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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

John J. MURTAGH, Plaintiff-Appellant,
v.
BOROUGH OF PARK RIDGE, a Municipal Corporation of the State of New Jersey, and Borough of Park Ridge Planning Board, an entity created by law, Defendants-Respondents.

Argued April 25, 2006. | Decided June 7, 2006.

Synopsis

Background: Landowner filed action in lieu of prerogative writs challenging planning board's decision to deny his applications for subdivision of property and for variances from zoning ordinances. The Superior Court, Law Division, Bergen County, Jonathan N. Harris, J., dismissed the complaint, and landowner appealed.

Holdings: The Superior Court, Appellate Division, held that:

[1] recused planning board member who owned land within 200 feet of property could object to the variance application, and

[2] planning board member could represent himself when objecting.

Affirmed.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, L-3396-03.

Attorneys and Law Firms

William I. Strasser argued the cause for appellant (Strasser and Associates, attorneys; Mr. Strasser, of counsel and on the brief; Robert A. Gorman, on the brief).

John J. D'Anton argued the cause for respondent Borough of Park Ridge.

John E. Ten Hoeve, Jr. argued the cause for respondent Borough of Park Ridge Planning Board.

Before Judges KESTIN, HOENS and SELTZER.

Opinion

PER CURIAM.

***1** Plaintiff owns property in Park Ridge. He applied for a subdivision of the property, creating two undersized lots, and for variances from the bulk requirements of the Park Ridge zoning ordinance. When his applications were denied by the Planning Board, he filed an action in Lieu of Prerogative Writs challenging the decision of the Board. The complaint asserted both that the denial of the subdivision was arbitrary and that the ordinance fixing the bulk requirements was invalid, generally and as applied. Judge Jonathan N. Harris rejected plaintiff's complaint in a comprehensive, well-reasoned twenty-eight-page written decision. He, therefore, dismissed the complaint by order dated November 8, 2004. Plaintiff appeals from that order, and we affirm.

On appeal, defendant raises the following four points:

POINT I

THE TRIAL COURT ERRED IN FAILING TO FIND THAT RECUSED PLANNING BOARD MEMBER DEAN HAVRILLA'S PUBLIC OBJECTIONS AND COMMENTS DURING THE PUBLIC HEARING SESSIONS INVALIDATED THE BOARD'S DECISION BECAUSE IT CREATED AN IMPERMISSIBLE APPEARANCE OF IMPROPRIETY AND UNJUSTLY INFLUENCED THE BOARD'S DENIAL.

POINT II

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE BOROUGH OF PARK RIDGE'S R-20 ZONING ORDINANCE IS INVALID AS A WHOLE AND AS APPLIED TO APPELLANT'S PROPERTY BECAUSE THE ORDINANCE WAS NOT DRAWN WITH REASONABLE CONSIDERATION OF THE R-20 ZONE DISTRICTS AND ALTHOUGH THE BOROUGH HAS BEEN AWARE OF THAT FACT SINCE 1997, IT HAS WILLFULLY

FAILED TO REVISE ITS ZONING ORDINANCES ACCORDINGLY.

POINT III

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE PLANNING BOARD'S DENIAL OF APPELLANT'S APPLICATION WAS ARBITRARY, UNREASONABLE AND CAPRICIOUS.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE PLANNING BOARD'S DENIAL MUST BE VOIDED BASED UPON THE IMPROPER MANNER IN WHICH THE PLANNING BOARD ATTORNEY INCONTROVERTIBLY IMPLIED ON THE RECORD THAT APPELLANT'S APPLICATION DID NOT WARRANT APPROVAL.

We have analyzed the record in light of the arguments advanced by the parties and are in substantial accord with the written opinion rendered by Judge Harris on October 14, 2004, although we add the following brief comments respecting plaintiff's first argument.

Dean Havrilla was both a member of the Planning Board and the owner of property abutting plaintiff's property. Because he owned property within two hundred feet of the property subject to the application, Havrilla did not did not participate in the Board's consideration of the application. *See N.J.S.A.* 40:55D-23b. Nevertheless, Havrilla spoke during the public portion of the meeting, objecting to the application. Plaintiff argues that this participation was impermissible and requires a reversal of the Board's decision. The resolution of that claim requires consideration of four statutes.

Individual notice of the application was required to be given to those persons, such as Havrilla, owning property within 200 feet of the land for which the application is made. *See N.J.S.A.* 40:55D-12(b). All other residents of the municipality receive notice only by publication. *See N.J.S.A.* 40:55D-12(a). The requirement of notice, of course, is to provide an opportunity to be heard. *Fraser v. Bodino,* 317 *N.J.Super.* 23, 721 A.2d 20 (App.Div.1998), *certif. denied,*160 *N.J.* 476, 734 A.2d 791 (1999). The special type of notice afforded to Havrilla suggests a special status for landowners in close proximity to the subject property. *See DeMaria v. JEB Brook, LLC.,* 372 *N.J.Super.* 138, 144-45, 855 A.2d 628 (Law Div.2003) ("Logic suggests that boards ... should be most interested in hearing from ... those" closest to a proposed development and should hear from such individuals before those "only remotely" affected by the proposal). This, in turn, suggests a strong policy of encouraging those affected most by the development to be heard.

***2** That policy is emphasized by *N.J.S.A.* 40A:9-22.5(k), which provides that: "Nothing shall prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in ... proceedings concerning his, or their, interests."

Against the right to be heard, *N.J.S.A.* 40A:9-22.5(h) provides that

> No local government, officer, or employee or business organization in which he has an interest shall represent any person or party other than the local government in connection with any cause, proceeding, application, or other matter pending before any agency in the local government in which he serves.

Finally, *N.J.S.A.* 40A:9-22.5(c) prohibits a local government officer or employee from "using his official position to secure unwanted privileges or advantages for himself or others."

[1] Plaintiff argues that a board member who also owns land within 200 feet of the property for which a variance is sought may not represent himself when objecting to the application. He relies upon a comment made in *Jock v. Shire Realty, Inc.*, 295 *N.J.Super.* 67, 684 A.2d 921 (App.Div.1996), *certif. denied,*148 *N.J.* 162 (1997). That case involved a review of the grant of a variance to an entity in which a Board member owned an interest and on whose behalf the member had testified. We thought that the testimony by the member created the appearance of an impropriety. We said: "Because an application for a variance necessarily seeks permission to violate the dictates of the zoning ordinance, 'a reasonably informed citizen could see [the Board member] as seeking a favor or special treatment' " in violation of *N.J.S.A.* 40A:9-22.5(c).*Id.* at 73 (quoting *Wyzykowski v. Rizas,* 132 *N.J.* 509, 531, 626 A.2d 406 (1993)).

Considering both the right to appear contained in *N.J.S.A.* 40A:9-22.5(k) and the prohibition contained in *N.J.S.A.* 40A:9-22 .5(h) we concluded, in the language upon which plaintiff now relies, that "[w]e do not, however, read *N.J.S.A.* 40A:9-22.5(k) to provide a general exemption to

N.J.S.A. 40A:9-22.5(h): it does not expressly permit self-representation before the agency in which the government employee or officer also serves."*Ibid.*

Accordingly, plaintiff concludes that Havrilla could not appear before the Board on which he sat even though the proceedings in which he sought to appear involved his interests. We do not read *Jock* so broadly. Our comments were made in the context of an application for a variance supported by a recused Board member whose support, we were concerned, would be seen as a request for "a favor or special treatment."

Those concerns, to the extent they exist at all, are much less pronounced when a member who has an interest in the application by virtue of its proximity to the member's property elects to object. In such a case, the request of the recused member is that the Board conform to, rather than depart from, the established zoning requirements. In that situation there is no reason to require the Board member to forfeit his right to be heard or to construe *N.J.S .A.* 40A:9-22.5(h) so as to bar that right. *See Szoke v. Zoning Board of Adjustment,* 260 *N.J.Super.* 341, 346, 616 A.2d 942 (App.Div.1992)("Board membership does not deprive an individual of a right to pursue an application nor of the right to pursue statutory rights granted to interested parties.")

***3** **[2]** We also reject plaintiff's contention that Havrilla was required to be represented by an intermediary in presenting his objections to the application. We recognize that there is some authority for that position. *See* Cox, *New Jersey Zoning and Land Use Administration,* § 3-2 at 56 (2006). The use of an intermediary may be appropriate when the Board member is an applicant because the proof needed to justify the relief sought may be developed from sources other than the applicant-member and because variance or subdivision applications generally require the retention of an attorney experienced in the field. The compelled use of an intermediary makes little sense, however, when a recused Board member objects to a requested deviation from the zoning plan, because, as a general matter, the objection will be based on the objector's peculiar situation and must be explained by the objector. There was, as the judge found, nothing improper in the actions of Havrilla.

Affirmed substantially for the reasons set forth by Judge Harris in his October 14, 2004, written opinion.

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