SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0309-22

GEORGE VETTER and
DEBORAH VETTER,

Plaintiffs-Appellants,

v.

TOWNSHIP OF WARREN,
BERGEN COUNTY UNITED
WAY and MADELINE
PARTNERS, LLC,

Defendants-Respondents.

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Argued November 29, 2023 – Decided December 3, 2024

Before Judges Gummer and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1536-21.

Bruce I. Afran argued the cause for appellants.

Timothy Patrick Beck argued the cause for respondent Township of Warren (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, PC, attorneys; Jeffrey Lehrer, of counsel and on the brief; Susan F. Bateman, on the brief).

Denis F. Driscoll argued the cause for respondents Bergen County United Way and Madeline Partners, LLC (Inglesino, Webster, Wyciskala & Taylor, LLC, attorneys; John P. Wyciskala and Denis Frances Driscoll, of counsel; Graham K. Staton, on the brief).

The opinion of the court was delivered by

GUMMER, J.A.D.

Plaintiffs George Vetter and Deborah Vetter appeal from orders granting defendants' motions to dismiss their complaint with prejudice and subsequent orders awarding defendants' counsel fees and costs. We affirm the dismissal orders and reverse the fee orders.

I.

On November 22, 2021, plaintiff filed a complaint in which they described themselves as owning and living on property abutting Block 83, Lot 4, in defendant Township of Warren. Plaintiffs alleged the Township had used "public monies" to purchase that lot sometime around May 2001 "for the purposes of open space, conservation, active and passive public reception[,] and environmental protection, as set forth [in] Resolution 2001-134," which was adopted on May 10, 2001. Plaintiffs also alleged that on or about May 14, 2020, the Township had agreed to lease the lot to defendants Bergen County United Way and Madeline Partners, LLC (collectively the Lessee defendants) "for

purposes of constructing a 36-bed special needs housing complex along with a sewage plant, discharge field and other facilities, with roads and parking areas."

Plaintiffs asserted in the complaint that they had objected to the Lessee defendant's pending application to the Township's Planning Board for permits and approval of their "special needs project" on several grounds, including "that the property was acquired for purposes of open space, conservation, active and passive public reception and environmental protection as per Resolution 2001-134 and not for development of a special needs or other housing project." Plaintiffs sought a judgment declaring that the lot "must be used for" and "restricted to" those enumerated uses. They also sought an injunction deeming the lot's deed "impressed with a restriction pursuant to the stated purposes of Resolution 2001-134 that the site is to be used for purposes of open space, conservation, active and passive public recreation and environmental protection" and voiding defendants' lease.

On March 4, 2022, counsel for the Township sent to plaintiff's counsel a letter pursuant to Rule 1:4-8, asserting and explaining why the complaint was frivolous and demanding plaintiffs dismiss it within twenty-eight days. Counsel for the Lessee defendants sent a similar letter on March 15, 2022.

When plaintiffs failed to take action, the Township on April 29, 2022, moved to dismiss the complaint with prejudice for failure to state a claim upon which relief can be granted pursuant to Rule 4:6-2(e). In support of its motion, the Township submitted its attorney's certification with fourteen attached exhibits, including a copy of Resolution 2001-134 and copies of documents not referenced in the complaint. It also submitted the six-page certification of the Township Administrator, Mark M. Krane. The Lessee defendants also moved to dismiss the complaint with prejudice and for an award of fees and costs. In support of their motion, they submitted the certification of their counsel with accompanying exhibits. Plaintiffs opposed the motions.

Because the motion judge treated the motions as summary-judgment motions pursuant to Rule 4:6-2, we viewed the evidence in the motion record in a light most favorable to plaintiffs, the non-moving parties, and discerned the following material facts. See Comprehensive Neurosurgical, P.C. v. Valley Hosp., 257 N.J. 33, 71 (2024).

As set forth in Resolution 2001-134, in 2000, the Township Committee adopted Ordinance 2000-38, entitled "Acquisition Of Property Known As The Wagner Farm By Eminent Domain," and Ordinance 2000-31, a bond ordinance authorizing the issuance of $6,000,000 in bonds for financing part of an

appropriation for the Township's "[p]urchase [o]f [p]roperty [a]nd [i]mprovements." See Warren, N.J. Twp. Comm. Res. 2001-134, at 3 (May 10, 2001). Wagner Farm was described as property designated on the Township tax map as Block 86, Lot 4, and Block 83, Lots 3.01, 3.02, 3.03, 3.04, 3.05, and 4. Id. at 1. As set forth in Resolution 2001-134, the Township's "Master Plan/Land Use Element . . . designates a substantial portion of the [p]roperty as open space/conservation" and its "Open Space Plan designates the entire [p]roperty as open space." Id. at 2.

According to Resolution 2001-134, after the Township Committee in 2000 decided to acquire Wagner Farm "for public purposes; namely, open space, conservation, active and passive public recreation, environmental protection and to continue and extend the open space along Mountain Avenue," the Township in 2001 instituted a condemnation action regarding Wagner Farm. Id. at 2-3. The Township was subsequently sued in connection with its condemnation efforts. Id. at 4. Reflecting the desire of the interested parties to resolve those lawsuits and the Township's belief the acquisition of Wagner Farm was in the best interests of the Township and its residents, Resolution 2001-134 authorized the Township's acquisition of Wagner Farm for $4,975,000. Id. at 4.

Pursuant to the authority granted in Resolution 2001-134, the Township purchased Wagner Farm, specifically Block 83, Lots 3.01, 3.02, 3.03, 3.04, 3.05, and 4, and Block 86, Lot 4, for $4,975,000. The purchase of the property was reflected in a May 31, 2001 deed, which was recorded on June 1, 2001 (the Title Transfer Deed). The Title Transfer Deed did not contain any restrictions or requirements regarding the use of the property, other than to indicate the conveyance of the property was subject to "all easements and restrictions of record, applicable zoning ordinances and the state of facts that an accurate survey would disclose."

Resolution 2002-108, which was adopted on April 18, 2002, indicated the Township was seeking $1,250,000 from the Green Acres Program to reimburse the Township for a portion of the purchase price of Wagner Farm. Warren, N.J. Twp. Comm. Res. 2002-108, at 1 (Apr. 18, 2002). It also provided that "the property to be funded by Green Acres Program moneys is a portion of the . . . property; the other part of the same is not to be so funded and will not be subject to Green Acres Program restrictions and will not be on the Township [Recreation and Open Space Inventory (ROSI)]." Ibid.

On September 17, 2002, the Township executed a Deed Establishing Conservation/Open Space Restrictions (Restriction Deed). Pursuant to the

Restriction Deed, the Township agreed to encumber a specified portion of the property, designated as "Restricted Green Acres" in the Restriction Deed, with certain Somerset County, Township, and Green Acres restrictions. The Restriction Deed provided that it was "the specific intent . . . that only the lands described . . . herein and depicted as . . . ('Restricted Green Acres') on the . . . [m]aps [attached] . . . shall be subject to the restrictions contained herein. All other lands located within [the property] shall not be affected by the restrictions . . . . " The Restriction Deed specifically identified portions of Block 86, Lot 4, and Block 83, Lots 3.01, 3.04 and 3.05 as being part of the Restricted Green Acres. The Restriction Deed did not designate any part of Block 83, Lot 4, which was the subject of plaintiffs' complaint, as part of the Restricted Green Acres. No portion of Block 83, Lot 4, was part of the Restricted Green Acres on the Restriction Deed or was ever included on the Township's ROSI.

On December 4, 2018, the court conducted a fairness hearing in In re the Application of Township of Warren, to determine whether the settlement agreement between the Township, the Fair Share Housing Center, and various intervenors was "fair and reasonable." In re the Application of Twp. of Warren, No. SOM-L-904-15 (Law Div. filed 2015); see also S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158, 205 (1983)

(reaffirming the constitutional obligation of towns to provide "a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing"). Block 83, Lot 4, was one of the sites subject to the settlement agreement and was "intended to be a 32-unit special needs project" and to be "rezoned." In re the Application of Twp. of Warren, at 9, 11; see also Mount Laurel II, 92 N.J. at 200-01 (acknowledging "municipalities around the State that have responded to our [affordable-housing] decisions by amending their zoning ordinances to provide realistic opportunities for the construction of low and moderate income housing").

Plaintiff George Vetter appeared at the fairness hearing and was permitted to testify even though he had not submitted a written objection. Id. at 2, 19 n.8, 20. He "offered a wide range of comments that were addressed to site suitability, traffic, environmental issues and the overall philosophy that underlies the law regarding affordable housing in New Jersey." Id. at 19-20. The court gave no indication that plaintiff had asserted at the fairness hearing that Block 83, Lot 4, could not be part of the settlement because it could be used only for open-space purposes and could not be rezoned for affordable-housing purposes.

The court found the settlement to be fair. Id. at 27. After conducting a compliance hearing on August 28, 2019, the court entered a Final Judgment of Compliance and Repose in favor of the Township. In re Twp. of Warren Compliance with Third Round Mount Laurel Affordable Hous., No. SOM-L-904-15 (Law Div. Sept. 26, 2019).

Consistent with that settlement, the Township adopted on March 14, 2019, Ordinance 19-12. That ordinance created a new zoning district classification entitled "AH-3 Affordable Housing District," which has as permitted uses "[a]partments and/or bedrooms designed to accommodate special needs persons." Warren, N.J., Ordinance 19-12 (Mar. 14, 2019). Ordinance 19-12 also amended the Township's zoning map to change the zoning classification of Block 83, Lot 4, from CR 130/65[1] to AH-3 Affordable Housing District. The ordinance's express "intent and purpose" for creating a new affordable housing district "are to implement the Affordable Housing Plan Element of the adopted Master Plan of Warren Township," and its "objectives are to provide and encourage development of housing affordable to low and moderate income

[1] Under the Township's zoning ordinance, the CR 130/65 District is an "Environmental Critical Rural Residential District," which "applies to large area[s] of vacant land with environmental constraints present within portions of all of these areas." Township of Warren, N.J., Code § 16-10, -10.1.

households as defined by the New Jersey Fair Housing Act, as well as middle income, age targeted and adult households." Ibid.

Plaintiff George Vetter attended the Township Committee's March 14, 2019 meeting, during which Ordinance 19-12 was discussed and adopted. According to the meeting minutes, he "had a long list of objections to this development and he was urged to attend the Planning Board Application meeting where most of the issues on his list are determined." Plaintiffs did not otherwise challenge the enactment of that ordinance.

As memorialized in Resolution PB21-03, the Township Planning Board approved on November 22, 2021, the Lessee defendants' application for preliminary and final major site plan approval to develop Block 83, Lot 4, with thirty residential special needs housing units.

After hearing argument on defendants' motions, the motion judge on July 11, 2022, entered orders and placed a decision on the record granting defendants' motions and dismissing the complaint with prejudice.[2] At the outset of his decision, the judge converted defendants' dismissal motions to summary-

[2] At the beginning of his oral decision, the judge referenced only the Lessee defendants' motion. Given the full content of the decision and the judge's statement on the order granting the Township's motion that he had placed his findings of fact and conclusions of law on the record on the same day, we understand the decision applies to both motions.

judgment motions because defendants had "relie[d] on matters [and] facts outside of the complaint." See R. 4:6-2(e). The judge found summary judgment to be appropriate also because plaintiffs had failed to show "with any degree of particularity the likelihood that further discovery w[ould] supply the missing element of [plaintiffs'] cause of action."

Rejecting plaintiffs' argument that Resolution 2001-134 limited the purpose for which Block 83, Lot 4, could be used, the judge determined that "[n]o portion of [Block 83, Lot 4,] is part of the land designated as restricted Green Acres," noting the Restriction Deed "speaks for itself" and that plaintiffs "in their papers concede[d] that the subject property was not purchased in fact with Green Acres, DEP or open space funds." Disputing plaintiffs' interpretation of the language of Resolution 2001-134, the judge nevertheless found the Township could rezone and properly had rezoned the lot and that plaintiffs had not filed a complaint in lieu of prerogative writs challenging the rezoning ordinance.

Citing N.J.S.A. 2A:15-59.1 and Rule 1:4-8, the judge found plaintiffs had received "substantial indisputable documentation that their allegations were frivolous" before they filed the complaint and failed to withdraw the complaint after receiving a demand to do so. The judge consequently determined it was

"appropriate" to award defendants counsel fees and directed them to submit certifications of services. After defense counsel submitted their certifications, the judge on August 18, 2022, entered an order awarding the Township $12,487 and an order awarding the Lessee defendants $13,379.89 in legal fees and costs.

On appeal, plaintiffs argue the court erred in converting the dismissal motions to summary-judgment motions and in granting those motions before discovery had taken place, in relying on the "affordable housing settlement" and in finding the township could "convert" the use of the property to an affordable-housing use, and in awarding counsel fees and costs as a sanction.

II.

An appellate court reviews a grant of summary judgment de novo, using the same standard that governed the trial court's decision. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show that there are no "'genuine issues of material fact and . . . the moving party is entitled to summary judgment as a matter of law.'" Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)); see also R. 4:46-2(c). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the

evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Id. at 24 (quoting Bhagat, 217 N.J. at 38). "We accord no special deference to the trial court's legal conclusions." Birmingham v. Travelers N.J. Ins. Co., 475 N.J. Super. 246, 255, (App. Div. 2023).

We consider first plaintiffs' procedural arguments about whether the motion judge properly treated defendants' dismissal motions as summary-judgment motions. "In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 221 n.3 (3d Cir.), cert. denied, 543 U.S. 918 (2004)); see also Teamsters Local 97 v. State, 434 N.J. Super. 393, 412 (App. Div. 2014) (same). "If a trial court reviewing a motion to dismiss relies on materials beyond the allegations in the complaint, the 'motion [is] treated as one for summary judgment.'" Arias v. Cnty. of Bergen, 479 N.J. Super. 268, 289 (App. Div. 2024) (alteration in original) (quoting Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 337 (App. Div. 2006); see also R. 4:6-2 ("If . . . matters outside the pleading are presented to and not excluded by the court, the motion

shall be treated as one for summary judgment and disposed of as provided by [Rule] 4:46")).

Although the judge in rendering his decision relied mostly on items referenced in the complaint or on publicly-available documents, the Lessee defendants and the Township respectively included in their motions and the judge referenced in his decision a letter from the Lessee defendants' counsel to the Township's land use coordinator regarding their pending application before the planning board and emails exchanged in 2019 between Krane and a representative of the Green Acres program. In the letter, counsel denied an objector's assertion that Block 83, Lot 4, was "either encumbered by Green Acres or Open Space conservation easements or was acquired with such funding sources" and provided copies of publicly-available documents, which were submitted with the motions, disputing that assertion. In the emails, Krane provided information and publicly-available documents to the Green Acres representative regarding the acquisition of Block 83, Lot 4, and the funding for that acquisition. Because parties submitted those documents and the judge considered them, the judge pursuant to Rule 4:6-2 properly treated the motions as summary-judgment motions.

Plaintiffs complain the motion judge did not give them advance notice of his intention to treat defendants' dismissal motions as summary-judgment motions. See R. 4:6-2 ("all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion"). In their transcript request form, plaintiffs requested a copy of the transcript of the oral argument of defendants' motions. However, that transcript was not provided to this court. Thus, we cannot know based on the record before us whether defendants' submission of documents outside the pleading or the conversion of the motions was discussed during oral argument.

Even accepting plaintiffs' representation for purposes of this appeal, the judge's purported omission is not a basis to reverse his orders granting the motions. The contents of defendants' motions, which included documents that were not referenced in or attached to the complaint or were not publicly available, clearly put plaintiffs on notice that the judge could convert the motions to summary-judgment motions. And, contrary to plaintiffs' assertion, the alleged lack of notice did not prevent plaintiffs from opposing the motions as summary-judgment motions.

Plaintiffs contend they "were denied the opportunity to defend against the motion as one for summary judgment," particularly referencing the opportunity to argue the motions, as summary-judgment motions, were premature. See Friedman v. Martinez, 242 N.J. 449, 472 (2020) ("It is inappropriate to grant summary judgment when discovery is incomplete and critical facts are peculiarly within the moving party's knowledge") (quoting James v. Bessemer Processing Co., 155 N.J. 279, 311 (1998) (internal quotation marks omitted). But, in fact, plaintiffs had the opportunity to argue and argued the judge could not grant the motions as summary-judgment motions because they were premature. Before rejecting it, the judge in his decision expressly acknowledged plaintiffs had made that argument: "plaintiff[s'] oral argument was that discovery is required and this matter is not . . . ripe for summary judgment but defendants argue and [the c]ourt agrees that no matter of discovery can cure the deficiency of the plaintiffs' claim and there for the motion should be granted."

And we agree with the judge's conclusion. "'[S]ummary judgment is not premature merely because discovery has not been completed, unless' the non-moving party can show 'with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action.'" Id. at 472-73 (quoting Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015)

(internal quotation marks omitted)); see also Minola v. Kushner, 365 N.J. Super. 304, 307 (App. Div. 2004) ("While we are aware that ordinarily decision on a summary judgment should be withheld until completion of discovery, nevertheless, discovery need not be undertaken or completed if it will patently not change the outcome"). Plaintiffs have failed to demonstrate the discovery they suggest – such as depositions of unnamed witnesses to learn "their understanding of the purpose and intent" of the relevant ordinances and resolutions and requests for documents about the decision-making process that resulted in the adoption of those ordinances and resolutions – would supply the missing elements of their cause of action or alter the outcome.

Block 83, Lot 4, may have been part of a district originally zoned for open-space purposes, but the Township had the statutory authority to amend its zoning ordinance pursuant to N.J.S.A. 40:55D-62, and nothing in the resolutions about the Township's acquisition of that lot or subsequent deeds created as a result of that acquisition stripped the Township of that statutory authority. See N.J.S.A. 40:55D-62(a) ("The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon"); Riya Finnegan LLC v. Twp. Council of S. Brunswick, 197 N.J. 184, 191 (2008) (quoting N.J.S.A. 40:55D-62(a)) (finding the Municipal

Land Use Law, N.J.S.A. 40:55D-1 to -163, "grants the governing body of each municipality the power to 'adopt or amend a zoning ordinance'"); Myers v. Ocean City Zoning Bd. of Adjustment, 439 N.J. Super. 96, 100-01 (App. Div. 2015) (acknowledging a governing body has the ability to adopt or amend a zoning ordinance pursuant to N.J.S.A. 40:55D-62(a)).

And that's what the Township did. It enacted a new zoning ordinance, Ordinance 19-12, that created an affordable housing district and amended the existing zoning ordinance and official zoning map to add that district. In adopting that ordinance, the Township did exactly what our Supreme Court in Mount Laurel II had praised municipalities for doing in response to the Court's affordable-housing decisions: it "amend[ed its] zoning ordinances to provide realistic opportunities for the construction of low and moderate income housing." 92 N.J. at 200-01.

Zoning ordinances are presumed to be valid. Riggs v. Long Beach Twp., 109 N.J. 601, 610-11 (1988). That presumption "may be overcome by a showing that the ordinance is 'clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute.'" Id. at 611 (alteration in original) (quoting Bow & Arrow Manor v. Town of W. Orange, 63

N.J. 335, 343 (1973)). "The party attacking the ordinance bears the burden of overcoming the presumption[.]" Ibid.

"A claim that a zoning ordinance is unreasonable must be raised by an action in lieu of prerogative writs challenging the validity of the ordinance." Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 78 (App. Div. 2006); see also Cox & Koenig, New Jersey Zoning & Land Use Administration § 40-3.1 (2024) ("Appeals from local land use decisions including ordinance adoption are primarily accomplished by actions in lieu of prerogative writs, governed by R. 4:69-1 through 4:69-7 of the New Jersey Court Rules.").

Generally, actions in lieu of prerogative writs must "be commenced [no] later than 45 days after the accrual of the right to the review, hearing or relief claimed . . . ." R. 4:69-6(a); see also Alexander's Dep't Stores of N.J., Inc. v. Borough of Paramus, 243 N.J. Super. 157, 169 (App. Div. 1990) (in case in which plaintiffs had filed a complaint in lieu of prerogative writs after borough adopted zoning ordinance amendments previously submitted to the Council on Affordable Housing as part of borough's effort to satisfy its "Mt. Laurel obligation," court found the action timely, "[t]o the extent that it challenge[d]

the validity of the zoning amendments . . . because it was filed within the permitted 45 day period established by R. 4:69-6(a)"), aff'd, 125 N.J. 100 (1991).

Plaintiffs did not file, timely or otherwise, a lawsuit challenging Ordinance 19-12. Even in this lawsuit, they didn't challenge Ordinance 19-12; they didn't even mention it in their complaint. Instead of filing an action properly challenging the ordinance that changed the zoning district of Block 83, Lot 4, they filed this lawsuit in which they claim Resolution 2001-134 prevents the lot from being used for housing for special needs persons – a use expressly permitted in the Affordable Housing District. But Resolution 2001-134 does not have that effect, by either its language or legal import.

A resolution is not an ordinance.

> An ordinance is distinctively a legislative act; a resolution, generally speaking, is simply an expression of an opinion or mind concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality. Thus, it may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters upon which the municipal corporation desired to legislate must be put in the form of ordinances.
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> [Inganamort v. Borough of Fort Lee, 72 N.J. 412, 418 (1977) (quoting Eugene McQuillen, Municipal Corporations, §14.02, 3d ed. 1972)).]

See also Reuter v. Borough Council of Fort Lee, 328 N.J. Super. 547, 552-53 (App. Div. 2000) (acknowledging "the substantial difference between a municipal action by ordinance and a municipal action by resolution"), aff'd in part, rev'd in part, 167 N.J. 38 (2001). A governing body's statutory authority to zone is by ordinance, not resolution. N.J.S.A. 40:55D-62; see also Riggs, 109 N.J. at 610 (finding "[m]unicipalities do not possess the inherent power to zone, and they possess that power . . . only insofar as it is delegated to them by the Legislature"). Resolution 2001-134 does not have the legal effect plaintiffs attribute to it.

And even if it could legally, the language of Resolution 2001-134 doesn't restrict the use of Block 83, Lot 4. The whereas clauses of the Resolution contain information about the history and then current status of Wagner Farms and the efforts and considerations the township had made in seeking to acquire it. The resolving clauses authorize the acquisition of the property and settlement of the pending lawsuits about the property. We see nothing in the language of the Resolution that limits the future uses of Block 83, Lot 4.

Perceiving no procedural or substantive error in the motion judge's grant of summary judgment and based on our own de novo review, we affirm the July 11, 2022 orders granting defendants' motions.

We now turn to the orders awarding defendants their counsel fees and costs. "We review the trial judge's decision on a motion for frivolous lawsuit sanctions under an abuse of discretion standard." Wolosky v. Fredon Twp., 472 N.J. Super. 315, 327 (App. Div. 2022). The decision should be reversed only if it "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Ibid. (quoting McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011)).

Due to procedural infirmities, we reverse the orders awarding defendants their counsel fees and costs. The judge awarded counsel fees, citing Rule 1:4-8. Paragraph (b) of the Rule sets forth the procedures a party seeking sanctions under the Rule must follow, including that "[a]n application for sanctions under this rule shall be by motion made separately from other applications . . . ." R. 1:4-8(b)(1); see also Toll Bros. v. Twp. of W. Windsor, 190 N.J. 61, 69 (2007) (finding "[a] litigant seeking sanction under [Rule 1:4-8] must file a separate motion . . . ."); Borough of Englewood Cliffs v. Trautner, 478 N.J. Super. 426, 445 (App. Div. 2024) (finding that to satisfy Rule 1:4-8 a party must file a subsequent motion with the court describing the conduct that allegedly violated the rule and including a certification that written notice and demand was sent to

the opposing party). "Strict compliance with each procedural requirement of Rule 1:4-8 is a 'prerequisite to recover[,]' and failure to conform to the rule's procedural requirements will result in a denial of the request for attorney's fees sanctions." Bove v. AkPharma Inc., 460 N.J. Super. 123, 149 (App. Div. 2019) (quoting State v. Franklin Sav. Acct. No. 2067, 389 N.J. Super. 272, 281 (App. Div. 2006)).

The judge awarded the Township counsel fees even though the Township had not stated in its notice of motion it was applying for counsel fees. See R. 1:6-2(a) (requiring a party seeking an order from the court to file a "notice of motion in writing . . . stat[ing] . . . the grounds upon which it is made and the nature of the relief sought . . . ."). And nothing else in the record shows the Township ever actually moved for counsel fees. In their notice of motion, the Lessee defendants stated they were seeking "an [o]rder dismissing the [c]omplaint with prejudice and awarding fees and costs to [them]." However, by moving simultaneously for dismissal and a fee award, the Lessee defendants failed to comply with the requirement that "[a]n application for sanctions under this rule shall be by motion made separately from other applications . . . ." R. 1:4-8(b)(1). Because defendants failed to comply with the required procedures

of Rule 1:4-8, we reverse the August 18, 2022 orders awarding them counsel fees and costs.[3]

Affirmed in part; reversed in part.

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

CLERK OF THE APPELLATE DIVISION

[3] We recognize a court on its own initiative may sanction a party under Rule 1:4-8, but to do so, the court must issue an order "describing the specific conduct that appears to violate this rule and directing the attorney or pro se party to show cause why he or she has not violated the rule." The motion judge did not follow that procedure.