SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3329-20

148 FIRST STREET URBAN RENEWAL, LLC,

Plaintiff-Appellant,

v.

144 FIRST HOLDINGS LLC and THE PLANNING BOARD OF THE CITY OF JERSEY CITY,

Defendants-Respondents.

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Argued October 26, 2022 – Decided August 4, 2023

Before Judges Accurso, Vernoia, and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3568-20.

Scott A. Heiart argued the cause for appellant (Carlin & Ward, PC, attorneys; Scott A. Heiart, of counsel and on the briefs; Arthur Usvyat, on the briefs).

Anna Drynda (London Fischer LLP) argued the cause for respondent 144 First Holdings LLC (Anna Drynda, attorney; Anna Drynda and Bernard London (London

Fischer LLP) of the New York bar, admitted pro hac vice, on the brief).

Santo T. Alampi argued the cause for respondent The Planning Board of the City of Jersey City (Law Office of Santo T. Alampi, LLC, attorneys; Santo T. Alampi, on the brief).

PER CURIAM

In this prerogative writs action, plaintiff 148 First Street Urban Renewal, LLC, an objector at the hearing before the Jersey City Planning Board, appeals from a July 15, 2021 Law Division order affirming the Planning Board's grant of preliminary and final site plan approval to defendant 144 First Holdings LLC to construct a new mixed-use commercial and residential building on a vacant lot located near plaintiff's residential building. The court held the Planning Board did not abuse its discretion by granting a nine-foot bulk C height variance to 144 First Holdings pursuant to N.J.S.A. 40:55D-70(c)(2).

We agree and affirm. There is ample evidence in the record supporting the Planning Board's approval of the C variance requested, and its determination a D variance was not required.

In November 2019, 144 First Holdings filed an application for preliminary and final site plan approval for construction of a twelve-story, 131-foot-tall mixed-use building with eighty-four residential units in the City's

Powerhouse Arts District Redevelopment Plan Area. The Redevelopment Plan permits new construction of a mixed-use residential building of eleven stories, with a height of 115 feet on the site. Because the property is in a flood hazard area, however, Jersey City's Land Development Ordinance permits the developer an additional seven feet to account for the flood elevation, thus raising the maximum height of the proposed building to 122 feet. Because 144 First Holdings' building was planned at 131 feet, it sought a nine-foot bulk C height variance pursuant to N.J.S.A. 40:55D-70(c)(2).

At the Planning Board hearing, 144 First Holdings' counsel summarized the application for the Board, noting it complied with all of the requirements of both the redevelopment plan and the City's land development ordinance, with the exception of the twelfth story and nine-foot height deviation and the exterior wall cladding (the latter of which is not an issue on appeal) for which 144 First Holdings sought a C(2) variance. 144 First Holdings presented the testimony of John Zimmer, the architect, who described the site as a long vacant, rectangular, 50-by-200-square-foot lot on Provost Street between First and Second Streets.

Testifying with reference to the detailed construction and architectural plans presented to the Board, Zimmer explained the differences between the

building proposed and the one the Board had approved four years before, the chief difference being the additional twelfth floor. Zimmer testified that although 144 First Holdings was proposing an added floor, it was not adding units. The number of residential units remained at the previously permitted eighty-four. Instead, the square footage added to the building simply allowed him to enlarge the size of the units throughout the building. Zimmer explained the "pressures on the building height" were as a result of other factors.

First, the Department of Environmental Protection no longer allowed a lobby floor "below base flood" elevation, requiring the lobby to be five feet higher than the sidewalk elevation. Zimmer explained that requirement reduced the overall amount of available lobby height, making it difficult to achieve the proper ground floor ceiling heights throughout.

Second, Zimmer noted the City's requirement of bicycle storage on the ground floor and the "greater demand" for amenities by tenants, including, for example, large "package rooms" driven both by COVID-19 and "a change in the way retail works," put "more pressure on ground floor space, and push[ed] other building functions, like storage and other mechanical [requirements], higher in the building." He testified the ground floor, aside from the planned retail spaces, would be occupied by a glass-enclosed lobby and a separate

service corridor adjacent to the lobby for future residents to move in and out of the building. Zimmer explained that service corridor has its own entrance and elevator access, which "also allows for services to the building, trash, switch gear, transformer rooms[,] . . . water and fire."

Moving from the ground floor to the roof, Zimmer explained the roof plan contained "both mechanical and amenity space," as permitted by the land development ordinance. He testified the rooftop structures complied "with all area requirements for enclosed amenity space, for mechanical space, [and] for outdoor recreation." According to Zimmer, the rooftop "would be extensively landscaped," with surrounding glass guardrails, but the amenity space was essentially "just a lounge," along with "the spaces that are required to make the lounge function: the elevator lobby to get to it, and the two fire stairs, and an outdoor bathroom." The mechanical space was screened as required by the ordinance, and the structures "kept well away from the building perimeter to reduce its visibility from the street."

Zimmer opined the effect of the nine-foot height deviation was insignificant, given "the adjacent buildings on the block are either as tall or taller," and shadow and light studies revealed a negligible difference between the shadows cast by the proposed building versus those cast by building "as of

right." He also noted the building would be "below the required maximum height at the setbacks on both First Street and Second Street," meaning it would have a reduced footprint at a lower level than required, thereby reducing the impacts on its immediately adjacent neighbors. Zimmer opined because "the street wall [would be] lower than what's permitted," the setbacks should be "an offsetting factor" in the Board's "deliberations about approving the extra height."

On cross-examination, plaintiff's counsel questioned Zimmer closely about the measurements of the individual rooftop amenity spaces, which were not broken out on the plans, in an effort to demonstrate the enclosed amenity spaces exceeded ten percent of the total roof area. Were that the case, the City's land development ordinance would require the height of the building to be measured from the sidewalk to the top of the amenity structure on the roof. That would make the building 146 feet, not 131 feet. Accordingly, the height deviation would be twenty-four feet, not nine feet, thereby exceeding the limits of a C(2) variance; the obvious implication being that 144 First Holdings

would have to apply to the zoning board of adjustment for a variance under N.J.S.A. 40:55D-70(d)(6).[1]

Although Zimmer did not have the measurements for the individual spaces, such as the lounge, the elevator lobby, and the bathroom, readily available, he noted that "adding the individual areas isn't going to give me a different number than plotting the entire area of each of these spaces electronically." Zimmer explained he calculated the total roof area and the area of the amenity space using CAD software. He testified he drew a "poly line" using his computer "around all of the enclosed amenity area," and the CAD software calculated the square footage of the enclosed space. Drawing a "poly line" around the roof likewise provided the total rooftop area. Zimmer testified the software performs the percentage calculation ensuring the enclosed amenity space did not exceed what was permitted by the ordinance. The record reflects counsel agreed the chart explaining the ten percent

[1] As the redevelopment plan vests exclusive jurisdiction in the Planning Board "to grant development decisions and/or deviations from the requirements of [the] Plan," expressly providing that "[n]o variance/deviation from the requirements herein shall be cognizable by the Zoning Board of Adjustment," an applicant seeking more than a nine-foot height deviation would need to seek an amendment of the redevelopment plan.

calculation for the amenity space was on the drawing "right there below the roof plan."

144 First Holdings also presented the testimony of its planner, Charles Heydt. He described the property as a 10,000-square-foot "corner through lot" with frontages on First, Second, and Provost Streets.

Heydt explained the property is in the rehabilitation subdistrict of the Powerhouse Arts District Redevelopment Plan Area where "the bulk requirements are actually specified for each lot, which is unique." He testified the maximum permitted number of stories for a building on the lot is eleven, with a maximum height of 115 feet, which the base flood elevation boosts to 122 in accordance with the land development ordinance. Heydt explained 144 First Holdings was proposing a building with a "height of 131 feet, which is under the ten feet and ten percent . . . . threshold,"[2] making it a bulk deviation, requiring the applicant to demonstrate the purposes of the Municipal Land Use Law would be advanced by the height deviation, and its benefits "would substantially outweigh any detriment." N.J.S.A. 40:55D-70(c)(2).

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[2] "The zoning board of adjustment has exclusive jurisdiction over an application for a variance concerning the height of a principal structure which exceeds by either ten feet or 10% the maximum height permitted in the district for a principal structure." Cox & Koenig, New Jersey Zoning and Land Use Administration § 35-4 (2023); N.J.S.A. 40:55D-70(d)(6).

Heydt testified the proposed building advanced the purposes of the Municipal Land Use Law to encourage municipal action to guide the appropriate development of land to promote the general welfare, N.J.S.A. 40:55D-2(a), by advancing the redevelopment plan of the Powerhouse Arts District, first and foremost, by redeveloping the property, now a vacant lot. He testified the proposed building, a mixed-use residential building with significant retail spaces on the ground floor, providing affordable units and meeting "the art requirement" of the Powerhouse Arts District, fulfilled the goals of the redevelopment plan "as a whole." He also opined the project, as proposed, advanced the Municipal Land Use Law by promoting "a desirable visual environment through creative development techniques and good civic design and arrangement." N.J.S.A. 40:55D-2(i).

As to the benefits provided by the additional nine feet in height, Heydt testified one of the most significant was the ability to offer larger units, including larger affordable units. He opined the ability to offer a greater mix of units, including three-bedroom units, would also allow for families. Heydt agreed with Zimmer that having to keep the lobby floor higher to meet DEP requirements, one of the "pressures" on the building height, allowed for "taller retail spaces" on the ground floor and that "having more glass, higher-volume

spaces at grade, is also a benefit." Heydt testified the design also accomplished the benefit of safeguarding the building from flooding, provided for "activity along the three frontages," and complied with the setback requirements, meeting "the intent of providing some reduced footprints on the taller stories, to reduce the impacts directly adjacent to the neighbors."

In reviewing the possible negative impacts, Heydt opined there were "two things to consider," that is, consistency with the other development in the same block, and the difference "between an as-of-right design and [its] impacts, in comparison to what's being proposed." Heydt reviewed the heights of the buildings adjacent to 144 First Holdings' proposed building, including plaintiff's building, which is close in height at twelve stories and 126 feet. He testified the requested deviation would not make the proposed building the tallest on the block, which was fifteen stories and 175 feet, nor the second or third tallest, but instead would simply make it consistent with what already existed. Heydt opined the shadow studies made clear there was no substantial detriment to light and air, as they demonstrated there was not "a substantially greater impact in the [proposed] building's mass" compared to what the applicant could build as-of-right.

Although Heydt acknowledged the proposed building would partially block some views to the east from a portion of plaintiff's neighboring roof deck, he noted the redevelopment plan did not contain a requirement that addressed viewsheds, and that viewsheds are not the property of building owners. No one "owns a viewshed." Thus, even acknowledging the proposed building's effect on some views, Heydt opined there was no detriment to the zone plan by the height deviation.

Heydt had the opportunity to further explain his view on cross-examination when plaintiff's counsel confronted him with the difference between plaintiff's building, which is 126 feet at the roofline, and 144 First Holdings' proposed building height of 131 feet at the roofline. Plaintiff's counsel asked whether Heydt had considered that "you're going to have a five-foot wall that people on my client's roof — which also has amenities — are going to be looking at, instead of having a view."

Heydt responded that he had considered it, but the problem from plaintiff's perspective was that 144 First Holdings was "permitted to have an enclosed amenity space, and unfortunately, that enclosed amenity space, as-of-right, can occur along that property line and create the same impact." In other words, while there are "portions of the twelfth story [of the proposed building]

that block [some views from] this corner area" of plaintiff's roof deck, Heydt explained plaintiff would "virtually have the same impacts with the conforming building, because [144 First Holdings is] allowed to locate that amenity structure" on its roof so as to "create that same building mass and impact as of right." Indeed, Heydt testified he believed one could design a completely conforming building on 144 First Holdings' site that would have a greater impact on plaintiff's views than the building proposed.

The Board's planner echoed Heydt's views, advising the Board on the record that the height of the enclosed amenity structure on the roof of 144 First Holdings' proposed building is twenty-four feet as of right, and thus there are "versions of proposals on the site that could still impede views that were discussed tonight at length within an eleven-story proposal, and would be completely as of right." The planner explained that "[h]ow the view is impeded could certainly be allocated or discussed within the specifics of the twelfth floor proposal, but the fact that a view is impeded is not unique to the deviation that's being sought."

144 First Holdings also presented the testimony of Alessandro Bonati, one of its principals. He testified the mission of his company on assuming ownership of the property "was not to make . . . a bigger building, but we

wanted to make a better impact in the building, but also in the community." To that end, he described 144 First Holdings' partnership with Yourban 2030, a not-for-profit organization advocating the United Nations goals for 2030 sustainability through lower carbon emissions, to create a 10,000-square-foot mural on the building's rear façade. Bonati testified the mural, which would be designed by award-winning artists in collaboration with the community, "has the capability of basically absorbing . . . pollution the same way that chlorophyll, photosynthesis, does, with many plants," through special paints patented in Italy. He also discussed his commitment to increase the number of trees on site and to work with the community to find funding to plant additional trees in other areas of the neighborhood.

Plaintiff presented the testimony of its own planner, Peter Steck. Steck did not prepare an expert report and agreed he was "basing everything just on [his] oral testimony." Steck began that testimony by reminding the Board there was an approval in place to build a fully conforming eleven-story building on 144 First Holdings' lot and asserted the property had "great benefits already" by virtue of its three frontages, meaning "it has window exposures on three sides." He highlighted the property was in "a zone in the redevelopment plan that applies just to this one lot, and so it's presumed that

the governing body, with the endorsement of the planning board, picked a height in relation to just this property."

Steck acknowledged, however, that the Board had authority to grant the nine-foot height deviation requested, agreeing with Heydt the application required only a C variance.[3] He explained that "[w]hile the applicant is only above the height limit by nine feet, when the legislature picked ten feet or ten percent [to require the applicant to seek a height variance from the zoning board under N.J.S.A. 40:55D-70(d)(6),] ten feet is essentially a story" and it "has the same impact, frankly, as a . . . building that exceeds the maximum by ten feet."

Steck opined the benefits associated with the deviation "are benefits primarily to the applicant," and that 144 First Holdings had not demonstrated any significant benefit flowing to the public. He testified there was no

[3] Steck testified it was only "technically a C variance." He explained it would be a C variance "if this were a traditional zoning ordinance," but it is instead "treated, as the Board is aware, as a deviation" from the redevelopment plan, which the Board was authorized to grant. When asked on cross-examination whether he was admitting 144 First Holdings only required "a C variance for height, and not a D variance," Steck responded that "[i]t's called a deviation in the redevelopment plan, not a variance, but it's akin to a C variance." As noted in the text, Steck testified unequivocally that 144 First Holdings did not require a D variance for the height deviation it was seeking. Steck was not asked to address anything relating to floor area ratios.

"general welfare or public benefit associated with a different mix of units," nor with the applicant's compliance with other code standards such as setbacks and mixed uses. Steck asserted 144 First Holdings could not establish whatever benefits there were outweighed the detriments, as "the applicant ha[d] not analyzed the negative impacts to the property owner that's most affected," that being plaintiff. He dismissed 144 First Holdings' position that an "as of right" building could also block plaintiff's views, and perhaps more so, because the Board was required to assess whether there would be a negative impact from granting this application and not some other.

Steck acknowledged Heydt's point that no one is "guaranteed the viewshed," but asserted plaintiff was entitled to enforcement of the zoning ordinance and "that relief should not be given if there's no justification for the relief." He also asserted "[t]here should be a high sensitivity [in the Board to the height limit], because this is a rehabilitation area . . . . intended to respect the historic buildings . . . in the area," such as those across Provost and First Streets. Steck claimed that Jersey City had deemed buildings in other

subsections of the redevelopment area "could be taller; pointing to those other zones" did not further the applicant's argument.[4]

On cross-examination, Steck acknowledged that plaintiff's building enjoyed "essentially, a 180-degree view . . . . to the east, to the north, and to the south." He also conceded that there would "be some blockage by a conforming building" on 144 First Holdings' property.

Although a few members of the public spoke against the application, others spoke in favor, including Alexander Mirescu, the president of the Powerhouse Arts District Neighborhood Association. He testified that missing from the discussion was any acknowledgement that the existing vacant lot was "essentially a derelict spot" that "is a major eyesore for our neighborhood," which the Association "strongly believe[s] . . . negatively impacts the values of the surrounding area."

Mirescu testified the Association saw "a lot more benefit than negative impacts here," especially in light of "the current state" of the site and was "very happy to have this project to fill out our neighborhood." Asked by the Board on the Association's thoughts about 144 First Holdings' proposed mural,

[4] 144 First Holdings' building is the only building in the rehabilitation zone on its block. The other buildings are in the transition zone.

Mirescu testified "this is something that we consider both a cultural alignment to the history of our neighborhood, but also expresses where we want to take the neighborhood in the future." He said the Association "couldn't be more pleased that it's not only an artistic impression, but the fact that they're using this cutting edge technology for air quality and sustainability." He also testified that "in a neighborhood with probably less than five percent tree coverage, any advantage we have to get more trees and get better air quality, that's almost always a plus in our book."

After taking testimony for over five hours and reviewing all the evidence, the Planning Board voted unanimously to approve the application. In a comprehensive thirteen-page resolution, the Planning Board found 144 First Holdings' project complied "with all requirements for its principal uses"; that the mix of units, which includes affordable as well as two- and three-bedroom market units, "is a benefit to the project and to the community by providing housing options for families of various size compositions and income"; that the "project is consistent with the development within the block"; and complies with the requirements of the City's redevelopment plan and the land use ordinance, with the exception, as pertains here, of the nine-foot height deviation and twelfth story, requiring a C variance.

The Board noted the redevelopment plan contained a provision providing the Planning Board with the authority to grant development decisions, and deviations, from the requirements of the plan, and specifically permitted the Board, "[a]s a function of preliminary site plan approval," to use the powers granted by the Municipal Land Use Law to "grant a deviation to allow departure from the provisions of this redevelopment plan" when "in an application relating to a specific piece of property the purposes of this redevelopment plan would be advanced by a deviation from the redevelopment plan requirements and the benefits of the deviation would substantially outweigh any detriment."

The Board found the requested height deviation was "necessary to achieve suitable lobby ceiling heights and the higher floor requirements of DEP," and accepted the architect's testimony that market demand and changing retail required first-floor amenities, including large package rooms, which "put pressure on ground floor space, thereby pushing other building functions, such as storage, and mechanical higher in the building." It further found the added twelfth floor will not increase the density or number of units (eighty-four) approved under the prior plan and "provides a benefit in adjusting the

distribution, improve[s] the layouts and unit sizes and provides for better amenity throughout the building."

Considering the potential detriments of the height deviation, the Planning Board found "the additional height sought is of negligible difference to the daylight entering into the center of the block. The project has the same impacts as a conforming building," and is thus "not above and beyond what could be perceived as-of-right." The Board further found there was "no substantial impact to light and air as there is sufficient separation of the proposed project from its neighboring structures to provide these elements adequately." Finally, the Board found "no substantially detrimental impact" from the limited partial blocking of the views from nearby buildings, noting "[t]here is no requirement in the redevelopment plan to address viewsheds."

The Board further found the mural 144 First Holdings planned to construct "[i]n partnership with Yourban 2030," to absorb the pollution of approximately eighty cars per day through the use of special paints, both fulfilled 144 First Holdings' "permanent public arts contribution (valued at up to $250,000) as required by the Powerhouse Arts District Redevelopment Plan" and "promote[d] a desirable visual environment, eliminat[ing] the eyesore of the vacant land, and it has the support of the Powerhouse Arts

District Neighborhood Association." Overall, the Board found "[t]he project furthers the purpose of the Municipal Land Use Law in advancing the general welfare," and "the project's benefits outweigh any detriments."

Plaintiff timely filed a four-count complaint in lieu of prerogative writs, alleging: 144 First Holdings "provided inadequate proofs to justify a height variance" and did not show any hardship that would justify a C variance; failed to provide proof of the negative criteria required for a bulk variance and did not demonstrate the absence of substantial detriment to the zone plan; and, because the building proposed by 144 First Holdings includes rooftop amenities in addition to an extra twelfth floor, "the top of the roof structure should have been considered as the height of the building," which "would have exceeded ten feet or ten percent under N.J.S.A. 40:55D-70(d)," and therefore, a D variance was required.

The trial court conducted a plenary trial on the record created in the Planning Board[5] and on June 25, 2021, placed a thorough and thoughtful

[5] At oral argument, plaintiff's counsel argued an additional issue not raised before the Planning Board. He contended 144 First Holdings needed a floor area ratio (FAR) variance because the height of the proposed building went "beyond the height that was allowed and what was contemplated by [the Redevelopment Plan]." Counsel asserted "O'Donnell v. Koch[, 197 N.J. Super. 134, 143 (App. Div. 1984)] says that it's the Board's responsibility to find these things," that is, jurisdictional defects, and "they didn't."

opinion on the record, affirming the Board's site plan approval and dismissing plaintiff's complaint. The judge had no hesitation in finding the height variance was appropriately considered and granted under a C(2) and not a D standard, and that the Planning Board did not abuse its discretion in granting the variance based on its consideration of the architectural and engineering site plans, expert witness testimony, and comparative studies of the effects of the variance on neighboring properties. The judge found plaintiff could not assert its FAR argument as it was not raised before the Planning Board and not urged as grounds for reversal in its Law Division complaint.

Plaintiff appeals, reprising the arguments it made to the trial court, including the argument not raised to the Planning Board, that 144 First Holdings' proposal violated the FAR restriction for the site in the redevelopment plan.

Judicial review of the decision of a planning board is limited. Smart SMR v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998). As our Supreme Court regularly reminds, our courts accord "wide latitude . . . to a municipal planning board in the exercise of its delegated discretion," Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013), in view "of [its] peculiar knowledge of local conditions," Kramer v. Bd. of Adjustment, 45 N.J. 268,

296 (1965). "Because a [board's] actions are presumed valid, the party 'attacking such action [has] the burden of proving otherwise.'" Northgate Condo. Ass'n v. Borough of Hillsdale Plan. Bd., 214 N.J. 120, 145 (2013) (alterations in original) (quoting Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002)). "The challenger must show that the Board engaged in 'willful and unreasoning action, without consideration and in disregard of circumstances.'" Ibid. (quoting Worthington v. Fauver, 88 N.J. 183, 204 (1982)). The Court has explicitly instructed that "[w]here there is room for two opinions, action is [valid] when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Id. at 145-46 (alteration in original) (quoting Worthington, 88 N.J. at 204-05 (1982)).

Applying those standards here, plaintiff has provided us no valid basis to reverse the determination of the trial judge upholding 144 First Holdings' site plan approval. We find no reversible error in the trial court's unwillingness to rule in the first instance on plaintiff's contention, based on reading two provisions of the redevelopment plan together, that there is a maximum FAR restriction for this property, notwithstanding one is not specified in the plan, and that it does not permit any deviation from the permitted building height of

eleven stories, and thus the Board was without jurisdiction to grant the requested height deviation because to do so would violate the FAR restriction, requiring relief from the zoning board pursuant to N.J.S.A. 40:55D-70(d)(4).

Plaintiff admits FAR restrictions "are ordinarily expressed as a number obtained by dividing the total floor area by the lot area," as the City has done in several other sections of the redevelopment plan.[6] It nevertheless posits, with no support, that for 144 First Holdings' property "rather than treating it as a set ratio, the City drafters of the Redevelopment Plan chose to regulate the FAR by regulating height and setback as its component parts," which cap "the maximum FAR . . . at whatever amount would be permitted within the building envelope as established by the height and setback criteria," that is, at 115 feet and eleven stories, "consistent with the notion that FAR is, in actuality, a product of the aggregate size of the building in relation to the area of land on which it is built." Plaintiff claims the City intentionally set the FAR "to be equivalent to the maximum permitted building envelope under existing height and setback restrictions as a means of incentivizing prospective developers

[6] The redevelopment plan, for instance, states that new buildings in the Transition Zone shall have a maximum FAR of 7:1, except for "block 13002 which shall be permitted a maximum FAR of 8:1." The maximum FAR in the High Rise Zone is 10:1; and 15:1 in the Power House Arts Residence Zone. Several other sections of the plan contain similar FAR restrictions.

into taking specific actions," i.e., demolishing the building previously on the lot.

The Planning Board insists plaintiff's theory is nonsense. Besides noting that neither the City Planning Office that drafted the redevelopment plan nor plaintiff's expert, who testified he reviewed it as well as the "application materials," presumably including the Planning Staff's report, testified there was a maximum FAR specified for this property, much less one 144 First Holdings exceeded, the Board contends plaintiff's interpretation cannot be squared with other provisions of the redevelopment plan.

Specifically, the Board notes the redevelopment plan in many other places sets forth the FAR as a ratio with a specific maximum. Here, in contrast, there is not only no ratio, there is no statement that the maximum height is the maximum permitted FAR, as plaintiff contends. Instead, the Board argues the redevelopment plan's statement that the FAR for this property "shall be regulated by the required height and setback criteria," acknowledges the plan vests the Planning Board with authority to grant deviations from the height requirements of the redevelopment plan in connection with site plan approval as permitted in the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70(c).

Although we are not bound, of course, by a Planning Board's determination of a question of law, as our review is de novo, we nevertheless "give deference to a municipality's informed interpretation of its ordinances," DePetro v. Twp. of Wayne Plan. Bd., 367 N.J. Super. 161, 174 (App. Div. 2004), cognizant "that local officials are 'thoroughly familiar with their communities' characteristics and interests' and are best suited to make judgments concerning local zoning regulations," Pullen v. Twp. of S. Plainfield Plan. Bd., 291 N.J. Super. 1, 6 (App. Div. 1996) (quoting Ward v. Scott, 16 N.J. 16, 23 (1954)). Plaintiff's failure to have raised its novel FAR argument before the Planning Board deprived the trial court, and now this court, of the benefit of the Planning Board's "informed interpretation" of the City's redevelopment plan, which it has worked with for nearly twenty years. Its assessment of the language would be important.

In addition, the record on this point appears wanting; if the components of the FAR for the building are, as plaintiff posits, the height and setbacks, no one appears to have performed any calculation for the record, and there is no testimony about the effect of the reduced setbacks on First and Second Streets, which 144 First Holdings' architect testified resulted in a reduced footprint at a

lower level than required, and should be "an offsetting factor" in the Board's "deliberations about approving the extra height."

While plaintiff is correct that a challenge "to subject matter jurisdiction may be raised at any time," Lall v. Shivani, 448 N.J. Super. 38, 48 (App. Div. 2016), there is no obligation in the court to consider jurisdictional arguments raised for the first time on appeal premised on a less than obvious interpretation of a municipal ordinance — by an objector who presented a planning expert before the Planning Board — on the theory that "it's the Board's responsibility to find these things, [and] they didn't."

We've held that where a municipality has not included a FAR regulation, "as defined in the statute," in its ordinance but does have a height restriction, a planning board may grant a height variance under N.J.S.A. 40:55D-70(c), not related to residential density, in connection with site plan review "unless the municipal legislative scheme unequivocally provides otherwise." Com. Realty & Res. Corp. v. First Atl. Props. Co., 235 N.J. Super. 577, 580 (App. Div. 1989), aff'd as modified on other grounds, 122 N.J. 546 (1991).

Although there is reference to FAR in the redevelopment plan for this property, there are no numbers for it and no maximum restriction listed. Moreover, there is no testimony in the record about it, or calculations, or the

effect setbacks might have on building height. We thus cannot find that 144 First Holdings made an application to "increase . . . the permitted floor area ratio," N.J.S.A. 40:55D-70(D)(4), under the redevelopment plan by applying for its nine-foot height variance. And because the plan unequivocally vests authority in the Planning Board to grant relief for a nine-foot deviation from the height limit in the form of a C variance, which plaintiff's expert testified was all that was required, we cannot conclude jurisdiction was improper in the Planning Board on this record.

Plaintiff's remaining points require only brief comment. Plaintiff's other argument for why the Planning Board lacked jurisdiction to hear this application — that the enclosed amenity spaces on the roof of the proposed building exceeded ten percent of the total roof area, requiring the height of the building to be measured from the sidewalk to the top of the amenity structure under the City's land development ordinance, which would increase its proposed height to 146 feet, thus requiring variance relief from the zoning board pursuant to N.J.S.A. 40:55D-70(d)(6) — is based on a misapprehension of the record.[7]

[7] We are aware that appellate counsel was not the lawyer who represented plaintiff in the Planning Board and thus assume the record is misapprehended, not misstated.

Plaintiff's entire argument on this point is based on a set of architectural renderings that were superseded by an updated set of plans that was before the Planning Board at the hearing. Although the Planning Board hearing was conducted via Zoom in the early days of the COVID-19 pandemic, the record is quite clear the CAD calculations for the rooftop amenity spaces, which the architect explained in the course of his testimony, were set forth on the set of plans the Board reviewed at the hearing. Plaintiff's counsel acknowledged, on the record, the calculation was on the plans, and plaintiff's planner did not challenge the calculation, having reviewed the plans and listened to the architect's testimony as to how he performed it.

The Planning Board in its resolution noted specifically that the "plans demonstrate the dimensions and percentages of rooftop amenity and mechanical areas in accordance to CAD drawings," and that the "[r]oof plan consisting of mechanical and amenity space is compliant with all area requirements as permitted by" the City's land development ordinance. Because the Board was free to accept the testimony of the architect and the accuracy of his calculations, see Hawrylo v. Bd. of Adjustment, 249 N.J. Super. 568, 579 (App. Div. 1991), there is substantial support in the record for the Board's factual findings on this point and they are thus entitled to our deference, see

Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 61 (1999). Plaintiff has provided us no basis on this record to conclude the Board erred in finding the requested height variance could be granted as a C variance under N.J.S.A. 40:55D-70(c)(2), and that a D variance under N.J.S.A. 40:55D-70(d)(6) was not required.

We are likewise satisfied there is ample evidence in the record to support the Planning Board's grant of the C(2) variance to 144 First Holdings here. See Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 471 (App. Div. 2015) (noting to establish entitlement to "a (c)(2) variance, the applicant must show that the purposes of the MLUL would be advanced, the variance can be granted without substantial detriment to the public good, the benefits of the variance will outweigh any detriment, and that the variance will not substantially impair the intent and purpose of the zoning plan and ordinance").

The Board found the project would advance the purposes of the Municipal Land Use Law in two ways: it would promote the general welfare, N.J.S.A. 40:55D-2(a), by providing a better mix of residential units, including affordable units and more two- and three-bedroom market rate units, thereby offering greater housing options for families of different sizes and income

levels; and it would "promote[] a desirable visual environment," N.J.S.A. 40:55D-2(i), by finally building on the site and "eliminat[ing] the eyesore" of the vacant lot, which the president of the Powerhouse Arts District Neighborhood Association testified had negatively affected property values in the area. He also testified to the Association's positive response to the developer's commitment to plant additional trees in a neighborhood with very little tree canopy and its use of technology to improve air quality in installing a large mural on the building, which the Association saw as "a cultural alignment to the history" of the neighborhood and an expression of where the Association wanted "to take the neighborhood in the future," benefits the Board noted in its resolution.

The Board found other benefits as well. There will be street trees, park benches and bicycle racks along all the street frontage; and, but for the height deviation, and the one for exterior cladding not at issue on this appeal, the project is fully compliant with both the land development ordinance and the redevelopment plan, fulfilling its purpose of spurring development in the district by its mix of uses and contributing to a wider range of housing for existing residents and new ones.

The Board further found, based on the testimony of 144 First Holdings' experts, that the twelve-story, 131-foot building would be consistent with other buildings on the block, and the added twelfth floor will not increase the density, as the eighty-four units permitted under the prior approval would remain static. The Board further concluded the deviation would cause only a "negligible difference to the daylight" filtering to the street and did not substantially impact light and air to neighboring structures. And while acknowledging some views to the east toward New York City would be partially blocked from some vantages on plaintiff's rooftop deck, the Board found that detriment was substantially outweighed by the benefits of the project to the broader community.

Far from impairing the intent and purpose of the zone plan and land development ordinance, the Board found the nine-foot height deviation accommodated new DEP demands for a ground floor above the base flood elevation, allowed for increased ceiling heights in the retail spaces along the streetscape, and improved the layouts and unit sizes, providing more housing options for families, that is, it "present[ed] an opportunity to put the property more in conformity with development plans" and advanced the purposes of the

zoning ordinance and the redevelopment plan. See Ten Stary Dom, 216 N.J. at 30.

Although plaintiff disagrees the alleged public benefits do not demonstrate a better zoning alternative than a fully conforming structure envisioned by the municipality through its own zoning ordinances, that the applicant could build a fully conforming structure and would benefit from the variance does not preclude a planning board from granting it based on its consideration of the recognized purposes of zoning, here promoting the general welfare through a better mix of housing, N.J.S.A. 40:55D-2(a), and a desirable visual environment, N.J.S.A. 40:55D-2(i). Bressman v. Gash, 131 N.J. 517, 530 (1993).

Notwithstanding the well-settled law that "in the absence of a restrictive covenant, a property owner has no right to an unobstructed view across a neighbor's property," In re Riverview Dev., LLC, Waterfront Dev. Permit No. 0908-05-0004.3 WFD 060001, 411 N.J. Super. 409, 430 (App. Div. 2010) (quoting Bubis v. Kassin, 323 N.J. Super. 601, 616 (App. Div. 1999)), we acknowledge plaintiff's legitimate interest in retaining every bit of its 180-degree view from all vantages of its roof deck. There is, however, substantial evidence in the record to support the Board's finding that granting 144 First

Holdings the nine-foot height deviation "would not adversely impact either the neighborhood or the zoning plan and would advance the general purposes of the MLUL." Pullen, 291 N.J. Super. at 8. Plaintiff has fallen far short of carrying its burden to show "the Board engaged in 'willful and unreasoning action, without consideration and in disregard of circumstances.'" Northgate Condo. Ass'n, 214 N.J. at 145 (quoting Worthington, 88 N.J. at 205).

We affirm the Planning Board's grant of site plan approval with the requested deviation. Plaintiff's remaining arguments, to the extent we have not addressed them, lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.