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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5003-13T2

MARK FUSCO,

Plaintiff-Appellant,

v.

RARITAN TOWNSHIP PLANNING BOARD
AND RARITAN JUNCTION, LLC,

Defendants-Respondents.

Submitted October 6, 2015 – Decided October 23, 2015

Before Judges Fisher and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-0438-13.

Kuchinsky & Rotunno, P.C., attorneys for appellant (Anthony M. Rotunno, on the brief).

Mauro, Savo, Camerino, Grant & Schalk, P.A., attorneys for respondent Raritan Junction, L.L.C. (Alexander G. Fisher, on the brief).

McElroy, Deutsch, Mulvaney & Carpenter, L.L.P., attorneys for respondent Raritan Township Planning Board, join in the brief of respondent Raritan Junction, L.L.C.

PER CURIAM

Plaintiff Mark Fusco, owner of a single-family residence adjacent to the property in question, appeals the dismissal of his complaint in lieu of prerogative writs. His suit challenged the Raritan Township Planning Board's decision granting defendant Raritan Junction, L.L.C.'s application for site plan approval, subdivision approval, and signage variances needed to construct a Costco retail establishment. Plaintiff argues the judge erred, claiming the Board: failed to incorporate an agreement prohibiting trucks from using a proposed driveway into the site; relied too greatly on concessions provided by Raritan Junction for the benefit of a neighboring school to the detriment of his property and the property of others; and failed to adequately consider the recommendations of its environmental commission. We find no merit in these arguments and affirm.

Briefly, the record reveals that Raritan Junction applied in October 2012 for the relief needed to develop its parcel of more than forty acres bordering Junction Road, Walter E. Foran Boulevard, and State Highway 31, in Raritan Township. The Board conducted public hearings on April 10, April 24, May 8, and June 12, 2013. Of relevance to the issues on appeal are the following facts derived from those proceedings and relied upon by the trial judge.

Raritan Junction's property is located within an area designated "in need of redevelopment." The applicable ordinance incorporates a conceptual plan designed "to help [e]nsure that the redevelopment of the site will promote smart growth planning principles and objectives." This conceptual plan "provides for a large box, single user retail store to complement the existing Lowe's and Wal-Mart large box stores and the smaller retail uses and offices . . . [to] provide a sense of place for the community." Further, the ordinance recognizes that the property contains "environmentally sensitive areas" and explains that "an important aspect of the [c]onceptual [p]lan is the dedication of lands to the Township . . . for municipal purposes."[1]

Raritan Junction's proposal sought to subdivide the property into four lots. Lots A and B consist of roughly 3.5 acres and 7.6 acres, respectively; both lots were designated for future development. Lot C spans nearly 24.5 acres and includes the proposed Costco building. And Lot D consists of about 5.5 acres dedicated to the public. Since purchasing this property in June 2003 from a manufacturing facility, Raritan Junction has

[1]Raritan Junction's professional planner, Richard Coppola, testified that the site plan was "drawn in concert" with the ordinance and its conceptual plan. He identified the site plan as "essentially identical" to the conceptual plan, which "obviously . . . [was] designed to bring about the development and vision in the ordinance itself."

leased approximately 100 of its 404 vacant parking spaces to neighboring Hunterdon Central Regional High School in exchange an annual payment of one dollar. Raritan Junction also leased an open field to a youth football program for practices and to the high school for extracurricular activities. The parking lot and practice field are located in proposed Lot D.[2]

With regard to the wetlands on the site near plaintiff's adjoining residence, Coco acknowledged that Raritan Junction would "need a [Department of Environmental Protection] Flood Hazard Area/Wetlands permit which . . . w[as] about to [be] submit[ted]." At a later part of the hearing, Coco stated that Raritan Junction reviewed its plans "in some detail" with the DEP, including establishing a flood hazard area and acquiring necessary wetland permits. Coppola also testified that Raritan Junction intended to preserve "environmentally sensitive areas[,] including freshwater wetlands and steep slopes[,] . . . as passive open space or as conservation easements."

[2]The Township's engineer, Tony Hajjar, initially believed Raritan Junction would improve the parking lot, which contained potholes and lacked lighting, prior to its public dedication. In response to the Board's inquiries about how Raritan Junction intended to improve the parking lot, Raritan Junction's professional engineer, Alfred Coco, explained that, prior to Lot D's dedication, the parking lot would be reconditioned. And, despite Raritan Junction's initial plan to dedicate only 2.2 acres in Lot D, it ultimately agreed to dedicate the entire lot.

Coco initially observed that Raritan Junction planned to install a driveway, which would enter from Route 31 and cross the wetlands area, that delivery trucks would use to enter and exit the site. Upon the Board's inquiry into potential negative effects on neighboring homes, Coco stated that Raritan Junction would increase buffering around the driveway. In response to plaintiff's inquiries about the fact that the environmental commission recommended the elimination of the driveway from its plans, Coco explained:

> [I]f the reason is because it's crossing wetlands, and a [r]iparian zone to me isn't enough, because we can get permits to do that. It would be different if we weren't allowed to do it, but we are. And we need that, frankly the site needs that access from Route 31.

At the next hearing date, however, Raritan Junction's principal, Scott Loventhal, testified that no delivery trucks would use the Route 31 driveway but would instead be rerouted through a driveway connecting the site to Walter E. Foran Boulevard.[3] Coco explained Raritan Junction's response to local trepidations about the Route 31 driveway:

> [T]here was some concern from . . . one of the property owners about the introduction

[3]Loventhal specifically stated, regarding delivery trucks' use of the driveway, that "[t]hey're not going to come in [Route] 31. None of them. None of them will come in Route 31."

> of a new driveway into the site and [its] impact. . . .
>
> [W]e are also going to provide for a six foot high solid fence basically that would wrap the corner on both of these properties. And we're going to offset it approximately five feet from the property line and provide some columnar evergreens along that fence line, . . . that will break the view up for these people into the fence and provide for a little visual barrier between their homes and where the driveway will be. . . .
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> [W]e [a]re going to also . . . include[e] some additional landscaping . . . between the property . . . [and] the fence . . . [as] part of a revised plan.

When plaintiff questioned whether the prohibition against truck deliveries through the Route 31 driveway applied only to Costco's trucks, Coco confirmed that the prohibition included all trucks. Raritan Junction's architect further assured the Board that delivery truck headlights would not bother neighboring homes due to the proposed loading dock's four-foot depression.

The Board unanimously voted to approve the application, memorializing its many factual findings and conclusions in a thirty-page resolution, which also conditioned approval on the completion, development and use of the property in accordance with the testimony provided by Raritan Junction and upon the obtaining of approvals from all outside agencies.

Plaintiff then filed his complaint in lieu of prerogative writs, which was found without merit by Judge Thomas C. Miller for reasons set forth in a thorough written opinion.

Among other things, the judge's opinion addressed plaintiff's contention that the delivery restriction on the driveway was ambiguous and unenforceable:

> Even though the [ordinance] did not require the limitation of truck[] traffic . . . , and trucks were originally going to be allowed to utilize the driveway . . ., the testimony clearly indicates that [Raritan Junction] agreed that no such trucks would be permitted on the driveway, in consideration of the local residents. Moreover, that limitation is indeed reflected in the Resolution, which also calls for the Resolution to be enforced consistent with the testimony, which is on the record and unambiguously reflects this concession. Accordingly, [p]laintiff's argument that the record is inconsistent as to truck traffic on the . . . driveway is without merit, and the Board's decision to adopt the Resolution was not arbitrary or capricious.

In addition, the judge rejected plaintiff's argument that the Board disregarded local concerns when eliciting concessions from Raritan Junction, noting the issue regarding the interpretation of "improved" under the ordinance became "moot when [Raritan Junction] agreed to do a[n] . . . overlay on the parking area, restripe [it], and [complete] necessary repairs" prior to its dedication. The judge quoted from our decision in Allen v. Hopewell Twp. Zoning Bd., 227 N.J. Super. 574, 581

(App. Div.), certif. denied, 113 N.J. 655 (1988), in holding that he was required to:

> defer to the judgment of the Board and must not "suggest a decision that may [be] better than the one made by the [B]oard." Rather, the scope of this [c]ourt's review is "to determine whether the [B]oard could reasonably have reached this decision" based upon the record. Having done so, it is clear that the Board did not abuse its discretion when it sought the concession that "improvements" included the parking area to be dedicated to the Township. In any event, that [Raritan Junction] agreed to provide those improvements to the parking area is certainly not grounds to overturn the Board's decision, and there is simply no sufficient evidence that the Board somehow extracted concessions out of [Raritan Junction] at the expense of the public. If anything, it would appear as though the repairs to the parking area serve to benefit the community.

The judge was also satisfied the Board did not incorrectly disregard the environmental commission's recommendations, reasoning "[t]he Board appropriately conditioned . . . approval on . . . obtaining wetlands and flood hazard approval from DEP rather than usurp DEP's authority." Noting that the commission generated advisory opinions, the judge reasoned:

> Here, as Raritan Township has not adopted more stringent regulations than [those established by] the Flood Hazard [Area] Control Act, N.J.S.A. 58:16A-50 [to -103,] the Board properly conditioned the . . . driveway construction upon DEP approval, which . . . has now been granted. Accordingly, [the court] cannot find that

> the Board acted arbitrarily or capriciously in refusing to act according to the [commission's] recommendation . . . .

Substantially for the reasons expressed in the judge's opinion, we reject the arguments posed in this appeal that the Board: improperly failed to incorporate in its resolution an agreement which would prohibit trucks from using a particular driveway for deliveries; gave inordinate weight to concessions extracted from Raritan Junction for the benefit of the neighboring high school, thereby exhibiting bias against other citizen concerns; and failed to give adequate consideration of the environmental commission's recommendations. In rejecting these contentions, we agree with Judge Miller that there is no merit in plaintiff's claim that the Board acted arbitrarily, capriciously or unreasonably.

Affirmed.