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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3509-20**

**RED WHITE OAK RIDGE,
LLC,**

Plaintiff-Appellant,

v.

**BAIS REUVEN KAMENETZ
OF LAKEWOOD, INC., and
LAKEWOOD TOWNSHIP
PLANNING BOARD,**

Defendants-Respondents.

Argued on February 8, 2023 – Decided March 2, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Ocean County, Docket No. L-3029-20.

Bernard M. Reilly argued the cause for appellant
(Gasiorowski & Holobinko, attorneys; R.S.
Gasiorowski, of counsel and on the briefs; Cathy S.
Gasiorowski, on the briefs).

Afiyfa H. Ellington argued the cause for respondent
Bais Reuven Kamenetz of Lakewood, Inc. (Giordano,

Halleran & Ciesla, attorneys; Paul H. Schneider and Afiyfa H. Ellington, on the brief).

Jilian McLeer argued the cause for respondent Lakewood Township Planning Board (King, Kitrick, Jackson, McWeeney & Wells, attorneys; John J. Jackson, of counsel and on the brief; Jilian McLeer, on the brief).

PER CURIAM

Plaintiff Red White Oak Ridge, LLC, a neighborhood association, appeals from a June 22, 2021 order dismissing its action in lieu of prerogative writs against defendants Bais Reuven Kamenetz of Lakewood, Inc. (Applicant) and Lakewood Township Planning Board (Board) as time barred under Rule 4:69-6(a). We affirm.

This appeal arises from plaintiff's challenge to site plan and subdivision approvals granted by the Board for a development project on Applicant's property in Lakewood. The Applicant applied to the Board for subdivision approval to create sixteen lots on its property. The Applicant also sought site plan approval to construct fifteen single-family residential homes and a private

elementary school for boys with a finished basement and a swimming pool (Project)¹ on the sixteenth lot.

At the Board's public hearing on July 30, 2019, the Applicant presented witnesses, including planning and traffic engineering experts, who offered testimony in support of the Project. The Applicant's planning expert described the school portion of the Project, explaining the school would have a finished basement, housing a simcha hall² for smaller type events such as bar mitzvahs and other non-school functions. The Applicant's planning expert testified that he met with neighbors living near the Project and made alterations to the Applicant's plans as a result of the meeting, including fencing, landscaping, and road widening. The Board also considered comments from the public regarding the Project.

¹ Single-family homes and schools are permitted in Lakewood's R-12 Residential Zone District where the Applicant's property is located. Swimming pools are permitted as an accessory use in this zone.

² In Hebrew, the term "simcha" means a joyous or happy event. According to the testimony during the Board hearing, the simcha hall would be a small venue, or assembly room, serving as an accessory use to the elementary school. The room would be used for bar mitzvahs, but not weddings. Simcha halls are common in Lakewood as places where Jewish people celebrate happy occasions.

At the conclusion of the public hearing, the Board approved the Applicant's subdivision and site plan applications. On August 27, 2019, the Board adopted two resolutions. Resolution SD-2395, setting forth the Board's findings of facts and law, granted preliminary and final subdivision approval for the sixteen-lot subdivision with fifteen lots dedicated to the construction of single-family homes. Resolution SP-2325, setting forth the Board's findings of facts and law, granted preliminary and final site plan approval for the school.

The time period for filing an appeal challenging the Board's approval of the Project expired on October 11, 2019. No one timely appealed, including plaintiff.

On December 16, 2020, plaintiff filed a complaint in lieu of prerogative writs. Plaintiff's action was filed almost fourteen months beyond the forty-five-day period of limitations under Rule 4:69-6(a) for bringing a prerogative writs action. Two days later, plaintiff filed an amended complaint in lieu of prerogative writs.

The Applicant filed a motion to dismiss plaintiff's prerogative writs action as time barred. The Board joined in the Applicant's motion and plaintiff filed opposition.

On March 19, 2021, Assignment Judge Marlene Lynch Ford heard oral argument on the motions to dismiss. After considering the parties' written submissions and oral arguments, Judge Lynch Ford entered a June 22, 2021 order and a thorough written statement of reasons, granting the motions and dismissing plaintiff's complaint with prejudice. The judge determined plaintiff's challenge to the Board's approvals was barred by the forty-five-day time limit under Rule 4:69-6(a). Additionally, she found none of the Rule 4:69-6(c) exceptions for enlarging the period of limitations for commencing an action in lieu of prerogative writs applied.

Further, Judge Lynch Ford expressly rejected plaintiff's "speculative" concerns that the Applicant made misrepresentations to the Board to gain approval because the school "would service more students than originally intended." The judge concluded plaintiff "maintains the right to challenge any deviation from the use of the property" by filing a future action for declaratory relief.

On appeal, plaintiff argues the Applicant's notice to the public was defective because it failed to comply with the requirements of N.J.S.A. 40:55D-11 by including mention of the simcha hall, which defect justified enlargement of the forty-five-day period of limitations for filing an action in lieu of

prerogative writs. Additionally, plaintiff contends that a simcha hall is not a permitted use in the Township's R-12 Residential Zone District and thus required a use variance from Lakewood's zoning board. Further, plaintiff claims the Applicant made "deliberate, relevant misrepresentations regarding the size, use and intensity of its [Project] to secure an approval quickly," warranting invalidation of the Board's resolutions.

After reviewing the record, including the transcripts of the Board's hearing, we affirm for the reasons stated by Judge Lynch Ford. We add only the following comments.

We review the grant of a motion to dismiss a complaint de novo, using the same standard as the trial judge. MasTec Renewables Constr. Co. v. SunLight Gen. Mercer Solar, LLC, 462 N.J. Super. 297, 309 (App. Div. 2020) (citing Castello v. Wohler, 446 N.J. Super. 1, 14 (App. Div. 2016)). Further, when analyzing a purely legal issue, such as a trial judge's application of a period of limitations, we review the matter de novo. Smith v. Datla, 451 N.J. Super. 82, 88 (App. Div. 2017).

Here, Judge Lynch Ford found plaintiff's complaint in lieu of prerogative writs was filed one year and two months after the forty-five-day time requirement under Rule 4:69-6(a) for filing an appeal from the Board's

resolutions of approval for the Project. She also found plaintiff failed to justify enlargement of the time limitation by demonstrating any of the recognized exceptions under Rule 4:69-6(c) and Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975).³ We agree with Judge Lynch Ford's finding that plaintiff's complaint is time barred for the comprehensive reasons stated in her June 22, 2021 written decision.

We also comment on plaintiff's argument that the forty-five-day time limit should have been enlarged because the Applicant's notice to the public failed to comply with N.J.S.A. 40:55D-11. The notice requirements under N.J.S.A. 40:55D-11 provide that an applicant must state "the nature of the matters to be considered." Plaintiff contends the notice failed to include any mention of a simcha hall and, therefore, the notice was defective and the defect justified enlargement of the forty-five-day period of limitations. We reject this argument.

While plaintiff raises this argument, it failed to provide a copy of the notice as part of the record on appeal. Nor did plaintiff's complaint or amended

³ Brunetti set forth the following exceptions in support of enlargement of the forty-five-day time period: "(1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." 68 N.J. at 586.

complaint cite the language from the Applicant's notice to the public. Thus, plaintiff's assertions are untethered to any competent evidence in the record. See R. 1:6-6; see also Baldyga v. Oldman, 261 N.J. Super. 259, 265 (App. Div. 1993) (finding the purpose of Rule 1:6-6 is, in part, to "eliminate the presentation of facts which are not part of the record by unsworn statement[s] of counsel made in briefs and oral arguments").

Here, plaintiff failed to include in the record on appeal the evidence, if any, submitted in support of its defective notice argument. See, e.g., Cmty. Hosp. Grp., Inc. v. Blume Goldfaden Berkowitz Donnelly Fried & Forte, P.C., 381 N.J. Super. 119, 127 (App. Div. 2005) (explaining appellate courts are not "obliged to attempt review of an issue when the relevant portions of the record are not included"). Thus, we reject plaintiff's argument related to the alleged defective notice.

We also reject plaintiff's claim that the Applicant required a use variance for the simcha hall under N.J.S.A. 40:55D-70(d)(1). According to the expert testimony before the Board, the simcha hall would be located in the school's finished basement and serve as an accessory use to the school. Under Lakewood's Uniform Development Ordinance, an "accessory use" is "[a] use . . . that is customarily incidental and subordinate to that of the principal and on

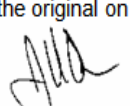
the same lot." The principal use of the lot is for a school and the Applicant provided testimony that the use of the simcha hall would be incidental and subordinate to the school as an accessory use.

"[A]n accessory use is implied as a matter of law as a right which accompanies a principal use." Shim v. Washington Twp. Planning Bd., 298 N.J. Super. 395, 401 (App. Div. 1997). "Zoning ordinances which permit 'customarily incidental' accessory uses to the main activity permit, by implication, any use that logic and reason dictate are necessary or expected in conjunction with the principal use of the property." Charlie Brown of Chatham, Inc. v. Bd. of Adj. for the Twp. of Chatham, 202 N.J. Super. 312, 323 (App. Div. 1985) (internal citation omitted).

Here, the principal use of a portion of the subdivided property is for a school. The simcha hall is an accessory use because the room is incidental and subordinate to the main use of the property as an elementary school. As an accessory use, the Applicant did not require a use variance.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION