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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3847-08T1

PHYLISS GIBSON and
MICHAEL POPONI,

Plaintiffs-Appellants,

v.

TOWNSHIP OF MONROE PLANNING
BOARD and PENN REAL ESTATE
GROUP, INC.,

Defendants-Respondents,

and

WAL-MART STORES, INC.,

Defendant/Intervenor-
Respondent.

Argued April 19, 2010 – Decided May 14, 2010

Before Judges Lisa and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-273-08.

Jeffrey I. Baron argued the cause for appellants (Baron, Riefberg & Brennan, P.A., attorneys; Mr. Baron, of counsel; Jeffrey M. Brennan, on the brief).

Leonard T. Schwartz argued the cause for respondent Township of Monroe Planning Board (Slotnick & Schwartz, attorneys; Mr. Schwartz, on the brief).

Robert C. Shea argued the cause for respondent Penn Real Estate Group (R. C. Shea & Associates, attorneys; Mr. Shea of counsel and on the brief; Dina M. Vicari, on the brief).

Scott G. Collins argued the cause for intervenor-respondent Wal-Mart Stores, Inc. (Riker Danzig Scherer Hyland & Perretti, LLP, attorneys; John M. Pellecchia, of counsel and on the brief; Mr. Collins and Scott L. Carlson, on the brief).

PER CURIAM

Plaintiffs Phyliss Gibson and Michael Poponi, residents of Monroe Township, opposed the development that is the subject of this appeal. After an adverse conclusion of the prerogative writ action they brought, they now appeal from the judgment in favor of defendants Township of Monroe Planning Board (Board) and Penn Real Estate Group, Inc. (Penn), affirming the Board's grant of subdivision and site plan approval and related waivers allowing Penn to construct a Wal-Mart Super Center. Plaintiffs argue:

> I. THE TRIAL COURT ERRED BY HOLDING THAT [PENN] HAD ESTABLISHED THE NECESSARY PROOFS TO OBTAIN ALL OF THE RELIEF REQUIRED BY ITS PROPOSED SITE PLAN.
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> II. THE TRIAL COURT ERRED BY HOLDING THAT THE PROCEDURES UTILIZED BY THE PLANNING BOARD DURING THE HEARING ON [PENN]'S APPLICATION DID NOT DEPRIVE PLAINTIFFS OF DUE PROCESS.

III. THE TRIAL COURT ERRED BY HOLDING THAT MAYOR GABIANELLI [SIC] WAS NOT BIASED AND PREDISPOSED TO GRANTING APPROVALS TO [PENN].

IV. THE TRIAL COURT ERRED BY HOLDING THAT [PENN]'S NOTICE MET THE REQUIREMENTS OF THE MUNICIPAL LAND USE LAW, N.J.S.A. 40:55D-1, ET SEQ., SUCH THAT THE PLANNING BOARD HAD JURISDICTION TO CONSIDER THE APPLICATION.

V. THE TRIAL COURT ERRED BY HOLDING THAT THE RESOLUTIONS ADOPTED BY THE PLANNING BOARD WERE NOT DEFECTIVE.

VI. THE TRIAL COURT ERRED BY DENYING PLAINTIFFS' MOTION TO REMAND THE MATTER TO THE PLANNING BOARD DUE TO A DEFECTIVE RECORD.

VII. THE TRIAL COURT ERRED BY DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT.

VIII. THE TRIAL COURT ERRED BY GRANTING THE PLANNING BOARD'S MOTION FOR PROTECTIVE ORDERS WHICH PRECLUDED PLAINTIFFS FROM DEPOSING MAYOR GABIANELLI [SIC] AND TIMOTHY KERNAN, PP.

I

On July 13, 2007, Penn filed an application for subdivision and consolidation of six existing lots in Monroe Township into two new lots, one 29.32 acres (Lot A) and the other 6.59 acres (Lot B). Penn also filed an application for preliminary and final major site plan approval, as well as any necessary variances or design waivers. It proposed to construct on Lot A: (1) a 199,798-square-foot Wal-Mart Super Center which was to include general merchandise retail space, a supermarket, an

outdoor garden center and a seasonal sales area; (2) a separate 16,000-square-foot retail structure with eight tenants; (3) a 4396-square-foot bank; and (4) 1101 parking spaces. No development was proposed on Lot B, which contained an existing Assembly of God Church.

Lot A and Lot B are situated in the Pinelands Protection Area. Lot A is also situated in the Township's regional growth commercial zone (RG-C), which, as amended in 2006, expressly permits planned large scale anchor store developments.

Upon receipt of the Penn applications, the municipal planner, Timothy Kernan, issued a review letter concluding that no variances and just seven waivers were required. Penn then published public notice of the Board hearing.

The Board conducted hearings on January 10 and 17, 2008. Penn presented testimony from its engineer, architect, planner, traffic engineer, and special architect dealing with topics including buffer plantings, the scope of the parking lot, the proposed bank's loading and garbage removal requirements, neighborhood traffic patterns, and the truck and other noise that would be generated by the proposed project. Penn also presented testimony from a Wal-Mart representative who discussed, among other things, the number and size of the trucks that would be making daily deliveries to the site. All of these

professionals were cross-examined by plaintiffs' counsel. Additionally, plaintiffs' counsel presented testimony from his own experts, including a traffic and environmental engineer and a professional planner.

Members of the public addressed the Board on both hearing dates. Several nearby residents requested that their residential street be turned into a cul-de-sac to preclude its use as a thoroughfare by future Wal-Mart customers. Other residents requested additional buffering, the relocation of a large sign, and limits on truck delivery hours. Changes were made to accommodate these requests.

On January 17, 2008, the Board voted to grant Penn both subdivision and site plan approval, plus the requested design waivers. The decision was memorialized in nine resolutions adopted on January 24, 2008.

On February 14, 2008, plaintiffs filed their complaint against the Board and Penn challenging the Board's decision. Wal-Mart later intervened. In July 2008, plaintiffs served subpoenas for the depositions of Monroe Township mayor and Board member Michael Gabbianelli, whom they alleged had been biased in favor of Penn's applications, and Kernan, whom they alleged had engaged in an improper "off-the-record" conversation with Gabbianelli at the January 17, 2009 hearing. The Board and Penn

moved for protective orders to bar the depositions, which the court granted. In August 2008, plaintiffs moved for a remand due to alleged deficiencies in the record, which the court denied. On October 14, 2008, plaintiffs filed a motion for leave to amend their complaint to add the town council as a defendant, and to add a count alleging spot zoning. The court also denied that motion.

After a bench trial on January 15, 2009, Judge Curio issued an oral decision affirming the Board's grant of approvals to Penn. Final judgment to that effect was filed on February 23, 2009. This appeal followed.

II

We first address the public notice issue. Plaintiffs argue in Point IV that the public notice was fatally defective because it failed to mention that the proposed large scale retail anchor store was to include a supermarket and operate twenty-four hours. We disagree.

Public notice of a hearing regarding an application for development of a major subdivision is required by <u>N.J.S.A.</u> 40:55D-12a. Such notice

> shall state the date, time and place of the hearing, the nature of the matters to be considered and . . . an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers[,] . . . and the

location and times at which any maps and documents for which approval is sought are available[.]

[N.J.S.A. 40:55D-11.]

The critical element of a public notice is an accurate, common sense description of what the property will be used for under the application. Perlmart of Lacey, Inc. v. Lacey Twp. Planning Bd., 295 N.J. Super. 234, 238-39 (App. Div. 2006). Although the notice need not be "exhaustive," the general public must be "fairly apprised" of the nature and character of the proposed development. Pond Run Watershed Assoc. v. Twp. of Hamilton Zoning Bd., 397 N.J. Super. 335, 351, 355 (App. Div. 2008); Perlmart, supra, 295 N.J. Super. at 237-38. If no notice is given or if the notice is in some way defective, this defect affects the jurisdiction of the board to act, and any action taken by the board in such cases is a nullity. Va. Constr. Corp. v. Fairman, 39 N.J. 61, 70 (1962); Twp. of Stafford v. Stafford Twp. Zoning Bd., 299 N.J. Super. 188, 196 (App. Div. 1997), aff'd, 154 N.J. 62 (1998). A board's decision regarding a question of law, such as whether it has jurisdiction over a matter, is subject to de novo review by the courts. TWC Realty P'ship v. Zoning Bd., 315 N.J. Super. 205, 211 (Law Div. 1998), aff'd, 321 N.J. Super. 216 (App. Div. 1999).

The notice that Penn published and sent to residents within 200 feet of the proposed development advised that it had applied for permission to construct

> a large scale retail anchor store of approximately 199,798 square feet which includes an outdoor Garden Center and a "seasonal sales" area. The site will include a separate retail structure consisting of 16,000 square feet of floor area and a bank containing approximately 4,396 sf [sic] of floor area. Vehicle ingress and egress will be provided on both road frontages. The applicant proposes 1,101 parking spaces.

Penn also listed all waivers it was seeking and noted that all plans were available at the Board's office for public inspection. Penn also specifically mentioned in its published notice that the elevation plans for the project had been prepared by Wal-Mart architects.

No challenge was made to the Board's jurisdiction on public notice grounds during the hearings. The issue, however, was raised at trial. Judge Curio rejected the challenge, noting that the notice was considerably more detailed than those provided in Pond Run and Perlmart, and that both of those cases were distinguishable because Perlmart involved a conditional use and Pond Run involved a non-permitted use. She dismissed the notion that the notice was deficient because it did not specify that the larger retail structure was to be a Wal-Mart store.

She concluded that a person of common intelligence would have a reasonably good understanding of what was meant by a large-scale retail anchor store. We agree.

In Perlmart, supra, 295 N.J. Super. at 237-41, we found deficient a published notice that stated only that it was made "for the creation of commercial lots," but did not inform the public of the nature of the proposed use for these lots, i.e., a K-Mart shopping center, and also failed to advise that conditional use approval was also being sought. Likewise, in Pond Run, we enjoined the construction of a restaurant as part of a proposed mixed-use development, where the developer's published notice stated only that it was seeking certain variances for "age-restricted rental units and retail/office units," Pond Run, supra, 397 N.J. Super. at 346, but failed to advise that the development would also include a free-standing, 168-seat restaurant, a non-permitted use. Id. at 354-55.

We are unpersuaded by plaintiffs' argument that the notice in this case contained the same deficiencies. Unlike the notices in Perlmart and Pond Run, Penn's notice specifically apprised the public of exactly what it intended to build, i.e., a cluster of two retail buildings and a bank. Both of these uses were permitted under the applicable zoning. The magnitude of the project was evident from the square footage of the

proposed buildings and the number of proposed parking spaces. While no separate mention of a supermarket was made, a supermarket qualifies as a "retail" operation and it was not to be housed in a separate structure, but contained within the larger of the two proposed buildings. Although the proposed hours of operation for the various components of this shopping center were not included in the notice, this is the type of "exhaustive" detail not required pursuant to statute or under Pond Run.

III

Plaintiffs argue in point VI that the judge erred in denying their request to remand the matter to the Board due to an incomplete record. In a related argument in part of point VIII, plaintiffs contend that the judge erred in refusing to permit them to depose the participants of the conversation that was omitted from the record. We are unpersuaded by these arguments.

The Board hearings were audiotaped by the Board and transcribed by a certified shorthand reporter hired by Penn. During the January 17, 2008 hearing, Mayor Gabbianelli and Kernan engaged in "several minutes" of private conversation. Following the hearing, plaintiffs' counsel requested a copy of either the Board transcripts or the audiotapes. However, after

being advised of the Board's transcript fee and that Penn had already prepared its own transcripts, counsel instructed the Board's secretary to "hold up on" his request. Plaintiffs' counsel then requested a copy of Penn's transcripts, for use as the official transcription of the proceedings, in return for payment of one-half of the transcription fee. Penn agreed.

However, at a May 2008 case management conference which took place before plaintiffs actually received the Penn transcripts, plaintiffs' counsel requested and received permission to perform a comparison of the Penn transcripts and a copy of the Board audiotapes. Plaintiffs' transcriber certified that (1) the copied audiotapes were of "extremely poor quality and entirely inaudible for significant periods of time"; (2) the Penn transcripts did not "follow in a precise verbatim fashion in all instances"; and (3) neither the Penn transcripts nor the audiotapes memorialized a colloquy which she had been told occurred between Gabbianelli and Kernan.

In July and August 2008, plaintiffs served subpoenas for the depositions of Gabbianelli and Kernan. The Board and Penn moved for protective orders to bar the depositions. Kernan certified that during the conversation Gabbianelli had simply asked him about Penn's required COAH and recreation fee

contributions, which Kernan subsequently discussed with the entire Board.

Plaintiffs subsequently moved for a remand for a new hearing, arguing that the Board could not prepare an accurate, verbatim record of its hearing because the audiotape copies it had received were of poor quality and that the Penn transcripts could not be used as substitutes because they did not include the conversation between Gabbianelli and Kernan. The Board submitted opposing certifications from its secretary and transcriber that the original master audiotapes (from which the copies supplied to plaintiffs had been made) were not of poor quality and could be fully transcribed.

At the September 26, 2008 hearing on these motions, counsel for the Board represented that accurate and complete transcripts could still be prepared from the original master audiotapes which were of better quality than the copies provided to plaintiffs, but that this would unnecessarily delay matters given the existence of the Penn transcripts. He doubted that the Board transcripts would include the Gabbianelli-Kernan colloquy. However, he asserted that depositions would be pointless because Kernan had already certified as to the substance of his conversation with Gabbianelli, which Kernan then discussed with the entire Board. Plaintiffs' counsel

argued that the mere occurrence of an "off the record conversation" violated the Sunshine Law and provided a reason to void the Board proceedings.

Judge Curio denied the motion to remand, ruling that the transcripts prepared by Penn would be the "certified, official transcripts for the Court's review in determining the merits of the [plaintiffs' c]omplaint." She noted that the parties had previously been "on track" to use these transcripts, that it had come as a surprise when plaintiffs suddenly called their accuracy into question, and that the only real criticism of the transcripts was that a certain off-the-record conversation was not transcribed.

The judge also granted defendants' motions to quash, noting that the nature of the conversation plaintiffs sought to inquire about was not

> unusual or out of the ordinary or inappropriate in the context of a zoning or a planning board meeting. That is the sort of thing that professionals engage in at these types of meetings.
>
> And . . . if we were to reinvent the wheel or throw out every board action that involved commentary by a municipal professional with a Board member, none of these actions would stand.
>
> So I don't accept and am not persuaded by [plaintiffs'] argument that this is somehow in violation of the Sunshine Law,

> that would require the Court to intervene on that basis at this point.

We find no mistaken exercise of discretion in these rulings. Municipal agencies "shall provide for the verbatim recording" of all zoning and planning board hearings, and shall furnish a transcript of any such proceedings on request to any interested party at that party's expense. N.J.S.A. 40:55D-10f. The Law Division's review of a planning board's decision must be based solely on the agency record. Willoughby v. Planning Bd., 306 N.J. Super. 266, 273 (App. Div. 1997). Where no record has been made or the record is deficient, a trial court may attempt to reconstruct the record with the aid of counsel. Scardigli v. Borough of Haddonfield Zoning Bd., 300 N.J. Super. 314, 322-23 (App. Div. 1997). If, however, the court cannot resolve the matter by stipulation of the record or by reconstruction, it must remand the case to the board with an order that it reconstruct the record. Ibid. If the board is unable to do so, it must then hear the testimony on the application anew. Ibid.; Carbone v. Planning Bd., 175 N.J. Super. 584, 586 (Law Div. 1980).

Plaintiffs insist that a rehearing was required in this case because the recordings made by the Board are largely inaudible and do not contain the Gabbianelli-Kernan colloquy. According to plaintiffs, the court erred in permitting the Board

to rely upon the Penn transcripts because the Board had a non-delegable obligation to provide the official record of the hearings. Alternately, they maintain that the Penn transcripts are themselves fatally deficient because they too do not contain the Gabbianelli-Kernan colloquy. Plaintiffs also contend that the court erred in refusing to permit them to depose Gabbianelli and Kernan.

Contrary to plaintiffs' representations, they never established that the original master recordings made by the Board were inaudible and incapable of full transcription; rather, they simply asserted that the copies reviewed by their transcriber had some unspecified inaudible sections. Also, because it is permissible for hearing records to be reconstructed from notes and minutes and by stipulation, we reject plaintiffs' argument that Penn's transcripts could not be adopted as the official record in this case. Plaintiffs have not identified any errors in the transcripts indicative of manipulation of the record by Penn.

Finally, we agree that the omitted conversation was unremarkable, was not a material deficiency in the record, and did not warrant depositions.

IV

Plaintiffs argue in point III that the judge erred in concluding that Mayor Gabbianelli was not biased and predisposed toward granting the approvals. In a related argument in part of point VIII, they contend the judge erred in refusing to permit them to depose Gabbianelli regarding his interest in the project. Plaintiffs rely on several comments by the mayor.

At some unknown point during the pendency of Penn's applications, Gabbianelli wrote the words "2007 Projects" on a white marker board outside his office. Under this heading, he listed six or seven projects with what appeared to be status notations. At the top of the list he wrote "Walmart - Kernan/Chuck - Tim to push."

During the Board hearing, in follow-up to testimony that the proposed drainage basin could handle a 100 year storm, plaintiffs' counsel asked Penn's engineer how the basin would perform assuming that "we have [a] 100 year storm on Tuesday and two hours later we have another 100 year storm, and then three hours later we have another 100 year storm?" Mayor Gabbianelli interjected: "Build an ark, brother, that's all I have to say." The engineer then responded that even with successive major storms the basin would perform better than the existing conditions on the site.

During the public comment portion of the hearing, plaintiffs' counsel sought to cross-examine a member of the public who had just spoken in favor of the project. Mayor Gabbianelli inquired of the Board's counsel whether such examination was legal and proper. Penn's counsel interjected that Penn had no objection. The Board's counsel agreed that plaintiffs' counsel could proceed with his questioning, which he did, at length.

After the requested approvals were granted, a news article appeared in the February 23, 2008 edition of the Gloucester County Times regarding the litigation. The article stated that Mayor Gabbianelli had supported the project because it would bring 400 jobs and $450,000 in tax money to the town. The mayor was quoted as saying, "[w]e've been encouraging it since we met them five years ago. It's what the town needs, it's the proper thing for the town and I hope we can go to court tomorrow."

The judge found these incidents insufficient to establish a prima facie showing of bias. In her final decision declining to invalidate the approvals based on mayoral bias, she incorporated her earlier findings on this issue and stated that nothing in her review of the extensive record had changed her earlier conclusion that no bias had been demonstrated.

"[A] hearing before an administrative tribunal acting quasi-judicially implies that the factfinder 'shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations.'" Kramer v. Bd. of Adj., 45 N.J. 268, 280 (1965) (quoting Pa. R.R. Co. v. N.J. State Aviation Comm'n, 2 N.J. 64, 70 (1949)); accord Baghdikian v. Bd. of Adj., 247 N.J. Super. 45, 48 (App. Div. 1991) (local board's quasi-judicial proceedings must be governed with "spirit of impartiality"). Except in limited circumstances, a person challenging the decision of a local board "may not inquire into the mental processes surrounding the decision of a board member." Catalpa Inv. Group, Inc. v. Franklin Twp. Zoning Bd., 254 N.J. Super. 270, 275 (Law Div. 1991). The interest which will disqualify a member of a governing body acting in a quasi-judicial capacity is a "personal or private one, and not such an interest as he has in common with all other citizens." Kramer, supra, 45 N.J. at 282.

An appellate court will not disturb the factual findings and legal conclusions of a trial judge unless it is convinced that "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v.

Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (internal quotation marks omitted).

The judge's findings are supported by the record. Plaintiffs' contention that the notation on Gabbianelli's message board meant Kernan had been charged by the mayor with "pushing" Penn's applications through to approval was speculation. The mayor's single flippant comment regarding building an ark and his question regarding the propriety of cross-examining a member of the public did not reveal "animus" toward plaintiffs' counsel. The post-approval statement made by Gabbianelli to the Gloucester County Times was consistent with his role as mayor. The interests he expressed in bringing Wal-Mart to Monroe Township were ones he shared with the local townspeople.

V

Plaintiffs argue in point II that the judge erred in finding that they were not improperly precluded from cross-examining certain testimony during the hearing. In particular, plaintiffs complain that after the public portion was closed, Penn's engineer responded to inquiries by a Board member about the detention basin, but that their counsel was not permitted to cross-examine the engineer on that additional testimony. This contention is totally lacking in merit for the simple reason

that plaintiffs' counsel did not request additional cross-examination. Plaintiffs also argue that they were improperly denied the opportunity to cross-examine Kernan regarding his conversation with Gabbianelli. Again, plaintiffs observed the conversation when it occurred, but did not then raise the issue or request cross-examination.

VI

Plaintiffs argue in point I that the judge erred in affirming the Board's determination that mere waivers, and not variances, were required in connection with Penn's request that it not be required to provide a loading space and a trash enclosure for the proposed bank. We reject this argument.

Monroe Township's land management ordinance consists of seventeen articles, including Article X entitled "Plat Detail and Data," Article XIII entitled "Design, Performance and Evaluation Standards," and Article XIV entitled "Zoning." Within Article XIII is a separate section, § 175-123, which specifically addresses "Off-street parking and loading." According to § 175-123.I(1):

> There shall be a minimum of one [loading] space per retail or wholesale commercial and/or industrial use, except that where more than one use shall be located in one building or where multiple uses are designed as part of a shopping center or similar self-contained complex; the number of loading spaces shall be based

> on the cumulative number of loading spaces based on the number of square feet within the building or complex; dispersed throughout the site to best serve the individual uses; and have site plan approval.

Section 175-123.I(2) further provides:

> There shall be a minimum of one trash/garbage pickup location separate from the parking and loading areas and located either within or outside a building in steel-like totally enclosed containers located and screened to be obscured from view from parking areas, streets and adjacent residential uses or residential zoning districts. If located within the building, the doorways may serve both the loading and trash/garbage collection functions. If a container used for trash/garbage collections function is located outside the building, it may be located adjacent to or within the general loading area(s), provided that the container(s) in no way interferes with or restricts the loading and unloading functions.

In connection with its site plan application, Penn requested waivers or variances from those provisions with respect to the proposed bank. Kernan determined decided that waivers were all that was needed.

At the Board hearing, Penn's engineer explained that the bank would have no need for an oversized loading space because the small vans that would be dropping off and picking up materials at the bank, including money, would fit in a normal parking space. He further testified that the bank would also

have no need for an exterior trash facility because it would have a private service that would come in on a daily basis to remove all trash, including sensitive materials, and the vehicles used by the private service would fit in a regular parking space. Penn's planner provided similar testimony.

At trial, plaintiffs' counsel conceded that, under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163, the Township could have placed its loading space and trash enclosure requirements in either its site plan ordinance or its zoning ordinance. Counsel argued that, because the Township had not opted to put these requirements in its site plan ordinance (Article X), it had to be assumed, regardless of the title of Article XIII, that they were contained within a zoning ordinance and that, as such, relief from these requirements could only be obtained through the grant of variances and not waivers. Judge Curio rejected this argument and so do we.

Purely legal determinations made by a board, such as interpretation of an ordinance, are not entitled to a presumption of validity but are subject to de novo review. Wyzykowski v. Rizas, 132 N.J. 509, 518 (1993). Nonetheless, deference will occasionally be given to a board's interpretation of its own ordinance because of the board's familiarity with

local conditions. Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 561 (App. Div. 2004).

Plaintiffs renew their contention that Penn could only get the relief it sought from the loading space and trash enclosure requirements of the township's land management ordinance by variance. However, plaintiffs' specific argument now is that, because the Township, in § 175-123.I(1) and § 175-123.I(2), linked these requirements to certain uses, these provisions were actually part of a zoning ordinance and, thus, variances were required. In support of this contention, plaintiffs note that, pursuant to N.J.S.A. 40:55D-65d, a zoning ordinance may "[e]stablish, for particular uses or classes of uses, reasonable standards of performance and standards for the provision of adequate physical improvements including, but not limited to, off-street parking and loading areas . . . ." We do not agree with this argument.

First, there is no use linkage in § 175-123.I(2) pertaining to trash enclosures. Therefore, plaintiffs' argument is inapplicable to this provision. In any event, plaintiffs' argument in general is illogical. The Township was not required to put its loading space requirements in a zoning ordinance and, in fact, it chose not to do so. Rather, it chose to include them in an article dedicated to addressing design standards. We

agree with Judge Curio that the township's decision to handle these requirements in this manner is entitled to judicial deference. Because these requirements were not placed in a zoning ordinance, no variances were required.

VII

We next consider plaintiffs' argument in point V that the judge erred when she concluded that the Board's resolutions were not defective.

After a decision has been reached by a board, the board's findings of fact and conclusions of law must be embodied in the form of a written resolution. N.J.S.A. 40:55D-10g. A conclusory resolution that merely recites the statutory language or the testimony presented at a hearing will not be deemed to have satisfied this requirement. Medici v. BPR Co., 107 N.J. 1, 23 (1987); Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div. 1988), certif. denied, 118 N.J. 216 (1989).

At trial, plaintiffs' counsel argued that the matter had to be remanded to the Board because most of its resolutions contained no findings of fact or conclusions. The judge rejected this argument, concluding that the many separate resolutions prepared by the Board had to be read as a whole and that, ultimately, she did not see what more could have been said given that the proposed uses were permitted uses. She stated:

> I, frankly, don't think it's too strong to say that the result and the reasoning, in view of the permitted use, is rather self-evident. And to require some sort of additional verbiage or rewording or editing of these resolutions appears to me to be unnecessary and not an appropriate exercise.

We agree. No further discussion of this argument is warranted. R. 2:11-3(e)(1)(E).

VIII

Finally, we address plaintiffs' argument in point VII that the judge should have allowed them to amend their complaint to add a claim of spot zoning.

In July 2006, Kernan forwarded a memo to the Township Ordinance Committee recommending certain amendments to the township land management ordinance addressing planned large-scale anchor store developments. He proposed that such developments be added as a principal permitted use within the RG-C district, and that the ordinance also include: (1) definitions of the terms "anchor store" and "garden center"; (2) a provision permitting retention and detention basins within required buffer areas and yards; (3) a provision permitting the Board to reduce the size of off-street parking spaces under certain circumstances; (4) a provision authorizing four parking spaces for each 1000 square feet of gross floor area in the case of a planned large-scale anchor store development; (5) a

provision establishing area and bulk requirements for a planned large-scale anchor store development; and (6) a provision confirming that planned large-scale anchor store developments could contain any use defined as "community commercial" within the ordinance as well as other uses such as garden centers, providing the development complied with certain enumerated design standards. On August 25, 2006, the Township Council adopted Ordinances 0:31-2006, 0:32-2006, 0:33-2006, and 0:34-2006, which reflected the suggested amendments.

On October 10, 2006, plaintiff Poponi and another Monroe Township resident, Joseph Rumpf, filed suit challenging the ordinances as improper spot zoning. However, on October 25, 2007, Poponi and Rumpf agreed to dismiss that litigation without prejudice. It was agreed, though, that their claims could be "reinstated and/or incorporated into future litigation" challenging any site plans submitted by Penn and approved by the Board.

On February 12, 2008, plaintiffs filed the complaint that is the subject of this appeal, but failed to include a claim of spot zoning. This failure was noted at the September 26, 2008 pre-trial hearing when plaintiffs attempted to rely upon an allegation of spot zoning in support of their position that Gabbianelli was biased and that depositions were required. On

October 14, 2008, plaintiffs filed a motion for leave to amend their complaint to add the Town Council as a defendant, and to add an additional count alleging spot zoning.

At the November 7, 2008 hearing on plaintiffs' motion, plaintiffs' counsel asserted that the 2006 ordinance amendments had allowed Penn to avoid the need to apply for variances in connection with its site plan. Counsel denied that he had filed this motion as a delaying tactic, noting that the case was only eight months old and that he had hoped to depose Gabbianelli and Kernan and gather additional facts before adding a spot zoning claim. He insisted that there was no prejudice because everyone knew it was coming.

Penn argued that it would be inappropriate to add a new party at this juncture, given that there was a January 15, 2009 trial date and the parties were in the midst of the briefing schedule. Counsel for the Board also pointed out that: (1) commercial uses were always permitted in the RG-C zone; (2) the RG-C zone covered a three- or four-mile area; (3) the new restrictions were adopted for anyone who wanted to build a large-scale anchor store development; and (4) there was presently pending before the Board another application for large-scale anchor store development within the zone. He

suggested that the real purpose of plaintiffs' motion to amend was simply to delay the resolution of the case.

Judge Curio found inexplicable plaintiffs' counsel's contention that he had wanted certain discovery before adding a spot zoning claim, noting that counsel could have simply included a basic claim in the complaint and then "filled in the blanks" later through discovery. She observed:

> If I were sitting hearing motions on a typical motion day in the Civil Division, and I had a case that was but nine months old, that would be a new case, a relatively young case. But, this isn't a typical matter of civil litigation, and this isn't a typical motion to amend nine months into a case. Prerogative writ litigation is more typically dealt with on a faster track, and in a more expeditious manner.
>
> It has been the position of the defendants . . ., in connection with the prior motions that have been heard, . . . that delay is the strategy of the plaintiffs in this matter. So, the question of delay takes on a larger role than it might in a typical situation. . . . In this situation, it strikes me that clearly, this allegation of spot zoning has been in the air at least since 2006, . . . when the initial prerogative writ action was file[d].
>
> So, we have a situation where the plaintiff clearly knew of the claim, had articulated the claim, and then for whatever reason, . . . dismiss[ed] that claim with the thought of perhaps pursuing it another day. But, that spot zoning claim . . . wasn't included in the new complaint.

The judge went on to note that plaintiffs' counsel had tried unsuccessfully to rely upon an allegation of spot zoning in order to bolster his claim that there was bias in this case and that depositions were warranted. She stated that it appeared to her that the motion was "an attempt to accomplish through the back door that which was unsuccessful" at the prior motion hearing. She then opined that plaintiffs' spot zoning claim seemed "rather weak," given that the ordinance amendments applied to the entire RG-C zone and did not benefit one property owner. In sum, the judge concluded that

> in looking at the totality of the circumstances, then the fact that the claim previously known was not brought in a timely fashion is significant. The fact that I share the concern that delay appears to be the plaintiff's strategy. The fact that this matter is close to being concluded in terms of a review of the board's action and the grant of these approvals, the fact that delay would result if this amendment were permitted, the fact that this is a weak case for spot zoning, and the fact that there appears, at least from my perspective, to be a certain lack of good faith in that this attempt to amend at this time is an end run around the prior ruling, I will exercise my discretion to deny the application to amend at this time.

Under Rule 4:9-1, leave to amend a complaint should be freely granted. Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456 (1998). However, "the granting of a motion to file an amended complaint always rests in the court's

sound discretion." Id. at 457. In exercising that discretion a trial court must consider "whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006). An amendment will be considered futile if a motion to dismiss under Rule 4:6-2(e), for failure to state a claim upon which relief can be granted, would subsequently have to be granted. Ibid.

Spot zoning is the use of the zoning power to benefit a particular private interest rather than the collective interests of the community. Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 80 N.J. 6, 18 (1976). It is zoning which disregards the statutory requirement that "regulation be accomplished in accordance with a comprehensive plan to promote the general welfare." Ibid. An ordinance enacted to advance the general welfare by means of a comprehensive plan is "unobjectionable even if the ordinance was initially proposed by private parties and these parties are in fact its ultimate beneficiaries." Ibid.

Plaintiffs contend that the judge abused her discretion in denying their motion to amend the complaint. They argue there was no untoward delay and they stood a great chance of succeeding on the merits of their spot zoning claim because the

relevant ordinances "were adopted without regard to the greater community welfare and only benefitted [Penn]."

We rest our decision primarily on the judge's appropriate exercise of discretion in concluding that plaintiffs' failure to incorporate a known claim into their original complaint was inexplicable, and that their subsequent attempt to add this claim and a new party during final trial preparation was highly suggestive of an unwarranted attempt to delay rather than a reasonably-timed effort to add a meritorious claim that could not have been earlier asserted. We have no occasion to interfere with this sound exercise of discretion.

Secondarily, as the judge noted, plaintiffs' claim of spot zoning was weak and susceptible to a motion to dismiss. While the ordinance amendments may have been prompted by Penn's anticipated application and ultimately did benefit Penn, the fact remains that the amendments were made applicable not simply to one property, but to an entire zone that already permitted commercial uses. The purpose of the amendments was to facilitate the "commercial renaissance of Monroe Township," a community-wide goal. The amendments had already prompted a second application for a large-scale retail anchor store as of the time of trial.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION