Public Meeting Act (OPMA), N.J.S.A. 10:4-6 to -21. In the OPMA, the Legislature found "the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process." N.J.S.A. 10:4-7. The operative provisions of the OPMA generally require a public body to give adequate notice of its meetings, N.J.S.A. 10:4-9(a)(3), make its meetings open to the public, N.J.S.A. 10:4-12(a), and keep minutes available to the public, N.J.S.A. 10:4-14.

Stop & Shop does not claim the Board of Freeholders violated the requirements in the operative provisions of the OPMA but instead claims it was required to conduct public deliberations. However, nothing in the OPMA requires any particular level of deliberation; it simply prohibits private deliberation except in specified circumstances. Moreover, though "[d]iscussion by board members in the public forum is beneficial" in land use cases, "[w]e do not deem it mandatory."

Scully-Bozarth Post # 1817 of Veterans of Foreign Wars v. Planning Bd., 362 N.J. Super. 296, 312 (App. Div.), certif. denied, 178 N.J. 34 (2003).

Stop & Shop cites In re Consider Distribution of Casino Simulcasting Special Fund, 398 N.J. Super. 7 (App. Div. 2008). There, the public vote of the New Jersey Racing Commission (NJRC) awarding a complicated calculus of funding awards "was based on private discussions and deliberations." Id. at 16. Although we stated "the OPMA requires the members of a public body to deliberate and vote at a public meeting," our concern was with "the problem of private deliberations." Id. at 17. "By the Chairman's admission, the NJRC made its decision based on a discussion that did not take place at the public meeting." Ibid.

This case does not resemble Casino Simulcasting. The motion before the Board of Freeholders sought a yes-or-no decision whether to affirm the County Planning Board. Moreover, the Board of Freeholders had already held the July 2014 public meeting at which it heard testimony and argument and received exhibits and submissions. Moreover, the chairman certified to the Law Division that "[t]he Freeholder Board did not meet to discuss, deliberate or consider the resolution prior to the vote on August 20, 2014." To the extent Stop & Shop suggests

impermissible private deliberations took place, we agree with the Law Division that there is no evidence of any such deliberations. See Witt v. Gloucester Cty. Bd. of Chosen Freeholders, 94 N.J. 422, 432 (1983) (rejecting "conjecture" that "resolutions were the product of a private meeting"). In any event, "invalidation of public action is an extreme remedy which should be reserved for violations of the basic purposes underlying the [OPMA]." Fallone Props., supra, 369 N.J. Super. at 566.

D.

The Board of Freeholders' resolution stated that its standard of review over the County Planning Board was de novo. The Board of Freeholders properly relied on an analogy to an appeal from a board of adjustment to a governing body under the MLUL.

> [T]he governing body . . . is not limited to weighing the decision of the board against the relatively indulgent arbitrary, unreasonable or capricious standard as would apply to proceedings in court. Instead, its decision to adopt an ordinance in which it has retained the power to hear an appeal from the zoning board is one which entitles it to de novo review.
>
> [Kane Props., supra, 214 N.J. at 227 (citing Evesham Twp. Zoning Bd. of Adjustment v. Evesham Twp. Council, 86 N.J. 295, 300 (1981)).]

Here, the Board of Freeholders similarly decided to create a county planning board over which it retained a right of appeal. N.J.S.A. 40:27-1, -6.9. Stop & Shop offers no reason why a different standard of review should apply where a Board of Freeholders reviews the decision of a county planning board. In any event, because the Board of Freeholders upheld the County Planning Board's decision, "the outcome is . . . the same under a de novo or arbitrary and capricious standard," as Stop & Shop concedes. Therefore, Stop & Shop failed to show reversible error.

E.

Stop & Shop argues the Law Division improperly applied general summary judgment rules instead of the summary judgment rules specifically applicable to complaints filed in lieu of prerogative writ under Rule 4:69. However, Rule 4:69 does not expressly limit the use of summary judgment. E.g., 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington, 221 N.J. 318, 338-39 (2015).

Nonetheless, we have stated: "Summary judgment is generally an inappropriate procedure in these types of cases because actions in lieu of prerogative writ, which pertain to zoning and planning board decisions, contemplate the filing of briefs and oral argument following submission of the administrative record,

thereby facilitating early disposition." W.L. Goodfellows & Co. of Turnersville, Inc. v. Wash. Twp. Planning Bd., 345 N.J. Super. 109, 112 n.1, 118 (App. Div. 2001) (reversing denial of summary judgment). Generally, such an action "is required to be heard by way of a non-jury plenary trial on the record below." Pressler & Verniero, Current N.J. Court Rules, comment 3 on R. 4:69-2 (2017). However, "if the trial is on the record below, the procedure is essentially akin to summary judgment motion." Ibid.

Thus, these two procedures are "akin" unless the court lacks the complete administrative record. See Hirth v. City of Hoboken, 337 N.J. Super. 149, 157 (App. Div. 2001). We have reversed where "the trial court granted [the] motion for summary judgment without reviewing the complete administrative record." Willoughby v. Planning Bd. of Twp. of Deptford, 306 N.J. Super. 266, 276 (App. Div. 1997).

Stop & Shop alleges error here only in "the trial court's second opinion in granting [partial] summary judgment."[5] In deciding that motion, the court received briefs, heard oral argument, and had before it the complete administrative record, including all of the transcripts from the County Planning Board

[5] This opinion dismissed counts 1-4 alleging error by the County Planning Board and counts 8 and 11-13 alleging error by the Board of Freeholders.

and the Board of Freeholders. Thus, using the summary judgment procedure was not "clearly capable of producing an unjust result." R. 2:10-2; see Hirth, supra, 337 N.J. Super. at 158.

F.

Stop & Shop argues it was error to deny its motion in limine to bar any factual "references or arguments made by counsel which are not supported by any factual statements in the record." The Law Division properly denied the motion, noting "[t]hey're arguments of counsel . . . . They were not offered as evidence." In this bench trial on a written record, the trial court "was in the best position to determine whether the evidence supported counsels' arguments." Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 128 (2004). "[W]e presume that the fact-finder appreciate[d] the potential weakness of such" unsupported arguments did so. See N.J. Div. of Child Prot. & Permanency v. J.D., 447 N.J. Super. 337, 349 (App. Div. 2016).

Accordingly, we affirm in appeal A-4630-14.

III.

We next consider appeal A-2134-14, concerning the dismissal under Rule 4:6-2(e) of Stop & Shop's OPRA litigation. "When we review a trial court's decision to dismiss a complaint under Rule 4:6-2(e)," including for mootness, "our review is de novo."

Teamsters Local 97 v. State, 434 N.J. Super. 393, 413, 416 (App. Div. 2014).

We summarize the facts detailed in the Law Division's November 18, 2014 opinion. On July 7, 2011, Stop & Shop submitted two OPRA request forms requesting various documents relating to Inserra's site plan application. Stop & Shop received responsive documents on August 8, 2011.

On June 26, 2014, Stop & Shop submitted another OPRA request form requesting documents provided by Inserra relating to its site plan application. On July 3, 2014, Stop & Shop received additional responsive documents, including: a January 27, 2011 report to the Township Board where Inserra's professional engineer, Jay Troutman, Jr., initially proposed a traffic signal be installed at the intersection of Wyckoff and Greenwood Avenues; a June 30, 2011 e-mail in which a County traffic engineer recommended against signalization due to "conflicting movements and a railroad crossing" just south of the intersection; and June 17, 2011 comments by the same engineer stating "[a] corridor improvement with Railroad pre-emption and signal coordination are required to be done before adding any trips to the corridor" and that "[a] traffic impact study of all the impacted intersections is required."

Stop & Shop wrote the Board of Freeholders advising it received those documents and arguing the documents should have been produced in response to its 2011 OPRA request. Stop & Shop requested, and the Board agreed, to consider these documents, which it admitted at its July 16, 2014 hearing. The Board expressly stated it considered Stop & Shop's documents when it approved Inserra's site plan application on August 20, 2014.

Two days before, on August 18, 2014, Stop & Shop filed a complaint seeking a declaratory judgment "that [the OPRA] Defendants violated Stop & Shop's rights under the Open Public Records Act" and the common law right of access. Stop & Shop also requested counsel fees. The OPRA defendants filed a motion to dismiss pursuant to Rule 4:6-2(e). On November 26, 2014, the Law Division granted the motion to dismiss, finding Stop & Shop's action was moot because it received the documents prior to initiating its OPRA lawsuit. We agree.[6]

"Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm." Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010).

[6] The Law Division also found dismissal appropriate because the complaint was "fatally time-barred" and because declaratory judgment is not "a recognized or an authorized form of relief in New Jersey" for a violation of OPRA. We need not reach these issues as the action is moot.

"It is firmly established that controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed." N.J. Div. of Youth & Family Servs. v. W.F., 434 N.J. Super. 288, 297 (App. Div.) (quoting Cinque v. N.J. Dep't of Corr., 261 N.J. Super. 242, 243 (App. Div. 1993)), certif. denied, 218 N.J. 275 (2014). "'[F]or reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, [or] a judgment cannot grant effective relief[.]'" Cinque, supra, 261 N.J. Super. at 243 (citation omitted).

Here, Stop & Shop's OPRA litigation was moot before it filed its complaint because it already received the documents it sought. Under OPRA's litigation provision, "[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court." N.J.S.A. 47:1A-6 (emphasis added). "If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed." Ibid. (emphasis added). Here, access was allowed even before Stop & Shop filed suit. See, e.g., Walsh v. U.S. Dep't of Veteran Affairs, 400 F.3d 535, 536 (7th Cir. 2005) ("'[O]nce the government produces all the documents a plaintiff requests, her

claim for relief under the FOIA becomes moot.'" (citation omitted)).[7]

Stop & Shop argues this litigation is not moot because it seeks counsel fees. Under OPRA's litigation provision, "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. "To be entitled to such counsel fees under OPRA, a plaintiff must be a prevailing party in a lawsuit . . . that was brought to enforce his or her access rights." Smith v. Hudson Cty. Register, 422 N.J. Super. 387, 393 (App. Div. 2011). This requires either (1) records are disclosed "after the entry of some form of court order or enforceable settlement" granting access, or (2) "when a government agency voluntarily discloses records after a lawsuit is filed" and under the catalyst theory the plaintiff "can establish a 'causal nexus' between the litigation and the production of requested records" and "'that the relief ultimately secured by plaintiffs had a basis in law.'" Mason v. City of Hoboken, 196 N.J. 51, 57, 76-77, 79 (2008) (citation omitted). Under the common law right of access, litigants must make the same showing. Id. at 79.

[7] New Jersey courts often consider cases interpreting "OPRA's federal counterpart, the Freedom of Information Act (FOIA), 5 U.S.C. § 552." See, e.g., Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009).

Our Supreme Court in Mason refused to presume OPRA litigants are entitled to counsel fees even when records are produced after suit is filed. Id. at 78-79. The Court emphasized such an entitlement could "upend the cooperative balance OPRA strives to attain," give plaintiffs "an incentive to file suit" to obtain "an award of attorney's fees," and give agencies "reason not to disclose documents voluntarily." Id. at 78. "OPRA cases designed to obtain swift access to government records would end up as battles over attorney's fees." Id. at 79.

Here, the OPRA defendants voluntarily produced the records before Stop & Shop filed suit. Such voluntary disclosure would be discouraged if Stop & Shop is allowed to file suit to obtain counsel fees for records it has already received. In any event, Stop & Shop did not obtain a judgment or enforceable consent decree granting it access to the records, and its filing of its lawsuit did not cause the production of the already-produced records. The Law Division properly found Stop & Shop not entitled to attorneys' fees as "Stop & Shop is not the prevailing party and this lawsuit was not the catalyst for its receipt of the requested documents."

Notably, Stop & Shop did not allege the OPRA defendants "knowingly and willfully violate[d]" OPRA and "unreasonably

denied access under the totality of the circumstances." N.J.S.A. 47:1A-11(a). Nor did Stop & Shop sue for imposition of the civil penalties which OPRA authorizes for such non-disclosure. Ibid. Thus, Stop & Shop did not claim entitlement to the remedy OPRA provides for such non-disclosure.

Stop & Shop's OPRA appellate brief also argues its OPRA lawsuit is not moot because "[a] declaration in this lawsuit that the documents should have been turned over earlier could affect" its appeal of the Board of Freeholders' approval of Inserra's site plan application, as Stop & Shop plans to argue "the County's indefensible delay in producing the documents deprived it of a fair hearing and due process of law." However, Stop & Shop did not raise that argument in its subsequent appellate brief in the site plan appeal. Moreover, a determination of whether there was an OPRA violation would be unnecessary to resolve whether Stop & Shop received a fair hearing and due process before the County Planning Board and the Board of Freeholders. Furthermore, the Board of Freeholders considered the documents in its de novo review, and we upheld its approval of the site plan application after considering those documents. Thus, this appeal is "moot" under OPRA and the common law because the "decision sought in [this] matter, when rendered, can have no practical effect on the existing

controversy." Redd v. Bowman, 223 N.J. 87, 104 (2015). Stop & Shop argues we should review this moot case because "the issue is of substantial importance, likely to reoccur, but capable of evading review." Bd. of Educ. v. Kennedy, 196 N.J. 1, 18 (2008). However, none of those requirements are met here.

Stop & Shop cannot avoid the proscription against litigating moot issues by bringing its action under the Declaratory Judgment Act (DJA), N.J.S.A. 2A:16-50 to -62. The DJA provides courts have the power to determine legal issues "in a proceeding for declaratory relief, in which a judgment will terminate the controversy or remove an uncertainty." N.J.S.A. 2A:16-52. However, a "court may refuse to render or enter a declaratory judgment, when, if rendered or entered, it would not terminate the uncertainty or controversy giving rise to the proceeding." N.J.S.A. 2A:16-61.

"[T]he remedy of a declaratory judgment is 'circumscribed by the salutary qualification that the jurisdiction of the courts may not be invoked in the absence of an actual controversy.'" Finkel v. Twp. Comm., 434 N.J. Super. 303, 318 (App. Div. 2013) (quoting N.J. Tpk. Auth. v. Parsons, 3 N.J. 235, 240 (1949)). "[W]here the issue is moot, declaratory judgment will not lie because of the absence of an actual controversy." Pressler & Verniero, Current N.J. Court Rules,

comment 1.2 on R. 4:42-3 (2017); see Parsons, supra, 3 N.J. at 240. Because Stop & Shop received the records, its right to receive them "is a moot issue," and it has no "entitlement to proceed under the [DJA]." JUA Funding Corp. v. CNA Ins./Cont'l Cas. Co., 322 N.J. Super. 282, 287 (App. Div. 1999); see Cornucopia Inst. v. U.S. Dep't of Agric., 560 F.3d 673, 675-76 (7th Cir. 2009) (rejecting the argument that the "court remained free to issue a declaratory judgment that [the agency] violated FOIA" after the documents were produced).

Additionally, "[t]he right to relief under the DJA is procedural in nature; it does not create substantive rights to relief." In re N.J. Firemen's Ass'n Obligation to Provide Relief Applications Under Open Pub. Records Act, 443 N.J. Super. 238, 253 (App. Div. 2015), certif. granted, 224 N.J. 528 (2016). "A party that lacks a statutory right of action under OPRA may not obtain declaratory relief regarding its rights or obligations under OPRA." Id. at 257.

Accordingly, we affirm the Law Division's ruling to the extent it held Stop & Shop was not entitled to a declaratory judgment in this moot litigation. We need not decide the OPRA defendants' "cross-appeal that Stop & Shop lacks standing" to raise the OPRA claim.

We affirm in appeal A-2134-14 and appeal A-4630-14.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION