18-P-1314 Appeals Court

JONATHAN GREEN vs. ZONING BOARD OF APPEALS OF SOUTHBOROUGH & another.[1]

No. 18-P-1314.

Worcester. June 5, 2019. - September 19, 2019.

Present: Wolohojian, Milkey, & Hand, JJ.

Zoning, Variance, Lapse of variance, Comprehensive permit. Words, "Exercised."

Civil action commenced in the Superior Court Department on December 6, 2016.

The case was heard by Susan E. Sullivan, J., on motions for summary judgment.

Daniel J. Pasquarello (Donald J. O'Neil also present) for the plaintiff.
Angelo P. Catanzaro for Park Central, LLC.
Aldo A. Cipriano for zoning board of appeals of Southborough.

WOLOHOJIAN, J. At issue is whether a use variance lapsed pursuant to G. L. c. 40A, § 10, which requires that variances be

[1] Park Central, LLC.

exercised within one year of their grant. On the parties' cross motions for summary judgment, a Superior Court judge entered judgment in favor of the defendants on the ground that the plaintiff, Jonathan Green, had failed to exhaust his administrative remedies. We affirm, but on different grounds.

Background. The essential facts are undisputed. On February 12, 2014, Park Central, LLC (Park Central), filed an application for a comprehensive permit to construct 180 units of affordable housing on a 101.25-acre parcel of land in Southborough (town). Park Central also proposed the construction of 158 townhouse units on another portion of the land, which were to be sold at market rate. There was local opposition to the entire development as originally proposed. During the comprehensive permit hearing process, Park Central and several direct abutters -- with the help of a consultant engaged by the town zoning board of appeals (board) -- negotiated a settlement agreement (agreement) that resulted in significant changes to the development and therefore had the general support of the neighborhood. Among other things, the agreement changed the type of affordable housing units from individual ownership to rental units (which would result in the town's affordable housing inventory far exceeding for decades to come the ten percent baseline required under G. L. c. 40B, § 20), relocated the affordable housing units away from the

neighboring residential community, and provided for a permanent conservation restriction on a portion of the land. The changes set forth in the agreement were incorporated into a concept plan finalized on April 8, 2015.

Because the development was to be located in three zoning districts ("Industrial Park," "Industrial," and "Residential A") that did not permit use of the land for the development as of right, Park Central applied for a use variance on April 13, 2015. The board granted the use variance on May 27, 2015, subject to sixteen conditions, the second of which (condition no. 2) is central to this appeal:

> "The [v]ariance is GRANTED subject to, and the project shall be constructed in substantial conformance with the conditions hereinafter set forth which are incorporated herein and made a part of this [d]ecision.
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> ". . .
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> "2. The [v]ariance shall be effective only following final [b]oard approval of [Park Central's] c. 40B [c]omprehensive [p]ermit [a]pplication for a 180 unit rental affordable housing project with buildings and infrastructure located in substantial compliance with the April 8, 2015 concept [p]lan and which approval shall be final with all appeals have [sic] expired. [Park Central] shall amend and modify its pending [c]omprehensive [p]ermit [a]pplication to reflect this change."

Notably, no one appealed the board's decision, and the use variance was recorded in the registry of deeds on July 27, 2015.

The following year, on August 23, 2016, Karen Shimkus, a town resident who lived approximately one mile from the

development, wrote to the town building inspector asking that he declare that the use variance had lapsed because the rights authorized under it had not been exercised within one year, as required by G. L. c. 40A, § 10.[2] The building inspector denied Shimkus's request the same day. The following day, August 24, 2016, the board approved Park Central's comprehensive permit application.

Shimkus timely appealed the building inspector's decision to the board, see G. L. c. 40A, §§ 8, 15, which held a public hearing on November 3, 2016. That same day, Jonathan Green, an abutter to an abutter to the proposed development, submitted what he styled a "Request for Formal Opinion" to both the building inspector and the board. In essence, Green's submission sought the same relief Shimkus sought: namely, a declaration that the use variance had lapsed. The board denied Shimkus's appeal. Neither the building inspector nor the board made any response to, or acted on, Green's request.

Green then joined Shimkus as a plaintiff in bringing the underlying Superior Court action pursuant to G. L. c. 40A, § 17, seeking review of the board's decision denying Shimkus's request

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[2] The statute provides in relevant part that "[i]f the rights authorized by a variance are not exercised within one year of the date of grant of such variance such rights shall lapse" unless an extension is given by the permit-granting authority. G. L. c. 40A, § 10.

for relief. Shimkus subsequently voluntarily dismissed her claim with prejudice, leaving Green as the sole plaintiff. On cross motions for summary judgment, the judge concluded that Green had failed to exhaust his administrative remedies, and judgment entered for the defendants. This appeal followed.

Discussion. On appeal, the parties raise various threshold issues before reaching the merits. First, Green contends that under G. L. c. 40A, § 17, he is entitled to appeal the board's decision even though he had not joined Shimkus's appeal to the board. It is Green's position that under the plain language of the statute, "[a]ny person aggrieved by a decision of the board of appeals"[3] may appeal that decision "whether or not previously a party to the proceeding." G. L. c. 40A, § 17. Thus, he contends, it does not matter that he did not join Shimkus in her appeal to the board, and he did not need to exhaust administrative remedies himself in order to appeal the board's decision pertaining to Shimkus. Second, Green contends that requiring him to seek further administrative relief would be futile given that the board and the building inspector denied Shimkus the same relief. The defendants, in addition to countering Green's arguments, argue that Green, having failed to

[3] As an abutter to an abutter, Green asserts he has presumptive standing and is a person aggrieved. See G. L. c. 40A, § 11.

appeal the issuance of the use variance, is not aggrieved by the board's decision and thus lacks standing. Because these various threshold issues are not outcome determinative we need not, and do not, resolve them.[4] See Mostyn v. Department of Envtl. Protection, 83 Mass. App. Ct. 788, 792 & n.12 (2013). The merits were fully briefed below and here, and our review is de novo, without deference to the judge's decision. See DeWolfe v. Hingham Ctr., Ltd., 464 Mass. 795, 799 (2013). "It is well established that, on appeal, we may consider any ground apparent on the record that supports the result reached in the lower court." Gabbidon v. King, 414 Mass. 685, 686 (1993). For all of these reasons, we turn directly to the merits.

Green argues first that, as a matter of law, because the use variance expired before it became effective, there was never a time when Park Central could exercise the use variance. This

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[4] Although the failure to exhaust administrative remedies has been said to be jurisdictional, in certain circumstances the failure to exhaust administrative remedies may not preclude reaching the merits on appeal. "Exceptions to the exhaustion requirement have been made when the administrative remedy is inadequate, 'when important novel, or recurrent issues are at stake, when the decision has public significance, or when the case reduces to a question of law.'" Hingham v. Department of Hous. & Community Dev., 451 Mass. 501, 509 (2008), quoting Luchini v. Commissioner of Revenue, 436 Mass. 403, 405 (2002). In addition, the exhaustion requirement may be suspended where "resort to the administrative remedy would be futile," which is what Green contends here. Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination, 463 Mass. 472, 480 (2012).

argument rests upon (1) G. L. c. 40A, § 10, which provides that "[i]f the rights authorized by a variance are not exercised within one year of the date of grant of such variance such rights shall lapse," (2) condition no. 2, which states that the use variance would become effective only upon approval of the comprehensive permit, and (3) the fact that the comprehensive permit was not approved until August 24, 2016, fifteen months after the use variance was granted. Taking these together, Green maintains that the use variance did not become effective until after it had already lapsed, and therefore no rights under it could be exercised. We disagree.

The granting of variances is governed by G. L. c. 40A, § 10, which, among other things, authorizes permit-granting authorities to "impose conditions, safeguards and limitations both of time and of use" on variances -- but speaks neither of "effectiveness" nor confers authority over legal effectiveness of a variance to local bodies. By contrast, legal effectiveness is statutorily pegged to the recording of the variance. A variance becomes legally effective when it is recorded with the registry of deeds pursuant to G. L. c. 40A, § 11, which provides that "[n]o variance . . . shall take effect until a copy of the decision . . . is recorded in the registry of deeds for the county and district in which the land is located." It is undisputed that the use variance at issue here was properly

recorded on July 27, 2015. And that is when it thus became legally effective. See Cornell v. Board of Appeals of Dracut, 453 Mass. 888, 891 (2009) ("variance could not become operative, and by implication, could not be exercised, until it was recorded"). Contrary to Green's view, legal effectiveness of the use variance is not controlled by condition no. 2.

What then does condition no. 2 mean when it states that the use variance shall become "effective" only once the comprehensive permit is approved? In context, it means nothing more than that approval of the comprehensive permit is a condition of the use variance. We think this conclusion flows naturally from the language of the use variance itself: the language appears in a section titled "Conditions," is prefaced (as we set out above) with language identifying it as a condition, and appears with no special demarcation among a lengthy list of sixteen conditions. See Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 205-206 (2005) (interpreting language of variance in context). Thus, the use variance itself gives no reason to think that the board intended condition no. 2 to be anything other than what it was called: a condition to which the use variance was subject, rather than a predicate to legal effectiveness.

We note further that Green's reading of condition no. 2 would, as a practical matter, render this particular use

variance illusory since the timing of the comprehensive permit lay in the board's hands -- not Park Central's. See Belfer v. Building Comm'r of Boston, 363 Mass. 439, 444-445 (1973) (tolling limitations period to avoid rendering variance meaningless by delay inherent in appeal). There is nothing to suggest that the board intended to grant the use variance with one hand while invalidating it with the other by delaying action on the comprehensive permit. This is especially so given that the comprehensive permit application had been submitted, heard, and changes to the development had been negotiated to the satisfaction of the neighborhood and town -- all before the board approved the use variance. The record gives no insight into why the board did not grant the comprehensive permit within one year of the use variance but, in any event, there is nothing to suggest that the timing was in any way chargeable to Park Central. See Cornell, 453 Mass. at 893 ("Circumstances beyond a variance holder's control may make obtaining a building permit within one year of the grant of a variance impossible and thus warrant equitable tolling of the one-year period"). In this context, it is clear that condition no. 2 makes issuance of the comprehensive permit a condition of the use variance, rather than a mechanism by which the use variance could lapse.

Even were we to conclude that condition no. 2 meant that the use variance did not become legally effective until the

board issued the comprehensive permit, it does not follow that Park Central was foreclosed from exercising rights under the use variance before then. "[T]he language and intent of G. L. c. 40A, §§ 10 and 11, do not mandate that actions taken to exercise a variance, such as obtaining a building permit in good faith, must be undertaken only after the variance has been recorded [i.e. has become legally effective]." Grady v. Zoning Bd. of Appeals of Peabody, 465 Mass. 725, 730 n.10 (2013). If rights under a variance can be exercised before it becomes legally effective pursuant to statute, there is no reason the same would not also be true where "effectiveness" is conditioned by a local board.

Thus we reach Green's final argument that disputed issues of fact exist as to whether Park Central exercised its rights under the use variance within one year. "Exercise" for these purposes "means 'to bring into play: make effective in action . . . bring to bear.'" Cornell, 453 Mass. at 891, quoting Webster's Third New Int'l Dictionary 795 (1993). A variance need not be fully carried out for rights to be "exercised" within the meaning of G. L. c. 40A, § 10. See Hogan v. Hayes, 19 Mass. App. Ct. 399, 404 (1985). "[A] 'use' variance may not require any construction or excavation, and a building permit may not be necessary to exercise such a variance. Evidence of 'use' within one year of issuance of the variance may be

sufficient to exercise such a variance." Cornell, supra at 894 n.9.

In addition to showing that it timely recorded the use variance and that it pursued approval of the comprehensive permit (a condition of the use variance), Park Central included in its summary judgment materials an affidavit of its manager, William DePietri, detailing various steps Park Central took after approval of the use variance and in reliance on it. The affidavit was made on personal knowledge and was supported by numerous invoices. In summary, DePietri averred that, in reliance on the issuance of the use variance, he engaged engineers, wetland specialists, and other professionals to redesign and modify the development plan to comply with the requirements and conditions of the use variance and that he expended more than $696,000 in that effort, as well more than $85,000 in consulting fees on behalf of the town. These efforts and expenditures appear to have been made in connection with the reformulation of the development required by the agreement and the resulting revised concept plan required to obtain the comprehensive permit which, as we have noted above, was a condition of the use variance. In other words, they were taken -- at least in part -- to satisfy a condition of the use variance.

Green disputed DePietri's affidavit in the sense that he responded "Disputed" to Park Central's statement, pursuant to Rule 9A of the Rules of the Superior Court (2017), of material fact setting forth the expenditures, and claimed that no further response was required because the allegations were conclusions of law. This, however, falls far short of creating a genuine issue of material fact sufficient to survive summary judgment. Green offered no information -- let alone admissible evidence -- on summary judgment to counter DePietri's affidavit, whether by way of affidavit or otherwise. See Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"); Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group, 469 Mass. 800, 804 (2014). "[M]erely responding 'disputed' to a proposed statement of fact does not establish a genuine dispute over a material fact. Rather, the party opposing summary judgment must adduce competent evidence sufficient to show a genuine issue for trial." Jenkins v. Bakst, 95 Mass. App. Ct. 654, 660 n.9 (2019). "While a judge should view the evidence with an indulgence in the [opposing party's] favor, . . . the opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat

the motion for summary judgment" (quotations omitted). LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

Judgment affirmed.