SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0009-21

THE SILVERMAN GROUP, 54-74 SOUTH STREET, LLC, SHOPS AT SOUTH STREET, LLC, SL 10 PINE STREET LLC, and SL 10 PINE STREET II LLC,

Plaintiffs-Appellants,

v.

MORRISTOWN PLANNING BOARD,

Defendant-Respondent.

Argued December 13, 2022 – Decided April 19, 2023

Before Judges Gilson, Rose, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-0476-21.

Nicole B. Dory argued the cause for appellants (Connell Foley LLP, attorneys; Kevin J. Coakley, of counsel; Nicole B. Dory, of counsel and on the briefs; Vanessa Pinto, on the briefs).

Mauro G. Tucci, Jr., argued the cause for respondent (Chiesa Shahinian & Giantomasi PC, attorneys; Ronald

L. Israel, Mauro G. Tucci, Jr., and James R. Hearon, on the brief).

PER CURIAM

In this declaratory-judgment action, plaintiffs appeal from an order dismissing their complaint and directing defendant Morristown Planning Board to conduct a hearing and render a decision on outstanding jurisdictional and completeness issues regarding the redevelopment application of plaintiff the Silverman Group (Silverman). Plaintiffs contend the trial court erred in dismissing their complaint instead of recognizing plaintiffs were entitled to automatic approval of their application based on the Planning Board's failure to conduct a hearing and decide the application within the 120-day period set forth in N.J.S.A. 40:55D-61. We disagree and affirm.

I.

Plaintiffs are the owners of certain properties located at 54-74 South Street, 76-80 South Street, and 10 Pine Street in Morristown and designated as Block 4802, Lots 4, 6, 7, 8, 9, and 10 (Property) on Morristown's Tax Assessment Map. The Property consists of 1.8 acres and contains buildings used as offices, restaurants, and retail stores. On April 22, 2019, Silverman filed an application with the Planning Board for approval of a project constructing two

floors of additional office space and a new mechanical parking garage on the Property.

A month later, the Planning Board's planner Phil Abramson co-authored a May 22, 2019 memorandum to James Campbell, Morristown's land use administrator and zoning officer and the Planning Board's secretary. Abramson opined the application fell within the exclusive jurisdiction of the Morristown Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70(d)(4) because the application required a variance from the maximum floor-area-ratio standard and the mechanical parking garage might require additional relief. In a May 31, 2019 letter, Silverman's counsel explained to Campbell why Silverman disagreed with the conclusion that the application required a variance for floor area ratio or for the parking garage.

In a June 5, 2019 letter, Campbell advised Silverman's counsel the application had been deemed incomplete, pursuant to a June 5, 2019 memorandum to the Planning Board from Abramson, who had identified several aspects of the application that required revision or supplementation, separate and apart from the jurisdictional issue. Campbell also advised counsel that Silverman could appeal the incompleteness decision to the Zoning Board pursuant to N.J.S.A. 40:55D-72(a) within twenty days. Instead of appealing the

incompleteness decision to the Zoning Board, in an August 6, 2019 letter to Campbell, Silverman's counsel responded to the June 5 memorandum and requested the Planning Board deem the application complete. Thereafter ensued an exchange of correspondence and memoranda from Campbell, Abramson, and Silverman's counsel.

In an August 30, 2019 memorandum to Campbell, Abramson evaluated "outstanding jurisdictional issues" and concluded the proposed project exceeded the maximum permitted floor area ratio and, consequently, required variance relief under N.J.S.A. 40:55D-70(d)(4). Because only the Zoning Board could grant that relief, Abramson recommended the Planning Board administratively transfer the application to the Zoning Board.

In a November 15, 2019 letter, Silverman's counsel advised Campbell that although Silverman maintained its objection to Abramson's analysis that the application required a floor-area-ratio variance, it had reduced the square footage of the project and had revised its floor-area-ratio calculation and site plans to eliminate any possible need for a variance. He asked the Planning Board to deem the application complete, thereby enabling it to conduct a hearing regarding the application.

In a January 10, 2020 memorandum to Campbell, Abramson provided "a supplemental evaluation of jurisdictional issues" based on Silverman's counsel's last submission. He concluded the proposed project still exceeded the maximum floor area ratio and that the application required a variance, "among other potential '[d]' variances." He recommended the application either be withdrawn or administratively transferred to the Zoning Board.

In a January 21, 2020 letter to Campbell, Silverman's counsel asserted the application had been deemed complete by operation of law as of December 30, 2019, because the Planning Board had not issued a completeness decision in response to counsel's November 15, 2019 letter within the forty-five-day time period set forth in N.J.S.A. 40:55D-10.3. He asserted the Planning Board was required under N.J.S.A. 40:55D-61 to decide the merits of Silverman's application by April 28, 2020, which was 120 days from December 30, 2019.

In a February 11, 2020 letter, Campbell informed Silverman's counsel that Silverman's application did "not comply with the floor area ratio requirements among other factors" as detailed in Abramson's memoranda and, accordingly, jurisdiction over the application was vested with the Zoning Board. He also informed Silverman's counsel of Silverman's right to appeal that determination with the Zoning Board pursuant to N.J.S.A. 40:55D-70(a) or to file the

application directly with the Zoning Board. Campbell sent counsel another letter dated April 15, 2020, advising him the appeal period had expired and that the Planning Board had administratively dismissed the application based on lack of prosecution of the "zoning determination."

On April 28, 2020, plaintiffs filed an action in lieu of prerogative writs (Silverman I), asserting the application had been deemed complete by operation of law on December 30, 2019, and, pursuant to N.J.S.A. 40:55D-61, defendant had to deny the application within 120 days or its failure to act would "constitute approval of the application." Plaintiffs sought a declaration that the Planning Board had failed to act on the application in accordance with N.J.S.A. 40:55D-61 and, consequently, the application was approved automatically in its entirety.

The Planning Board moved to dismiss, arguing the matter should be transferred to the Zoning Board because the proposed project needed a floor-area-ratio variance, which could be issued only by the Zoning Board, and that plaintiffs, who had not appealed that determination or otherwise transferred the application to the Zoning Board, had failed to exhaust their administrative remedies. In a September 18, 2020 order, the trial court denied the motion, remanded the case to the Planning Board "for review of [Silverman's] redevelopment application in accordance with the Municipal Land Use Law

[(MLUL), N.J.S.A. 40:55D-1 to -163]," and directed the clerk to "close this matter on the docket."

In a statement of reasons, the trial court found planner Abramson had made recommendations to the Planning Board, but the Planning Board had "neither noticed nor convened hearings to consider the recommendations as required by the MLUL" and, thus, had "made no final determination as to completeness of the [a]pplication or its own jurisdiction." Making no finding that the application had been deemed complete or automatically approved, the court held it could not "conduct any substantive review of the [Planning] Board's actions," denied the motion, and remanded the case so that the Planning Board could conduct an "appropriate review."

The Planning Board moved for reconsideration. Plaintiffs requested, and were granted, two adjournments of the motion. The trial court denied the Planning Board's subsequent motion for reconsideration on January 8, 2021. The court did not include in either order a deadline by which the Planning Board had to conduct the review. Neither plaintiffs nor defendant appealed the initial- or reconsideration-motion order.

Campbell contacted Silverman's counsel on February 24, 2021, attempting to schedule a hearing regarding plaintiffs' application. According to counsel,

Campbell waited until the time period to appeal the January 8, 2021 order had expired on February 23, 2021 and then suggested the hearing take place during one of the Planning Board's regularly scheduled meetings on February 25 or March 25, 2021. Counsel told him February 25 was not possible and that she needed to confer with her clients. Campbell understood plaintiffs were not available and that counsel would contact him with a proposed date. Because she had not contacted him, Campbell sent her an email on March 4, 2021, asking for a proposed hearing date.

Counsel did not respond to that email. Instead, on that same day, plaintiffs filed the complaint in this case (Silverman II). Plaintiffs sought a judgment declaring the Planning Board had failed to act on the application in accordance with N.J.S.A. 40:55D-61 and that the application was approved in its entirety. Apparently unaware plaintiffs had filed the complaint, Campbell sent counsel a letter on March 18, 2021, advising that the Planning Board had scheduled a hearing on the application for April 22, 2021.[1] In a March 23, 2021 letter, plaintiffs' counsel sent a copy of the complaint to Campbell, stating the complaint had been served on the Planning Board on March 8, 2021. Counsel

[1] Plaintiffs did not include in the procedural-history or statement-of-facts section of their brief any information regarding Campbell's attempt to communicate with their counsel to schedule the court-ordered hearing.

asserted the Planning Board had been required to schedule the hearing on remand within the 120-days of the September 18, 2020 order, citing the time period set forth in N.J.S.A. 40:55D-61, and because the Planning Board had failed to schedule the hearing within that time period, plaintiffs had "decided to proceed with litigation" instead of the court-ordered hearing. Counsel also contended that any attempt by the Planning Board to schedule a hearing on the application would be ultra vires.

Counsel for the Planning Board responded in a March 31, 2021 letter, positing that the time to hold a jurisdictional hearing had not lapsed, plaintiffs had made no effort to schedule the hearing and had thwarted the Planning Board's efforts to schedule it, and plaintiffs' use of the declaratory-judgment action as "a mechanism to preclude the Planning Board from proceeding to a jurisdictional hearing on April 22nd, in accordance with the [c]ourt's [o]rders, [was] disingenuous and meritless."

On April 12, 2021, the Planning Board moved to dismiss the complaint. After hearing argument, the trial court entered an order on July 21, 2021, granting the Planning Board's motion and dismissing the complaint. The court directed the Planning Board to conduct a hearing on August 26, 2021, review the application as ordered in the September 18, 2020 order and "render a

decision on the outstanding jurisdictional and completeness issues" within seven days. The court also ordered the Planning Board to administratively transfer the application to the Zoning Board if it concluded the Planning Board did not have jurisdiction. In a statement of reasons, the court explained it was unwilling to substitute its judgment for the Planning Board's judgment regarding the issue of jurisdiction.

In an amplification statement submitted pursuant to Rule 2:5-1(d), the court described plaintiffs' request for automatic approval of the application as "premature." The court explained:

> Jurisdiction is a threshold issue that must be determined before the court can consider the requested relief. In other words, if plaintiffs submitted their application to the wrong Board for review (i.e., the Planning Board instead of the Zoning Board), then automatic grant of the redevelopment application would be clearly inappropriate, and contrary to the intent of the [MLUL], which was to assure review of applications by agencies with the most expertise, but to ensure prompt review. If jurisdiction for the application is with the Zoning Board, then preventing the Zoning Board from such review and automatically approving the application simply because plaintiff filed it before the wrong body would be a ludicrous result. Indeed, it would completely circumvent the intent of the statute, and encourage the misfiling of applications.

The court reasoned (1) if the Planning Board determined it lacked jurisdiction, then plaintiffs could submit the application to the Zoning Board or could

challenge that determination in a prerogative writs action or (2) if the Planning Board found it had jurisdiction, plaintiffs' claim for automatic approval was "preserved for later review by the court." Thus, the court dismissed the complaint without prejudice because it was premature.

Plaintiffs appeal the July 21, 2021 order dismissing their declaratory-judgment complaint. Contending they set forth in the complaint a cognizable claim pursuant to N.J.S.A. 40:55D-61, plaintiffs argue the court failed to apply the correct standard for a motion to dismiss and erred in finding a jurisdictional bar to their automatic-approval claim. Unpersuaded by those arguments, we affirm.

II.

We review de novo a trial court's ruling on a motion to dismiss. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). "Although the review of the factual allegations of a complaint on a motion to dismiss is to be 'undertaken with a generous and hospitable approach,' '[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one.'" Am. Civ. Liberties Union of N.J. v. Cnty. Prosecutors Ass'n of N.J., 474 N.J. Super. 243, 255-56 (App. Div. 2022) (first quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746

(1989); then quoting Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011)).

The issue underlying this case is whether Silverman's application fell within the Planning Board's jurisdiction. "Subject matter jurisdiction involves 'a threshold determination as to whether [a court] is legally authorized to decide the question presented.'" Robertelli v. N.J. Off. of Att'y Ethics, 224 N.J. 470, 481 (2016) (quoting Gilbert v. Gladden, 87 N.J. 275, 280-81 (1981)). It is "well established that a court cannot hear a case as to which it lacks subject matter jurisdiction." Murray v. Comcast Corp., 457 N.J. Super. 464, 470 (App. Div. 2019) (quoting Peper v. Princeton Univ. Bd. of Tr., 77 N.J. 55, 65-66 (1978)). "When a court lacks subject matter jurisdiction, its authority to consider the case is 'wholly and immediately foreclosed.'" Robertelli, 224 N.J. at 481 (quoting Gilbert, 87 N.J. at 281). The failure to object to the improper submission of a matter to a tribunal lacking jurisdiction does not create jurisdiction. See Murray, 457 N.J. Super. at 470 (finding "[s]ubject matter jurisdiction cannot be waived by the parties' failure to object, nor conferred upon the court by the parties' agreement"). Thus, the threshold issue of jurisdiction "must be addressed before considering the substantive merits of the matter." N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 411 (App. Div. 1997).

Those fundamental legal principles apply equally to planning and zoning boards, which function as quasi-judicial bodies. Paruszewski v. Township of Elsinboro, 154 N.J. 45, 54 (1998) (finding a "zoning board is a quasi-judicial board"); Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215, 225 (App. Div. 2009) (noting planning board members act in a "quasi-judicial capacity"). Planning and zoning boards obtain their jurisdiction by statute, specifically the MLUL, which "enables and defines the limits of a municipality's procedural and substantive power to regulate land development within its borders." Township of Franklin v. Hollander, 338 N.J. Super. 373, 387 (App. Div. 2001), aff'd o.b., 172 N.J. 147 (2002).

Because they are created by statute, planning and zoning boards "may exercise only those powers granted by statute." Paruszewski, 154 N.J. at 54 (quoting Cox, N.J. Zoning & Land Use Admin. § 4-2.1 (1997)). The MLUL provides that "[a]ny power expressly authorized by this act to be exercised by (1) planning board or (2) board of adjustment shall not be exercised by any other body, except as otherwise provided in this act." N.J.S.A. 40:55D-20. The Legislature in the MLUL gave to zoning boards of adjustment the authority to grant variances for "departure[s] from regulations" set forth in subparagraph d of N.J.S.A. 40:55D-70, including variances for "an increase in the permitted

floor area ratio." N.J.S.A. 40:55D-70(d)(4); see also Com. Realty & Res. Corp. v. First Atl. Props. Co., 122 N.J. 546, 549, 563 (1991) (finding "d variances . . . can be authorized only by [zoning] boards of adjustment" and recognizing the Legislature "has seen fit to include variances from floor-area-ratio . . . restrictions among those warranting the more-protective treatment afforded to subsection d variances").

Because zoning boards have the statutory authority to grant d variances, "a planning board would lack jurisdiction to hear a development application which seeks relief pursuant to N.J.S.A. 40:55D-70(d)." TWC Realty P'ship v. Zoning Bd. of Adjustment of Twp. of Edison, 315 N.J. Super. 205, 217 n.10 (Law Div. 1998), aff'd o.b., 321 N.J. Super. 216 (App. Div. 1999). A planning board cannot usurp authority granted exclusively to zoning boards by the Legislature in the MLUL, and any attempt to do so would be ultra vires. Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 504 (1955) (finding "an act utterly beyond the jurisdiction of a municipal corporation . . . [is] ultra vires in the primary sense and void"); Tanenbaum v. Twp. of Wall Bd. of Adjustment, 407 N.J. Super. 446, 460-61 (Law Div. 2006) (finding a planning board cannot waive a zoning board's jurisdiction under the MLUL), aff'd o.b., 407 N.J. Super. 371 (2009); Cox & Koenig, N.J. Zoning & Land Use Admin.,

§16-3 (2023) ("Because only [zoning] boards of adjustment have the statutory authority to hear d variance applications, exercise of that authority by planning boards is ultra vires.").

"It is a long held principle of our law that automatic approval statutes are to be 'applied with caution.'" Eastampton Ctr., LLC. v. Planning Bd. of Twp. of Eastampton, 354 N.J. Super. 171, 193 (App. Div. 2002) (quoting King v. N.J. Racing Comm'n, 103 N.J. 412, 422 (1986)). Plaintiffs would have the court apply the automatic approval provision of N.J.S.A. 40:55D-61 even though the Planning Board may not have had jurisdiction over Silverman's application. That cannot be. A planning board's authority to grant or deny an application, referenced in N.J.S.A. 40:55D-61, is premised on the planning board having jurisdiction over the application. A planning board – by its action or inaction – cannot grant or deny an application over which it has no jurisdiction. And nothing in the language of N.J.S.A. 40:55D-61 bestows on a planning board jurisdiction it does not otherwise have.

In Chesterbrooke Ltd. Partnership v. Planning Board of Township of Chester, 237 N.J. Super. 118, 124, 131 (App. Div. 1989), we reversed a trial court's decision granting automatic approval of a subdivision and variance application pursuant to N.J.S.A. 40:55D-61. We held the planning board did not

have jurisdiction to act on the application and, thus, "had no power to grant the application in any event." Id. at 126; see also Tanenbaum, 407 N.J. Super. at 461 (explaining that "if a board lacks jurisdiction over the subject matter of an application, no automatic approval can be obtained by the board's failure to act").

Plaintiffs' reliance on Amerada Hess Corp. v. Burlington County Planning Board, 195 N.J. 616 (2008), is misplaced. The jurisdiction of the defendant planning board was not at issue. The defendant planning board had jurisdiction and, thus, could have and should have acted on the pending application, but failed to do so in a timely manner.

The Planning Board has not yet made the required threshold jurisdictional determination. Perhaps it thought it had made that determination when its planner issued the May 22, 2019 memorandum finding the application required relief from the maximum floor-area-ratio standard and fell within the exclusive jurisdiction of the Zoning Board pursuant to N.J.S.A. 40:55D-70(d)(4) or when its secretary sent Silverman's counsel the February 11, 2020 letter containing the same conclusion. The trial court held in its unappealed September 18, 2020 opinion in Silverman I that the memorandum by the planner did not constitute a final determination by the Planning Board and remanded the case for the Board

to make that determination. After exercising its right to move for reconsideration and, according to plaintiffs, after the time to appeal had run, the Board's secretary attempted to schedule the court-ordered hearing. That hearing did not happen because plaintiffs chose to pursue this litigation instead.

Plaintiffs assert in their complaint in Silverman II that "N.J.S.A. 40:55D-61[] required the Planning Board to decide the [a]pplication with 120 days of the September 18, 2020 [o]rder" in Silverman I and argue they are entitled to an automatic approval of the application because the court-ordered hearing did not happen within that time frame. However, nothing in the language of N.J.S.A. 40:55D-61, and no caselaw cited by plaintiffs, links the 120-day time period to the date of a remand order.

The trial court properly granted the Planning Board's motion and dismissed the complaint pursuant to Rule 4:6-2(e). If the Planning Board has no jurisdiction over the application, plaintiffs do not have a cognizable claim. Because the Planning Board must first decide that threshold issue, the trial court appropriately remanded this case, with a specified return date for a hearing on that issue. Because that date has passed, we direct the trial court to confer with the parties and issue an order with a new date.

Affirmed.