SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3161-15T1

IRVING FREEDBERG, JAMES SPATZ, OLGA STARISKY and TERRY VAVRA,

Plaintiffs-Appellants,

v.

ZONING BOARD OF ADJUSTMENT OF THE BOROUGH OF RAMSEY, RICHARD MAMMONE, ZONING OFFICER OF THE BOROUGH OF RAMSEY, and V BOYS RAMSEY HOLDING, LLC, a Limited Liability Company of the State of New Jersey,

Defendants-Respondents.

Submitted March 16, 2017 – Decided March 31, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4207-15.

Robert J. Inglima, Jr., attorney for appellants.

Matthew S. Rogers, attorney for respondent Zoning Board of Adjustment of the Borough of Ramsey.

Eastwood, Scandariato & Steinberg, attorneys for respondent Richard Mammone, Zoning Officer

of the Borough of Ramsey (Peter A. Scandariato, on the brief).

Beattie Padovano, LLC, attorneys for respondent V Boys Ramsey Holding, LLC (Antimo A. Del Vecchio, of counsel; Daniel L. Steinhagen, on the brief).

PER CURIAM

This case concerns challenges to a proposed Wawa gas station and convenience store on State Highway 17 in the Borough of Ramsey. Plaintiffs, Ramsey residents whose properties abut the property at issue, appeal from the February 17, 2016 final judgment dismissing with prejudice their complaint in lieu of prerogative writs against defendants, Zoning Board of Adjustment of the Borough of Ramsey (the Zoning Board), Zoning Officer Richard Mammone (the Zoning Officer), and V Boys Ramsey Holding, LLC (V Boys). Plaintiff's complaint challenged the Board's resolution denying their appeal of the Zoning Officer's decision that V Boys' development application does not require any variances. Plaintiffs seek reversal of the judgment, asserting various claims of trial court error. We have considered plaintiffs' arguments in light of the record and our review of the applicable legal principles. We affirm.

I.

We derive the following relevant facts from the record before the Zoning Board. On February 6, 2013, V Boys filed an application

for variance and conditional use approval with the Ramsey Planning Board to develop a lot in Ramsey's B-3 commercial district on Route 17. V Boys requested nine variances. V Boys also filed an application for site plan proposal. The application for site plan stated V Boys intends to use the lot for "[r]etail convenience and gas sales." V Boys planned to have WaWa, Inc., operate the convenience store and service station. The lot contains 77,280 square feet, and the proposed principal building will occupy 5,051 square feet, with an additional 7,067 square foot canopy. V Boys subsequently revised its application, removing all requested variances.

We review the Borough's zoning ordinance (hereinafter Ordinance). Ordinance, § 34-29.1, states, "In the B-3 Highway Commercial Districts only those uses listed below are permitted": "[a]ny use permitted in the B-1 Zone." "In the B-1 Central Business District only the following uses are permitted:" (1) "[b]usiness uses of a strictly retail sales and service type, conducted entirely within the confines of a building, such as stores, shops and offices, and involving the rendering of service or sale of goods directly to the ultimate consumer" and (2) "[p]ublic garages and service stations." Ordinance, § 34-26.1. "Public garages and service stations shall be subject to all of the requirements of all of the terms and provisions of Section 34-

8, Public Garages or Service Stations," and "[t]he minimum ground floor area of any public garage or service station hereafter erected shall not be less than 1,600 square feet." Ordinance, § 34-26.1(d)(1), (2).

According to Ordinance, § 34-3, a "structure" is "[a]nything constructed or erected, whether portable, prefabricated, sectional or otherwise, which is permanent or temporary, located on and/or under the ground or attached to something so located." It does not define "building," although it does distinguish between a "structure" and a "building." See Ordinance, § 34-4.2 ("No building or structure or part thereof shall be erected, raised, moved, extended, enlarged, altered or demolished . . . ."); Ordinance, § 34-4.5, 4.13, 8.1, 8.2, 9.2, 40.1. "[N]o lot may contain more than one principal building." Ordinance, § 34-4.4. "There shall not be more than one accessory building on any lot . . . . A single structure used as a garage for the storage of motor vehicles shall not be construed as to exclude an accessory building for the purpose of this Paragraph . . . ." Ordinance, § 34-4.5(c).

Ordinance, § 34-4.3, defines a "fast-food restaurant" as "[a] restaurant having a limited menu and serving food to the general public for consumption either on or off the premises." It does not define "restaurant."

On August 15, 2013, plaintiffs sent the Planning Board a letter, arguing the Planning Board lacked jurisdiction over V Boys' application because the proposed gas station and convenience store required variances from the Zoning Board. In response, on August 20, 2013, the Zoning Officer sent the Planning Board a memorandum confirming his determination that V Boys' application required no variances from the Zoning Board.

On September 6, 2013, plaintiffs challenged the Zoning Officer's decision, requesting review by the Zoning Board. The Zoning Officer testified at the April 6, May 21, and June 18, 2014 meetings. He reviewed V Boys' application and plans for the lot and concluded V Boys was applying to develop a "gas station with a retail component." He testified he was "familiar with the standards that are applicable to public garages and service stations." He "looked at [the] plan that showed a gas station with a retail store attached to it and that is something that the Borough has allowed . . . down Route 17 [for] probably over 20 years." He said the Ordinance does not define "restaurant," but explained the difference between a convenience store and a restaurant is "[s]eating . . . . A fast food restaurant is a restaurant that sells prepared foods either indoors or outdoors in disposable containers; i.e., paper or plastic and does not have

waiter service." He said V Boys' application did not include any seating, so their plan did not include a restaurant.

On July 16, August 20, and September 17, 2014, plaintiffs presented an expert witness, who was a licensed professional engineer, licensed architect, and certified municipal engineer. He testified the Ordinance requires the service station "to include a building with a minimum ground floor area of 1,600 square feet." He said this leads to two possible interpretations: (1) the service station fails to comply with the Ordinance because it does not have a minimum floor area of 1,600 square feet, or (2) the service station's canopy is a second building on the lot, which also violates the Ordinance. He explained that the 5,051 square foot building does not satisfy the service station's requirement for 1,600 square feet because the 5,051 square foot building is for the convenience store. "It does not have anything to do with the repair or storage of vehicles[,] and therefore it in my opinion does not meet the requirement of the 1,600 square foot building that services the public garage or service station that's required for this use in this zone."

The expert also read the Ordinance defining "fast food" as a "restaurant having a limited menu and serving food to the general public for consumption either on or off the premises." He therefore opined "that the use that's proposed here is not one

that I would classify as a retail store but rather as a fast-food establishment in accordance with the definitions set forth in your ordinance."

V Boys presented its expert, a licensed professional planner, on September 17, November 19, and December 17, 2014. He agreed with the Zoning Officer's "determination that the applicant meets all the conditions for the public garage or service station use." He noted the Zoning Officer had "consistently approved service stations and convenience stores in the B-3 zone." As a professional planner, he further noted "that most modern service stations generally do include both convenience, retail, and a service station component on site."

V Boys' expert had reviewed the Planning Board's previous decisions and saw "four service stations with retail convenience stores [had] been approved along Route[] 17 since 1999." He said the "definition of a fast food establishment specifically refers to restaurant as determined by the zoning official in this Borough is an establishment with seats." He further testified the 1,600 square foot canopy is "clearly not a building." He noted the Planning Board had never considered a service station's canopy as a second building.

The Zoning Board issued its written decision in favor of V Boys on March 18, 2015. Five members voted in favor of V Boys,

one in favor of plaintiffs, and three abstained. The Zoning Board concluded, "[T]he retail use and service station use is permitted whether considered one (1) combined use or two (2) separate uses and, therefore, the application was properly before the Planning Board." The Zoning Board further concluded the service station does not require a 1,600 square foot ground floor, and if it did, the convenience store or area of the canopy would satisfy the requirement.

On May 4, 2015, plaintiffs filed their complaint challenging the Zoning Board's decision to deny their appeal of the Zoning Officer's determination that V Boys' application did not require any variances. Defendants answered, and the court held a bench trial on November 16, 2015. The court issued an eight-page written decision on February 1, 2016, affirming the Zoning Board.

This appeal followed, with plaintiffs asserting five claims of trial court error. First, the trial court should have concluded V Boys' proposed gas station and convenience store fails to comply with Ordinance, § 34-26.1(d)(2), which states, "The minimum ground floor area of any public garage or service station hereafter erected shall not be less than 1,600 square feet." Second, the trial court should not have considered the Zoning Officer's testimony because he "did not possess the requisite competence and understanding of the Borough's ordinances to make such

determinations." Third, the trial court should have concluded the Borough's ordinances "clearly restrict the development of lands in the B-3 Zone District to a single principal use and limit the number of principal structures." Fourth, the trial court's "ruling that the 7,000 square foot canopy does not constitute a principal building is not supported by the Zoning Ordinance or MLUL." Fifth, "[t]he trial court failed to determine whether the proposed use of the WaWa building is a fast-food establishment, pursuant to the Zoning Ordinance."

II.

Zoning boards make quasi-judicial decisions to grant or deny applications within their jurisdiction. Willoughby v. Planning Bd. of Deptford, 306 N.J. Super. 266, 273 (App. Div. 1997); Kotlarich v. Mayor of Ramsey, 51 N.J. Super. 520, 540-42, (App. Div. 1958). The determination of a zoning board is presumed to be valid. Cell S. of N.J. v. Zoning Bd. of Adjustment of W. Windsor, 172 N.J. 75, 81 (2002); Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 285 (1965). The court's review of a board's decision is based solely on the record before the board. Kramer, supra, 45 N.J. at 289. A court must not substitute its own judgment for that of the board unless there is a clear abuse of discretion. See Cell S. of N.J., supra, 172 N.J. at 81. The burden is on the challenging party to demonstrate that the board's

decision was arbitrary, capricious, or unreasonable. Ibid.; New Brunswick Cellular v. S. Plainfield Bd. of Adjustment, 160 N.J. 1, 14 (1999); Smart SMR of N.Y., Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1988).

The Municipal Land Use Law expressly rejects adherence to the rules of evidence in zoning board hearings. See N.J.S.A. 40:55D-10(e) (declaring that "[t]echnical rules of evidence shall not be applicable to the hearing" of a municipal land use agency); see also Baghdikian v. Bd. of Adjustment of Ramsey, 247 N.J. Super. 45, 49 (App. Div. 1991) (stating that a zoning board "cannot be equated with courts" and procedural safeguards employed in judicial proceedings should not be "imported wholesale" into proceedings before a land use board). Consequently, a zoning board may consider an opinion when the data and other evidence establish that it is not arbitrary or unreasonable.

This court applies the same standards as the trial court. Bressman v. Gash, 131 N.J. 517, 529 (1993); D. Lobi Enters. v. Planning/Zoning Bd. of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009). However, when an appeal raises a question of law, we apply a plenary standard of review. Wyzykowski v. Rizas, 132 N.J. 509, 518 (1993).

A.

Plaintiffs first argue the trial court should have concluded V Boys' proposed gas station and convenience store fails to comply with Ordinance, § 34-26.1(d)(2), which requires the service station to have a floor area of 1,600 square feet. Their expert testified the 5,051 square foot building does not satisfy this requirement because it is for the convenience store, not the service station. He also said the canopy could not satisfy the requirement unless it was considered a second building, something not permitted in the zone.

Defendants contend Ordinance, § 34-29.1, does not incorporate the subsections of Ordinance, § 34-26.1. We decline to rely on this argument because Ordinance, § 34-26.1, permits certain uses but limits them according to their subsections.

Plaintiffs' argument is also misguided. Ordinance, § 34-26.1(d)(2), states, "The minimum ground floor area of any public garage or service station hereafter erected shall not be less than 1,600 square feet." Ordinance, § 34-4.5, states, "A single structure used as a garage for the storage of motor vehicles shall not be construed as to exclude an accessory building for the purpose of this Paragraph . . . ." We therefore conclude the canopy, like a garage, is not a principal or accessory building, but the 7,067 square foot canopy does establish the service

station's floor area exceeds 1,600 square feet. We further note Ordinance, § 34-26.1(d)(2), does not limit the 1,600 square feet for the exclusive use of the service station, so the 5,051 square foot convenience store clearly satisfies the area required by the Ordinance.

B.

Plaintiffs next argue the trial court should not have considered the Zoning Officer's testimony because he "did not possess the requisite competence and understanding of the Ordinance to make such determinations." The Zoning Officer reviewed V Boys' application and plans for the lot, and as Ramsey's Zoning Officer, he was familiar with the Ordinance. We conclude his opinion was based on data and other evidence that established his opinion was not arbitrary or unreasonable. See Cell S. of N.J., supra, 172 N.J. at 81; New Brunswick Cellular, supra, 160 N.J. at 14; Smart SMR of N.Y., Inc., supra, 152 N.J. at 327.

C.

Plaintiffs also argue the trial court should have concluded the Borough's ordinances "clearly restrict the development of lands in the B-3 Zone District to a single principal use and limit the number of principal structures." Ordinance, § 34-29.1, states, "In the B-3 Highway Commercial Districts only those uses listed below are permitted": "[a]ny use permitted in the B-1 Zone." The

Ordinance does not qualify the number of "uses . . . permitted." We decline to add any numerical limitation to the Ordinance.

D.

Plaintiffs correctly note, "No lot may contain more than one principal building." Ordinance, § 34-4.4. They argue the trial court's "ruling that the 7,000 square foot canopy does not constitute a principal building is not supported by the Zoning Ordinance or MLUL." This argument lacks merit. We discern no basis for considering a gas station canopy as a principal building. While the Ordinance does not define "building," it does distinguish between a "structure" and a "building. See Ordinance, § 34-4.2, 4.5, 4.13, 8.1, 8.2, 9.2, 40.1. We affirm the trial court's conclusion the canopy constitutes a structure, not a building.

E.

Last, plaintiffs argue, "The trial court failed to determine whether the proposed use of the WaWa building is a fast-food establishment, pursuant to the Zoning Ordinance." First, the trial court did clearly state, "[T]he WaWa associated with the gas station is not a fast food restaurant." Ordinance, § 34-4.3, defines a "fast-food restaurant" as "[a] restaurant having a limited menu and serving food to the general public for consumption either on or off the premises." Although the Ordinance does not

define "restaurant," the Zoning Officer's definition requiring seating makes common sense.

Affirmed.