

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0771-08T2

VONNIE KITE,

Plaintiff,

and

TERRI MORRIS,

Plaintiff-Appellant,

v.

TOWNSHIP OF PENNSVILLE
PLANNING BOARD, TOWNSHIP OF
PENNSVILLE COMMITTEE, and
ANGELONI DEVELOPMENT, LLC,

Defendants-Respondents.

Submitted October 1, 2009 - Decided March 2, 2010

Before Judges Graves and Newman.

On appeal from Superior Court of New Jersey,
Law Division, Salem County, Docket No.
L-0007-07.

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

Respondent Township of Pennsville Planning
Board has not filed a brief.

Respondent Angeloni Development, LLC, has
not filed a brief.

PER CURIAM

Plaintiff Terri Morris (Morris) appeals from a second amended judgment dated August 22, 2008, affirming a decision by defendant Pennsville Township Planning Board (Board)¹ that granted preliminary major subdivision approval, preliminary major site plan approval, and conditional use approval to defendant Angeloni Development, LLC (Angeloni), for a retail shopping center. After examining the record and applicable law in light of the arguments advanced on appeal, we affirm.

In January 2005, Angeloni, the contract purchaser of approximately seventy-eight acres designated as Block 4701, Lot 23, on the Pennsville Township Tax Map, filed an application with the Board seeking preliminary major subdivision and site plan approval together with all necessary variances and waivers to construct a Wal-Mart Supercenter together with a separate retail shopping center. After Angeloni submitted two amended applications to comply with Pennsville's Land Development Ordinance (LDO), its application was deemed complete on July 11, 2005.

¹ Pennsville has a combined Planning Board and Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-25(c).

On November 14, 2005, the Board commenced the first of ten public hearings on the merits of Angeloni's application. Multiple witnesses testified both for and against the application. In response to input from the Department of Transportation and the Board's experts, Angeloni modified its plan to allow access to the site by creating a road that bisected the property. Angeloni also added new storm water management provisions, withdrew its request for a gas station, and ultimately reduced the number of proposed subdivision lots from eight to four.

On September 25, 2006, the Board approved Angeloni's application, and the approvals were memorialized in a resolution adopted on November 13, 2006. On November 24, 2006, Terri Morris, a resident of Pennsville, appealed the Board's grant of use variances for signage to the Township of Pennsville Committee (Committee), pursuant to N.J.S.A. 40:55D-17 and Section 4.6B of the LDO. In addition, Morris filed a complaint in lieu of prerogative writs challenging each of the approvals granted by the Board and, after the Committee failed to render a timely decision as required by N.J.S.A. 40:55D-17, Morris filed an amended complaint challenging the Committee's approval of the Board's decision through inaction.

On September 24, 2007, Judge Farrell required James Tanyer, a former Board member, to attend a Board meeting so that he could be questioned regarding statements he allegedly made regarding Angeloni's application, and the Board could vote on whether or not he "exhibited a bias in favor of the applicant." After plaintiff's counsel questioned Tanyer at a Board meeting on November 19, 2007, the Board found that Tanyer's consideration of Angeloni's application was proper.

On January 9, 2008, the court conducted a trial on the merits, and Judge Farrell issued a comprehensive letter opinion on April 2, 2008, affirming the Board's decision except for the grant of variances pertaining to signage. The court remanded the issue of variances to the Board for further review and factual findings. In the interim, however, Angeloni's contract to purchase the property expired. On July 2, 2008, Angeloni withdrew its application from the Board's consideration and the remand hearing was never held. On August 25, 2008, the trial court entered a second amended judgment, which vacated the signage variances granted by the Board.

Plaintiff presents the following arguments on appeal:

POINT I

THE TRIAL COURT COMMITTED ERROR IN RULING THAT THE APPLICANT WAS NOT REQUIRED TO FILE AN AMENDED APPLICATION BECAUSE OF THE SUBSTANTIAL CHANGES MADE TO THE PROPOSED

LAYOUT OF IMPROVEMENTS DURING THE COURSE OF THE HEARINGS.

POINT II

THE TRIAL COURT COMMITTED ERROR IN RULING THAT THE BOARD'S CLASS I AND CLASS III MEMBERS DID NOT IMPROPERLY PARTICIPATE IN THE CONSIDERATION OF ANGELONI'S APPLICATION.

POINT III

THE TRIAL COURT COMMITTED ERROR IN DETERMINING THAT BOARD MEMBER TANYER'S PARTICIPATION WAS PROPER.

We conclude that these arguments are without sufficient merit to warrant extended discussion in a written decision. R. 2:11-3(e)(1)(E). Nevertheless, we add the following comments.

With respect to plaintiff's first point, N.J.S.A. 40:55D-46(b) provides as follows:

If the planning board requires any substantial amendment in the layout of improvements proposed by the developer that have been the subject of a hearing, an amended application for development shall be submitted and proceeded upon, as in the case of the original application for development. The planning board shall, if the proposed development complies with the ordinance and this act, grant preliminary site plan approval.

[Ibid.]

Therefore, an amended application may be required where the plans submitted for final approval are substantially different from those submitted for preliminary approval. Davis v.

Planning Bd. of Somers Point, 327 N.J. Super. 535, 541 (App. Div. 2000). However, the court found that an amended application was not required in this case because the changes made to the traffic pattern and storm water management were "the types of changes routinely made during the approval process." Moreover, Angeloni's modifications reduced the number of proposed lots and removed a proposed gas station. Consequently, the changes reduced the project and an amended application was not required under N.J.S.A. 40:55D-46(b). See Davis, supra, 327 N.J. Super. 535 at 542 ("[W]e conclude that the Law Division should have upheld the Board's determination that it had jurisdiction to review the final site plan because the changes were not a significant or substantial revision of the preliminary site plan. Unquestionably, this project got smaller.").

In her second point, plaintiff contends that Class I and Class III Board members improperly participated in the consideration of Angeloni's application. The trial court noted that, pursuant to N.J.S.A. 40:55D-25(c)(1), "Class I and III members are not permitted to participate 'in the consideration of applications for development which involve relief pursuant to [N.J.S.A. 40:55D-70(d)],'" such as variance determinations. However, in this case, plaintiff's challenge is limited to

voting which occurred during the completeness review process, and the trial court properly found that "[c]ompleteness review is an administrative process to determine whether an application can proceed. It is not a review or hearing on the merits and does not require a public hearing. Its purpose is to determine whether the applicant has submitted sufficient documentation" to proceed to a hearing on the merits.

Moreover, as the court noted, "on the occasions when the Class I and III members participated in completeness review, Angeloni's application was deemed incomplete and it did not proceed to a hearing on the merits." Thus, these Board members were permitted to participate in a "strictly administrative" function which had "nothing to do with the deliberative process relating to Angeloni's application."

Similarly, there is no merit to plaintiff's claim that the proceedings were impermissibly tainted by the mayor's brief response to the Board Chairman's question regarding the status of the Township's affordable housing obligation. The trial court found that the mayor's comment did not invalidate the Board's decision and the record fully supports that determination. Compare Szoke v. Zoning Bd. of Adjustment of Borough of Monmouth Beach, 260 N.J. Super. 341, 345 (App. Div. 1992) (reversing a zoning board's decision because a

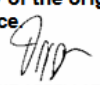
disqualified board member's conduct was "totally incompatible" with the "spirit of impartiality with which the Board's quasi-judicial proceedings must be governed."). Accordingly, the trial court correctly concluded that the participation of Class I and Class III Board members was not improper.

In her final point, plaintiff claims that former Board member James Tanyer should not have participated in the application approval process. Assessing plaintiff's allegations of bias in light of Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268, 296-97 (1965), the court found "no indication that Tanyer's views touched on the actual merits of Angeloni's application." We concur with the trial court's determination that Tanyer's explanation for his allegedly biased comment was "logical"; the record evidenced a "full, thorough and fair hearing on this application"; and "Tanyer was not required to disqualify himself . . . based on bias."

Judge Farrell carefully reviewed the proceedings before the Board, and we agree there was no valid basis or legal justification for invalidating the approvals granted to Angeloni. Accordingly, we affirm substantially for the reasons he stated in his comprehensive written decision on April 2, 2008.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION