SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3564-14T2
A-0522-15T2

DANIEL J. ROE; KEVIN G. ROE; AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Corporation of the State of Maryland,

Plaintiffs-Appellants/
Cross-Respondents,

v.

PLANNING BOARD OF THE BOROUGH OF MONTVALE,

Defendant-Respondent,

and

MONTVALE DEVELOPMENT ASSOCIATES, LLC,

Defendant/Intervenor-
Respondent/Cross-Appellant.

DANIEL J. ROE; KEVIN G. ROE; LINDA BONGARDINO; JOHN BONGARDINO; and THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Corporation of the State of Maryland,

Plaintiffs-Appellants,

v.

BOROUGH OF MONTVALE,

Defendant-Respondent,

and

MONTVALE DEVELOPMENT ASSOCIATES, LLC,

Defendant/Intervenor-Respondent.

DANIEL J. ROE; KEVIN G. ROE; LINDA BONGARDINO; and JOHN BONGARDINO;

Plaintiffs-Appellants,

and

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Corporation of the State of Maryland,

Plaintiff,

v.

MONTVALE PLANNING BOARD; and MONTVALE DEVELOPMENT ASSOCIATES, LLC,

Defendants-Respondents.

Argued January 31, 2017 - Decided March 10, 2017

Before Judges Yannotti, Fasciale and Gilson.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-3733-13; L-4489-13; and L-8268-14.

Thomas J. Cafferty and Nomi I. Lowy argued the cause for appellants (Gibbons P.C., attorneys; Natalie H. Mantell, on the brief in A-3564-14; Mr. Cafferty and Phillip J. Duffy, of counsel; Ms. Mantell, Ms. Lowy, and Kaitlyn Stone, on the briefs in A-0522-15).

Antimo A. Del Vecchio argued the cause for respondent/cross-appellant Montvale Development Associates, LLC in A-3564-14 and respondent in A-0522-15 (Beattie Padovano, LLC, attorneys; Mr. Del Vecchio, of counsel; Daniel L. Steinhagen, on the brief).

Robert T. Regan argued the cause for respondent Planning Board of the Borough of Montvale (Law Offices of Robert T. Regan, attorneys; Mr. Regan, on the brief).

Philip N. Boggia argued the cause for respondent Borough of Montvale in A-3564-14 (Boggia & Boggia, LLC, attorneys; Mr. Boggia, of counsel; Joseph W. Voytus, on the brief).

PER CURIAM

In A-3564-14, plaintiffs appeal from the trial court's final judgment dated February 26, 2015, and other orders entered by the court, which dismissed their challenges to the Borough of Montvale's adoption of an amendment to the Borough's master plan and Ordinance 2013-1374. Montvale Development Associates, LLC (MDA) cross-appeals from the court's order of October 29, 2013, which denied its motion to dismiss plaintiffs' challenge to the ordinance.

In A-0522-15, plaintiffs appeal from the trial court's final judgment dated August 19, 2015, which affirmed the approval by the Borough's Planning Board (Board) of MDA's application for preliminary and final site plan approval, a bulk variance, and planned unit development approval.

We address both appeals in this opinion. For the reasons that follow, we affirm on the appeal and cross-appeal in A-3564-14, and affirm in A-0522-15.

I.

These appeals pertain to the development and rezoning of certain properties in the Borough, specifically the lands identified as Block 2802, Lots 2 and 3; and Block 1002, Lots 3 and 5. The DePiero Family owns the Block 2802 properties, and Block 1002, Lot 5, which is located north of the Block 2802 parcels. The DePieros used the properties for farming and the operation of a farm store. Katalin Deim is the owner of Block 1002, Lot 3, a plot that adjoins Lot 5, and is the site of a single-family residence.

In the early 1990's, the Borough was subject to a Mount Laurel[1] lawsuit, and, pursuant to a settlement of that litigation, rezoned the Block 2802 properties as a potential site for a

[1] S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983); S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975).

development that would include thirty-two affordable housing units. The remainder of the Block 2802 parcels were placed in a zoning district, in which office buildings, hotels, and scientific and research labs are permitted.

In 2010, the DePieros and SHG Montvale, LLC, formed MDA to pursue development of the Block 2802 parcels for retail purposes. In furtherance of this goal, MDA approached the Borough concerning a potential rezoning of the property. To address the Borough's concerns about the construction of the thirty-two affordable housing units, MDA proposed constructing those units on Block 1002, Lot 5.

In July 2012, the Board adopted an amendment to the Borough's master plan, which proposed the rezoning of the Block 2802 parcels to permit a lifestyle-retail development, and the transfer of the affordable housing component previously attached to the Block 2802 parcels to Block 1002, Lot 5. In November 2012, an ordinance was proposed to rezone the properties as recommended in the master plan amendment. In August 2012, Daniel J. Roe, Kevin G. Roe, and The Great Atlantic & Pacific Tea Company, Inc. (A&P) filed an action in the Law Division seeking to invalidate the 2012 master plan amendment.

Thereafter, an ordinance was introduced in the Borough Council to amend the Borough's zoning regulations in accordance

with the 2012 master plan amendment. In December 2012, the Council voted to table the proposed ordinance, due to concerns about construction of the affordable housing units on Block 1002, Lot 5, a 1.6-acre parcel.

MDA then entered into a contract to purchase Block 1002, Lot 3, so that both lots of Block 1002 would be potential sites for the thirty-two affordable housing units. Thereafter, another amendment to the master plan was proposed, which recommended rezoning the Block 2802 parcels to permit a lifestyle-retail center on that property, and the transfer of the affordable housing designation from that site to the Block 1002 parcels.

Richard Preiss, P.P., the Borough's Planner, determined that the proposed zoning changes would further six goals of the Borough's previously-adopted master plan, and at least five purposes of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -129. In March 2013, the Board held a public hearing on the proposed master-plan amendment, and in April 2013, adopted the amendment.

On April 9, 2013, Ordinance 2013-1374 was introduced in the Borough's Council to rezone the Block 2802 and Block 1002 parcels, in accordance with the 2013 master plan amendment. Among other provisions, the proposed ordinance stated that at least three acres would be zoned for the construction of at least thirty-two

affordable housing units, in a development sponsored by the Borough.

On April 30, 2013, the Borough Council conducted a public hearing on the proposed ordinance. The Roes and Linda Bongardino appeared and opposed adoption of the ordinance. After a lengthy public-comment period and extensive deliberations, the Council adopted Ordinance 2013-1374.

In May and June 2013, the Roes, Linda and John Bongardino, and A&P filed actions in lieu of prerogative writs in the Law Division seeking to invalidate the 2013 master plan amendment and Ordinance 2013-1374.

In August 2013, MDA filed a motion, which sought, among other relief, to: intervene in the pending Law Division actions; dismiss plaintiffs' challenge to the ordinance as untimely, or alternatively, to consolidate the actions; and dismiss the claim in the challenge to the master plan amendment, alleging violations of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21.

On September 24, 2013, Judge William Meehan granted MDA's motion to intervene and consolidate the complaints regarding the 2013 master plan amendment and Ordinance 2013-1374. On October 29, 2013, the judge entered an order dismissing plaintiffs' OPMA claims regarding the 2013 master plan amendment, finding that the claims had not been filed within the time required by OPMA, specifically

N.J.S.A. 10:4-15(a). The judge also denied MDA's motion to dismiss the challenge to the ordinance, finding that it had been filed within the time required by Rule 4:69-6. In addition, the judge dismissed plaintiffs' complaint challenging the 2012 master plan amendment as moot.

Thereafter, MDA moved to dismiss plaintiffs' OPMA claims regarding Ordinance 2013-1374, and plaintiffs filed a cross-motion for reconsideration of the court's October 29, 2013 order. On January 13, 2014, the judge entered an order granting MDA's motion and dismissed the OPMA claims, finding that they were time-barred, and barred by res judicata and issue preclusion. The court also denied plaintiffs' cross-motion for reconsideration.

Meanwhile, MDA had filed an application with the Board seeking preliminary and final site plan approval, a bulk variance, and planned unit development approval for the lifestyle-retail development on the Block 2802 properties. In July 2014, after conducting fourteen public hearings, the Board granted MDA's application. In August 2014, plaintiffs filed an action in lieu of prerogative writs seeking to invalidate the Board's approval of MDA's application.

Judge Meehan conducted a trial on plaintiffs' challenges to the 2013 master plan amendment and Ordinance 2013-1374. On February 12, 2015, the judge filed a written opinion finding that plaintiffs

had not met their burden of showing that the Borough's actions were arbitrary, capricious or unreasonable.

The judge entered an order dated February 26, 2015, affirming the adoption of the master plan amendment and ordinance, and dismissing plaintiffs' complaints with prejudice. Plaintiffs' appeal and MDA's cross-appeal followed. The appeal was docketed as A-3564-14.

In April 2015, Judge Meehan granted MDA's motion for partial summary judgment in plaintiffs' challenge to the approval of MDA's development application, and dismissed plaintiffs' claims of OPMA violations and conflicts of interest on the part of the Borough and Board members.

In July 2015, the judge denied plaintiffs' motion to amend the complaint to include a claim that the Board did not have jurisdiction to consider MDA's application because MDA had not provided the required notice of the hearing to an owner of property near the subject property. The judge then conducted a trial on plaintiffs' remaining claims.

On August 5, 2015, the judge filed a written opinion, finding that the Board's approval of MDA's application was not arbitrary, capricious or unreasonable. The judge entered a judgment dated August 19, 2015, dismissing plaintiffs' complaint with prejudice. Plaintiffs' appeal followed. The appeal was docketed as A-0522-

15.

II.

Appeal No. A-3564-14

We first consider plaintiffs' appeal from the trial court's judgment affirming the adoption of the 2013 master plan amendment and Ordinance 2013-1374, and MDA's cross-appeal from the denial of its motion to dismiss as untimely plaintiffs' challenge to the adoption of the ordinance.

A. Plaintiffs' Appeal

On appeal, plaintiffs argue: (1) the trial court erred by refusing to recognize that the Board approved the 2013 master plan amendment and Ordinance 2013-1374 on a quid pro quo basis in violation of the MLUL; (2) Ordinance 2013-1374 is arbitrary, capricious and unreasonable because there are numerous unfulfilled contingencies that prevent the achievement of its primary purpose, which is the construction of affordable housing; (3) Ordinance 2013-1374 constitutes impermissible spot zoning; (4) the trial court erred by finding that the OPMA claims were not timely filed; and (5) the court should have invalidated the 2013 master plan amendment and Ordinance 2013-1374 due to the repeated violations of the OPMA.

1. Quid Pro Quo Claim

Plaintiffs argue that the trial court should have invalidated

the 2013 master plan amendment and Ordinance 2013-1374 because they were allegedly adopted as a quid pro quo for MDA's agreement to pay (1) $3 million for certain off-tract roadway improvements; (2) all of the Borough's professional fees related to the rezoning process; and (3) the legal fees and expenses incurred by the Borough in this litigation.

N.J.S.A. 40:55D-42 states:

> The governing body may by ordinance adopt regulations requiring 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.

Here, MDA agreed to pay $3 million toward the cost of improvements to certain roadways and intersections, which are needed to accommodate MDA's development of the Block 2802 properties. Preiss, the Borough's Planner, estimated that the cost of these improvements was $3,907,125, but that amount did not include the cost of right-of-way acquisition, permit fees, or utility relocation costs.

Findings of fact of a trial judge, sitting without a jury, will not be disturbed on appeal if they are supported by "adequate, substantial and credible evidence" in the record. Twp. of W. Windsor v. Nierenberg, 150 N.J. 111, 132 (1997) (quoting Rova

Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)). Deference to the trial court's findings is especially appropriate when the trial court's findings are informed by its opportunity to hear and see the witnesses and gain a "feel" of the case, which a reviewing court cannot enjoy. Ibid. (quoting State v. Whitaker, 79 N.J. 503, 515-16 (1979)). However, the trial court's legal determinations are not entitled to any special deference. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Here, there is sufficient credible evidence in the record to support the trial court's finding that the Board's adoption of the 2013 master plan amendment and the ordinance was not a quid pro quo for MDA's agreement to pay the $3 million for the roadway improvements. The evidence shows that MDA's agreement to pay these costs was made at the behest of the County, not the Borough. The improvements at issue are to county roads, and it is undisputed that the Bergen County Planning Board conditioned its approval of MDA's county site plan application upon MDA's payment of $3 million for improvements to the county roads in the area of the development.

Plaintiffs do not argue that the road improvements are not necessary or reasonable. They also did not present any evidence in the trial court showing that the $3 million MDA agreed to pay

exceeds its pro rata share of the cost of these improvements. Furthermore, Section 128-5.14(B)(8)(a)(4) of Ordinance 2013-1374 expressly provides for reimbursement if a developer pays more than its pro rata share of the cost of off-tract improvements.

There also is sufficient credible evidence in the record for the trial court's determination that the Board's action was not in exchange for MDA's agreement to pay the Borough's professional fees for the rezoning, and the Borough's legal expenses in this litigation. The trial court correctly found that MDA's agreement to pay these expenses is lawful. See Flama Constr. Corp. v. Twp. of Franklin, 201 N.J. Super. 498, 507 (App. Div. 1984) (holding that an ordinance requiring reimbursement of professional expenses "is neither unfair nor violative of public policy").

2. Adoption of Ordinance 2013-1374

Plaintiffs contend the Borough's adoption of Ordinance 2013-1374 was arbitrary, capricious and unreasonable because "there are numerous unfulfilled contingencies that prevent the purported primary purpose -- the generation of affordable housing -- from occurring[.]"

Plaintiffs argue that the Borough's ability to construct the thirty-two affordable housing units is contingent upon the occurrence of several events, including the Borough obtaining title to Block 1002, Lot 3, and its ability to transfer the

affordable housing obligation from the Block 2802 parcels to the Block 1002 properties.

Plaintiffs further argue that the primary purpose of the rezoning, the construction of the affordable housing units, is "nothing more than an illusion." They contend that the Borough's real purpose in adopting the ordinance is to facilitate MDA's development on the DePieros' property.

There is, however, sufficient credible evidence in the record to support Judge Meehan's finding that Ordinance 2013-1374 is not arbitrary, capricious or unreasonable. The 2013 master plan amendment contains a "Summary of Reasons for Supporting the Proposed Rezoning," which lists ten reasons for adoption of the ordinance. The zoning of the Block 1002 parcels for affordable housing is only one of those purposes. Furthermore, the zoning changes effected by the ordinance provide a realistic possibility that the thirty-two units of affordable housing will be built.

As we stated previously, the DePieros' property had been zoned as a potential site for thirty-two units of affordable housing, but the DePieros continued to use their property for farming and a related farm store and the units were not constructed. Ordinance 2013-1374 envisions that the Borough will obtain title to both Block 1002 parcels, and it will retain control over the construction of the units on those properties. The record

shows that the Borough has successfully sponsored the construction of affordable housing in the past.

Plaintiffs argue that MDA cannot convey title to Lot 3 of Block 1002 because MDA does not own that property. Plaintiffs assert that MDA never produced a contract for the purchase of the property, but MDA credibly stated that it had entered into the contract. Therefore, when it adopted the ordinance, the Borough reasonably assumed that MDA would be able to acquire title and convey it to the Borough.

Plaintiffs further argue that the requirements of the Council on Affordable Housing (COAH) prohibit the Borough from deleting the DePieros' property as an inclusionary development site without a formal motion and COAH's approval. See N.J.A.C. 5:96-14.1(b). However, it is undisputed that COAH is no longer a functioning administrative agency, and the trial courts have again assumed responsibility for affordable-housing litigation. See In re Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 5-6 (2015).

Here, the Borough reasonably assumed that it would be able to substitute the Block 1002 parcels for the Block 2802 properties as a site for the thirty-two units. Furthermore, the Borough fairly assumed that construction of the units was realistically possible because the Borough would acquire title to the parcels and it would have control over the construction of the units.

Ultimately, the Borough may have to obtain the court's approval for transferring the affordable housing obligation from the Block 2802 parcels to the Block 1002 lots.[2] However, this is not a reason for concluding that the ordinance is arbitrary, capricious or unreasonable.

3. Spot Zoning

Plaintiffs also argue that Ordinance 2013-1374 constitutes improper spot zoning. At trial, plaintiffs presented testimony from an expert planner in support of this claim, but Judge Meehan found that this witness' testimony was not credible. The judge also found that the witness' opinion was not supported by the relevant facts or the MLUL. The judge found that Preiss' testimony was more credible.

Preiss testified that the ordinance was a valid exercise of the Borough's zoning power, and satisfied the criteria in Riggs v. Twp. of Long Beach, 109 N.J. 601, 611-12 (1988). The judge noted that Preiss stated that the ordinance advances several purposes of zoning. Preiss explained that the ordinance increased the Borough's base of tax ratables; updated the land use regulations that were inconsistent with existing and future uses;

[2] We note that the Borough has filed a declaratory judgment action, seeking trial court approval of its housing element and fair share plan, which includes the zoning changes adopted in 2013.

updated regulations to address traffic concerns; promoted sustainability; and created affordable housing.

The judge noted that the provision of affordable housing promotes the general welfare. The judge found that it is more likely that the affordable housing units will be constructed under the ordinance than under any other plan. The judge's findings of fact are supported by substantial credible evidence in the record.

The record also supports the judge's determination that the ordinance does not constitute "spot zoning," which is the use of the zoning power to benefit particular private interests rather than the collective interests of the community. Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 80 N.J. 6, 18 (1976), cert. denied sub nom. Feldman v. Weymouth Twp., 430 U.S. 977, 97 S. Ct. 1672, 52 L. Ed. 2d 373 (1977). Here, Judge Meehan found that the ordinance advances the purposes of the Borough's master plan, promotes the development of inherently beneficial use, and advances the general welfare of the community. There is substantial credible evidence in the record to support the judge's findings.

4. The OPMA Claims

Plaintiffs argue that the trial judge erred by initially finding that their OPMA challenges to the adoption of the 2013 master plan amendment and Ordinance 2013-1374 were not timely filed. We need not, however, address this argument because at the

trial, the court allowed plaintiffs to present evidence on these claims, and the judge addressed the claims on the merits.

Here, plaintiffs allege that the Borough violated the OPMA because individual officials or select groups of officials met at various times with MDA's representatives to discuss the development of the DePieros' property and the rezoning plans. Plaintiffs note that these meetings began in June 2010 and continued through the adoption of the 2013 master plan amendment and Ordinance 2013-1374. Plaintiffs claim the public was unlawfully excluded from these meetings, in violation of the OPMA.

Plaintiffs further allege that the Borough's Mayor and certain Council members violated N.J.S.A. 10:4-11, which provides that "[n]o person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of [the OPMA]." According to plaintiffs, the Mayor met at times with no more than two members of the Council to discuss MDA's development and the proposed zoning changes. Plaintiffs claim that, in doing so, the Mayor and the Council members purposely acted to circumvent the open-meeting requirements of the OPMA.

OPMA addresses the right of the public "to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or

acted upon in any way," with certain exceptions. Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 529 (2005) (quoting N.J.S.A. 10:4-7). OPMA therefore requires public bodies to provide adequate notice to the public of scheduled meetings and the matters to be discussed and acted upon at those meetings. N.J.S.A. 10:4-9, -9.1, -9.2, -10, -18, and -19. The term "meeting" is defined in OPMA as:

> any gathering . . . which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering.
>
> [N.J.S.A. 10:4-8(b) (emphasis added).]

In concluding that the Borough officials did not violate the OPMA, the judge found:

> [The Mayor's] testimony established that Ordinance 2013-1374 and the Amended Master Plan were formed after long and careful deliberation and planning. No Council members were excluded from any meetings for the purpose of avoiding quorum requirements. While the Mayor regularly spoke with Council members, he never conducted official business outside of a public meeting. Plaintiffs have not shown any quorum of the [M]ayor and [C]ouncil or Planning Board ever took place until after the 2012 application by MDA.

> Further, no decisions were made at any discussion with MDA's representatives. Decisions took place at public meetings. This was clear, as Ordinance 2012-1366 was tabled on December 11, 2012, based on comments and concerns from the public and council. There had been many exchanges between MDA and its experts, [the Mayor, the Board's Chairman], and the Borough's experts. The vast majority of the exchanges took place before [the amendment was] made in 2012. The [C]ouncil clearly did not agree to or accept the 2012-1366 Ordinance. Plaintiff[s] provided no evidence that the Montvale Council met as a body in private to deliberate on the rezoning of the DePiero Property. No decision was made behind closed doors. The failure to accept Ordinance No. 2012-1366 shows with clarity that no backdoor deals were made.

The judge's factual findings are supported by substantial credible evidence in the record. The judge correctly found that the meetings between the Borough officials and MDA representatives, and the Mayor's informal discussions with some Council members, were not "meetings" under the OPMA. N.J.S.A. 10:4-8(b).

Furthermore, plaintiffs' claim that the Borough officials violated N.J.S.A. 10:4-11 is not supported by the record. The Mayor's testimony established that he did not discuss the development of the DePieros' property and the rezoning with more than two Council members at any time. The Mayor stated that in doing so, he was acting to comply with the public-meeting requirements of the OPMA, not to circumvent those requirements.

Moreover, there is no evidence that any official action was taken during these discussions. As the record shows, ultimately the Board and the Council took official actions upon the development and rezoning plan at public meetings. It is undisputed that those meetings fully complied with the OPMA.

B. MDA's Cross-Appeal

In its cross-appeal, MDA argues that the trial judge erred by denying its motion to dismiss plaintiffs' challenge to the adoption of Ordinance 2013-1374. MDA contends that Rule 4:69-6 required plaintiffs to file their action in lieu of prerogative writs challenging the ordinance within forty-five days after the ordinance was adopted, not forty-five days after the Borough published notice of the ordinance's adoption.

The trial court denied MDA's motion, finding that Rule 4:69-6(b)(3) expressly provides that the forty-five-day limitations period begins to run from the date of publication of the official action. The trial court's ruling is supported by sufficient credible evidence in the record and it is consistent with the plain language of Rule 4:69-6(b)(3).

III.

Appeal No. A-0522-15

We turn to plaintiffs' appeal from the trial court's judgment affirming the Board's decision to grant MDA's development

application. As we noted previously, MDA applied to the Board for preliminary and site plan approval, a bulk variance, and planned unit development approval, with respect to its development of the DePiero properties.

A. Motion to Amend Pleadings

Plaintiffs argue that the trial judge erred by denying their motion to amend the complaint to include a claim that MDA failed to provide the statutorily-required notice of the Board's hearing on its development application to all of the owners of properties within 200 feet of the subject property. Plaintiffs alleged that because the notice had not been sent to one property owner entitled to notice under N.J.S.A. 40:55D-12(a), the Board did not have jurisdiction to act upon the application.

Our court rules provide that leave to file an amended pleading "shall be freely given in the interest of justice." R. 4:9-1. However, a court is "free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256-57 (App. Div. 1997) (quoting Mustilli v. Mustilli, 287 N.J. Super. 605, 607 (Ch. Div. 1995)). Here, the trial court did not err by denying plaintiffs' motion to amend their pleadings.

The record shows that MDA properly complied with the notice requirements in N.J.S.A. 40:55D-12, which states, in pertinent part:

> b. . . . notice of a hearing requiring public notice pursuant to subsection a. of this section shall be given to the owners of all real property as shown on the current tax duplicates, located in the State and within 200 feet in all directions of the property which is the subject of such hearing. . . . Notice shall be given by: (1) serving a copy thereof on the property owner as shown on the said current tax duplicate, or his agent in charge of the property, or (2) mailing a copy thereof by certified mail to the property owner at his address as shown on the said current tax duplicate.
>
> . . .
>
> c. Upon the written request of an applicant, the administrative officer of a municipality shall, within seven days, make and certify a list from said current tax duplicates of names and addresses of owners to whom the applicant is required to give notice pursuant to subsection b. of this section. In addition, the administrative officer shall include on the list the names, addresses and positions of those persons who, not less than seven days prior to the date on which the applicant requested the list, have registered to receive notice pursuant to subsection h. of this section. The applicant shall be entitled to rely upon the information contained in such list, and failure to give notice to any owner, to any public utility, cable television company, or local utility or to any military facility commander not on the list shall not invalidate any hearing or proceeding. . . .
>
> [(Emphasis added).]

It is undisputed that MDA's attorney asked the Borough to provide him with a certified list of all property owners within 200 feet of the subject property, and the Borough's Land Use Administrator provided the attorney with that list. The list did not, however, include the owner of Block 1903, Lot 2, a property that is within 200 feet of the subject property. Plaintiffs claim that MDA's failure to provide notice of the hearing to that one property owner deprived the Board of jurisdiction to consider the application. We disagree.

Based on the plain language of N.J.S.A. 40:55D-12(c), MDA was permitted to rely on the list that the Land Use Administrator provided. Consequently, MDA's failure to provide the owner of Block 1903, Lot 2, with notice of the hearing did not preclude the Board from acting upon MDA's application.

Accordingly, plaintiffs' proposed amendment failed to state a valid cause of action under N.J.S.A. 40:55D-12. Therefore, the court's denial of plaintiffs' motion to amend the complaint was not a mistaken exercise of discretion.

B. Quid Pro Quo Claim

Plaintiffs further argue that the trial court should have invalidated the Board's approval of MDA's development application because the Board's approval was a quid pro quo for MDA's agreement to assume the cost of more than its pro rata share of the off-

tract roadway improvements deemed to be required by the development.

The trial court rejected this claim in the challenge to the 2013 master plan amendment and Ordinance 2013-1374, and did so again in the challenge to the Board's approval of MDA's development application. For the reasons stated previously, we conclude that the record supports the trial court's determination that the Board did not approve the application as a quid pro quo for MDA's agreement to pay $3 million for the off-tract road improvements.

C. Variances

1. Use Variance

Plaintiffs argue that the trial court erroneously determined that MDA did not require a use variance for the café/restaurant in the proposed supermarket, pursuant to N.J.S.A. 40:55-70(d). In his decision, Judge Meehan stated that

> a use variance was not necessary in this instance. Ordinance 2013-1374 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 [Ordinance 2013-1374]. The café/restaurant is included

> within the definition of an anchor store due to the "and/or" language.

N.J.S.A. 40:55D-70(d) provides in pertinent part that the Board may, "[i]n particular cases for special reasons, grant a variance to allow departure from regulations . . . of this act to permit: (1) a use or principal structure in a district restricted against such use or principal structure. . . ." However, as the trial judge found, plaintiffs' claim that a café/restaurant is a principal use that required a variance.

Judge Meehan correctly determined that the café/restaurant is a permitted use under the ordinance. As the judge pointed out, the definition of "anchor store" in the ordinance clearly includes "a supermarket and/or a maximum of four (4) lifestyle retail uses," and the term "lifestyle retail use" includes a restaurant.

Plaintiffs do not contend that the proposed café/restaurant is prohibited per se. Rather, they contend that MDA's proposed use goes beyond the sort of restaurant use contemplated by the ordinance. Plaintiffs assert that the ordinance only permits "shoppers to enjoy a quick cup of coffee or baked good," rather than an "extensive array" of foods and other items. Plaintiffs provided no evidence to support these allegations.

2. The (c)(2) Variance

Plaintiffs argue that the trial court erred by finding that

the Board properly granted MDA a variance from a provision of the Borough's zoning code, which states: "Sidewalks, where constructed along the building, shall be located not less than five feet from the building, unless landscaping beds of a minimum depth of five feet are located along 50% of the length of the building to which the sidewalk is adjacent." Montvale, N.J., Code § 128-7.1(I) (2012). Plaintiffs contend MDA failed to meet the criteria for a variance under N.J.S.A. 40:55D-70(c)(2).

To obtain the (c)(2) variance, MDA had to show that: (1) the variance pertains to a specific property; (2) it advances the purposes of the MLUL; (3) the variance does not cause "substantial detriment to the public good"; (4) its benefits substantially outweigh any detriments from the deviation; and (5) the variance does "not substantially impair the intent and purpose of" the zoning plan and the zoning ordinance. Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 198 (App. Div. 2009) (citation omitted).

The first, second, and fourth criteria are commonly called the "positive criteria," while the third and fifth are the "negative criteria." Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 57 (1999). The criteria reflect the essential question of whether, given "the characteristics of the land," the variance represents not just a benefit for the

property's owner, but rather "an opportunity for improved zoning and planning that will benefit the community." Kaufmann v. Planning Bd. for Warren Twp., 110 N.J. 551, 563 (1988) (emphasis omitted).

In its resolution approving the variances, the Board credited the testimony of MDA's expert Peter Steck, P.P., and found that MDA had satisfied both the positive and negative criteria. The Board found that it could grant the variance without substantial impairment of the intent and purpose of the zone plan and the zoning ordinance. The Board stated that MDA's proposal is consistent with the 2013 master plan amendment and the relevant provisions of the zoning ordinance.

In the resolution, the Board also stated that

> [t]he omission of this small landscaping strip, representing one-third (1/3) of one (1%) percent of the site is, under any reasonable standard, de minimis in scope and character. Not having this planted area is a practical solution to problems that may arise as a result of building overhangs diverting rainfall from these areas. The fact that landscaping for the entire site is significant and substantial mandates a conclusion that this single variance may be granted without substantially impairing the zone plan and [z]oning [o]rdinance.

The trial court correctly determined that the Board's findings were supported by sufficient credible evidence. The record supports the court's finding that, in granting the variance, the Board had not acted arbitrarily or capriciously.

We have considered plaintiffs' other arguments in both appeals and conclude that they are without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

Affirmed on the appeal and the cross-appeal in A-3564-14; and affirmed in A-0522-15.