

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2477-10T2

WALDWICK AUTO SERVICES, INC.,

Plaintiff-Appellant,

v.

ZONING BOARD OF ADJUSTMENT OF
THE BOROUGH OF WALDWICK,

Defendant-Respondent,

and

CONSTRUCTION CODE OFFICIAL OF
THE BOROUGH OF WALDWICK,¹

Defendant.

Argued October 5, 2011 – Decided July 17, 2012

Before Judges Fuentes, Graves and Koblitz.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No.
L-11035-09.

Bruce E. Whitaker argued the cause for appellant
(McDonnell & Whitaker, L.L.C., attorneys; Mr.
Whitaker, on the brief).

John J. D'Anton argued the cause for respondent.

¹ Pursuant to a consent order, plaintiff's claims against the construction code official have been dismissed without prejudice.

PER CURIAM

Plaintiff Waldwick Auto Services, Inc., appeals from a December 20, 2010 judgment of the Law Division affirming the decision of defendant Borough of Waldwick Zoning Board of Adjustment (the Board), which denied plaintiff's application to establish a "mini-mart" in its gas station. For the reasons that follow, we reverse the Law Division's order and remand for further proceedings.

The subject property is located in the C-1 Village Commercial District where the gas station and related activities, including mechanical repairs, are permitted. In 2009, plaintiff applied to the Board for permission to convert an existing office, with an area of approximately eighteen by eighteen feet, into a mini-mart for the sale of coffee, candy, prepackaged food, newspapers, and other convenience items.

On June 24, 2009, and September 23, 2009, the Board held public hearings on plaintiff's application. On September 23, 2009, after plaintiff's attorney completed his summation, the Board's acting chairman stated: "I'm going to close the application and we'll discuss this in our work session on . . . October 14th." In addition, the Board's attorney instructed the Board as follows:

Members of the Board, typically I do suggest the Board Members . . . take a little bit of time to think about applications like this, get your thoughts together, talk about it in the executive session.

If anyone has any questions about the standard of proof or what evidence was permitted or anything like that, feel free to give me a buzz, but at the executive session I'll be able to tell you . . . what I think they proved and what I think they didn't prove and you can make . . . your own decisions.

During a public meeting on October 28, 2009, the acting chairman of the Board confirmed that plaintiff's application had been discussed during an "executive meeting." In addition, the members of the Board voted to deny plaintiff's application and to approve the resolution prepared by the Board's attorney without any further discussion.

On appeal to the Law Division, plaintiff's attorney argued that plaintiff did not need a variance for the proposed use, and the Board was without "jurisdiction to do anything because there was no variance required." Plaintiff's attorney also argued that the Board's decision-making process violated the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, and he asked the court "to grant a judgment nullifying the resolution of denial by the [Board]":

Your Honor . . . I know executive session under the Open Public Meetings Act is when you call executive session and you

go off the record, take notes separately because there's a matter pending for litigation, personnel, et cetera. . . . You don't use an executive session when you're making a decision . . . about a matter that's been brought before the public. The decision[-]making process has to be open and on the table, and has to be recorded, and has to be made in front of the public. Obviously I think we all see from the transcripts and the procedure here, that never occurred.

Following the trial on October 1, 2010, the court rendered a written decision on November 4, 2010. The court found that plaintiff failed to prove both the positive criteria and the negative criteria required by N.J.S.A. 40:55D-70(d) to obtain a use variance. See Smart SMR v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998) (noting that the positive criteria require an applicant to establish special reasons for the variance, and the negative criteria require proof that the variance can be granted without substantial detriment to the public good and that it will not substantially impair the intent and purpose of the zone plan and zoning ordinance). However, the court failed to address plaintiff's claim that the Board's resolution was void because the Board violated the OPMA.

On appeal to this court, plaintiff advances the same arguments it made to the trial court. Plaintiff maintains the Board's conduct was "contrary to the mandates and requirements

of the [OPMA]," and "plaintiff's proposed use of the existing building as a mini-mart" does not require a variance.

Based on the limited record before us, which does not include the minutes from the "executive session" held on October 14, 2009, it appears that plaintiff has raised a substantial question regarding the legitimacy of any action taken by the Board during the closed session on October 14, 2009.² The intent and purpose of the OPMA has been clearly stated by our Legislature:

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision[-]making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of

² Pursuant to N.J.S.A. 10:4-15, "[a]ny action taken by a public body at a meeting which does not conform with the provisions of [the OPMA] shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court."

individuals would be clearly in danger of unwarranted invasion.

[N.J.S.A. 10:4-7 (emphasis added).]

As noted by plaintiff, the transcripts of the public meetings on September 23, 2009, and October 28, 2009, suggest that "'something' occurred beyond the realm of the public hearings," and the trial court "never addressed this issue . . . in its written opinion." Accordingly, this matter is remanded to the Law Division to determine whether the resolution adopted by the Board should be nullified because the Board violated the OPMA. In view of this disposition, we need not consider plaintiff's additional arguments.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

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


CLERK OF THE APPELLATE DIVISION