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THE SILVERMAN GROUP, 54-74 SOUTH STREET, LLC, SHOPS AT SOUTH STREET, L.L.C., SL 10 PINE STREET LLC AND SL 10 PINE STREET II LLC,

Plaintiffs,

v.

MORRISTOWN PLANNING BOARD,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO.

Civil Action

**COMPLAINT
ACTION IN LIEU OF
PREROGATIVE WRITS**

Plaintiffs the Silverman Group, 54-74 South Street, LLC, Shops at South Street, L.L.C., SL 10 Pine Street LLC and SL 10 Pine Street II LLC (collectively “Plaintiffs”) by way of Complaint against defendant Morristown Planning Board (“Planning Board” or “Board”) hereby say as follows:

PARTIES

1. Plaintiffs 54-74 South Street, LLC, Shops at South Street, L.L.C., SL 10 Pine Street LLC and SL 10 Pine Street II LLC are the owners of certain properties located at 54-74 South Street, Morristown, New Jersey, 76-80 South Street, Morristown, New Jersey and 10 Pine Street, Morristown, New Jersey, and designated as Block 4802, Lots 4, 6, 7, 8, 9 and 10 as shown on the Tax Assessment Map of the Town of Morristown (the “Property”).

2. Plaintiff the Silverman Group (“Silverman”) is a family-owned and operated real estate development organization with offices at 195 Morristown Road, Basking Ridge, New Jersey 07920 and is an affiliate of the other Plaintiffs.

3. Defendant Planning Board is a governmental entity of the Town of Morristown (“Morristown”) charged with carrying into effect Morristown’s Land Use Ordinances in compliance with the Municipal Land Use Law (“MLUL”), N.J.S.A. 40:55D-1 et seq.

FACTUAL BACKGROUND

The Property:

4. The Property consists of approximately 1.8 acres and is located in Morristown’s Town Center Zone and is currently occupied by a number of tenants for uses including offices (general & professional), offices (medical), restaurant (coffee/café), restaurant (full service), and retail together with onsite parking.

Plaintiffs’ Agreement to Develop the Property:

5. In 2018, Silverman was contacted by a real estate brokerage firm on behalf of the “Big Four” accounting firm, Deloitte, as a large potential tenant for the Property. The broker provided a Request for Proposal (“RFP”) that sought a proposal for the construction and leasing of office space for Deloitte’s New Jersey corporate headquarters.

6. Silverman was part of a competitive bidding process for the RFP and was selected as the successful bidder for the construction and leasing of office space for Deloitte’s New Jersey corporate headquarters.

7. Silverman engaged in substantial efforts to secure an agreement with Deloitte for the Property, including but not limited to engaging architects and other professionals to prepare design plans, reaching an agreement in principle with the Morristown Parking Authority to lease

parking for Deloitte employees and preparing and submitting to Deloitte a letter of intent and draft lease to memorialize the contractual relationship.

8. Subsequently, representatives and/or elected officials of Morristown met with representatives of Deloitte and made certain allegedly disparaging remarks about Silverman, stating in substance that development for Deloitte at the Property would not be approved. This caused Deloitte to withdraw its consideration of the Property and certain of Plaintiffs to then file litigation on May 23, 2019 against the Mayor of Morristown and Morristown, which is currently pending as Docket No. MRS-L-1101-19.

The Property's Zoning and the Application to the Planning Board:

9. Morristown's Zoning Ordinance provides that the Town Center Zone allows for various permitted and conditional uses that include the existing uses on the Property as well as the proposed additional use of the Property for offices. As contemplated by the Town Center Zone, the Application sought to add modern office space while maintaining street front retail space at the Property.

10. The Ordinance states "The Town Center is the heart of Morristown and provides for the highest development intensity."

11. The Ordinance states "The Town Center Zone consists of mixed use buildings typically ranging from two to four stories with a shallow setback from the public right of way."

12. The Ordinance allows a 2.5 Permitted Floor Area Ratio ("FAR") for the Town Center Zone. With respect to Permitted FAR, the Ordinance contains an exemption stating "Buildings that conform to Lot Regulations and Building Regulations of a permitted building type in Section 30-3 are excluded from FAR. Nonconformities with these standards arising from

existing lot or building characteristics shall not require compliance with FAR standards” (“FAR Exemption”).

13. In furtherance of development of the Property, on April 22, 2019 Silverman filed an application with the Planning Board for preliminary and final site plan approval that was identified with application #19-06 (“Application”) to maintain most of the existing uses at street level on the Property and to construct two floors of new office space (96,212 square feet), including a lobby to South Street above the existing buildings along with a multi-level, 290-space mechanical parking deck at the rear of the existing buildings fronting on South Street (“Project”). The Application included engineering plans, survey, architectural plans, renderings and materials, a presentation of the project, as well as various application forms, checklists, worksheets, forms and substantial escrow and application fees.

14. The Application explained that “The existing uses at street level will remain, except that the General & Professional Office space will be expanded and the Medical Offices will be removed.” The Application stated it complied with the 2.5 Permitted FAR for the Town Center Zone.

15. In response to the Application, on May 23, 2019, Silverman received a memorandum from Topology, the Board’s planner, dated May 22, 2019 (“May 22 Memo”), entitled “Preliminary Jurisdictional Review.”

16. The May 22 Memo did not make a determination that the Application was “complete for purposes of commencing the applicable time period for action” pursuant to N.J.S.A. 40:55D-10.3. Instead the May 22 Memo stated “Due to certain jurisdictional concerns identified during a preliminary review of the submitted materials, this memorandum focuses on high-level

zoning issues. As will be fully described below, this memorandum concludes, among other things, that the submitted Application would require ‘D’ variance relief, which may only be granted by the Morristown Zoning Board of Adjustment.”

17. The May 22 Memo raised various issues with the Application. In particular, the May 22 Memo disputed Silverman’s calculation of FAR, concluding that the Application as proposed exceeded the maximum FAR of 2.5. The May 22 Memo stated “FAR is particularly relevant based on the fact that variances from FAR are under the jurisdiction of the Zoning Board of Adjustment.”

18. The May 22 Memo also questioned whether the proposed mechanical parking deck fell within the definition of “parking space” in Morristown’s Ordinances and requested additional information, stating “[a]t that time, [the Board’s planner] may recommend that this issue is best left for the Board of Adjustment to render an interpretation, as authorized under N.J.S.A. 40:55D-70(b).”

19. On May 31, 2019, Silverman submitted a cover letter and revised site plans with additional information to respond to the May 22 Memo. In the letter, Silverman objected to the Board’s planner’s determination that the Application required a FAR variance or that interpretation by the Zoning Board of Adjustment was required to determine whether the mechanical parking garage qualifies as parking under Morristown’s Ordinances. Silverman stated that the Application was properly before the Planning Board and requested that the Board promptly determine completeness in accordance with the time period in N.J.S.A. 40:55D-10.3.

20. In the May 31, 2019 letter, Silverman explained that the Board's planner's calculation of FAR was not correct, Silverman's FAR calculations were conservative and the existing retail structures are properly excluded pursuant to the FAR Exemption in the Ordinance.

21. In the spirit of cooperation, in the May 31, 2019 letter Silverman offered to meet with the Board's professionals to discuss the Application and to address any issues related to the completeness of the Application. Silverman also offered, as a condition of completeness, to provide additional information to address the Board's planner's concerns about the mechanical parking garage.

22. The May 31, 2019 letter stated "The Applicant will agree to toll the 45 day time period for the Board to determine completeness during the 8 day time period from May 23, 2019 until the date of this letter and requests that the Board issue a determination of completeness by June 14, 2019."

23. Silverman next received a memorandum from Topology, the Board's planner, dated June 5, 2019 ("June 5 Memo"), entitled "Completeness Report #1." The June 5 Memo stated the Application "should be deemed INCOMPLETE" and requested substantial additional information before the Application could be complete for review by the Planning Board.

24. In the June 5 Memo, the Board's planner continued to maintain the jurisdictional objections to the Application asserted in the May 22 Memo. The June 5 Memo also concluded that the FAR Exemption did not apply to the existing retail structures that were to remain.

25. The June 5 Memo identified six (6) bulk variances subject to the Board's review under N.J.S.A. 40:55D-70(c) and/or design waivers for the Application, of which four (4) alleged

variances concerned existing lot or building characteristics related to existing retail structures that are subject to the FAR Exemption.

26. The June 5 Memo noted that the Application did not request a lot merger and stated that if a lot merger was not applied for, then “additional bulk and use variance relief will be required.”

27. A June 5, 2019 newspaper article published on the MorristownGreen.com reported the Mayor’s response to the Application as stating the proposal “to wedge a 110,000 square foot building atop 13 active storefronts remains highly speculative and is rife with practical challenges. Beyond that, the scale of their proposal has the potential to erode the very character of an area that has made Morristown so desirable.”

28. In response to the June 5 Memo, Silverman made substantial revisions to the Application to provide responses to the various requests by the Board’s planner and submitted them to the Board on August 6, 2019.

29. In the August 6, 2019 submission, Silverman explained that the Board’s planner’s calculation of FAR still contained various errors. Silverman stated that the FAR Exemption applies to the existing retail space, which exempts those structures from FAR requirements, and that the Board’s planner had not responded to Silverman’s May 31, 2019 letter regarding same.

30. In the August 6, 2019 submission, Silverman responded to each of the various requests for additional information identified in the June 5 Memo so that the Application would be deemed complete for review by the Board.

31. For example, in response to the Board’s planner’s suggestion, Silverman revised its site plans to include a request for a lot merger to eliminate additional bulk variances for the

Application and also submitted additional plans and reports to comply with the numerous requests from the Board's planner.

32. On September 3, 2019, Silverman next received an August 30, 2019 memorandum ("August 30 Memo") from the Board's planner, which stated that its purpose was "to evaluate outstanding jurisdictional issues" and concluded:

the Applicant's current proposal exceeds the maximum permitted F.A.R. and therefore requires variance relief under N.J.S.A. 40:55D-70(d)(4), which may only be granted by the Zoning Board of Adjustment. As such, it is recommended that Application #19-06 be administratively transferred to the Zoning Board of Adjustment for adjudication.

33. In the August 30 Memo the Board's planner maintained his position that the alleged variances concerning existing lot or building characteristics for the existing retail structures that are to remain prevented application of the FAR Exemption.

34. The Board's planner also concluded that because Silverman now requested a lot merger in response the planner's suggestion, the FAR Exemption did not apply because "[v]irtually none of the characteristics of the six (6) existing individual lots are being maintained." The Board's planner also concluded that 32,690 square feet of non-habitable, storage space in the parking garage should be included in the calculation of FAR.

35. In response to the August 30 Memo, Silverman again made substantial revisions to the Application to provide responses to the comments of the Board's planner and submitted them to the Planning Board on November 15, 2019.

36. In the November 15, 2019 submission, Silverman stated it had "reduced the square footage of its project and revised its FAR calculation and site plans accordingly to eliminate any possibility of a FAR variance."

37. To address the Board's planner's comments, the November 15, 2019 submission withdrew Silverman's request for a lot merger, reduced the square footage of the Project by approximately 6,640 square feet and also counted non-habitable garage space in the FAR calculation. The submission stated "[a]s a result of the foregoing revisions, the Application complied with the maximum FAR required by the Ordinance and the Application is within the jurisdiction of the Planning Board."

38. In the November 15, 2019 submission, Silverman stated "[t]he Applicant requests that the Planning Board expeditiously confirm completeness of the Application as revised and in accordance with the 45 day time period set forth in N.J.S.A. 40:550-10.3. To the extent that the Board is not prepared to declare the Application complete, the Applicant requests the opportunity to be heard by the Board regarding issues of completeness."

39. The Planning Board's decision to confirm the completeness of the November 15, 2019 revised Application expired 45 days later on December 30, 2019.

40. Silverman did not receive a response from the Planning Board regarding the completeness of the Application by December 30, 2019.

41. A January 8, 2020 newspaper article published on the MorristownGreen.com quoted the Mayor's January 7, 2020 annual State of the Municipality address as making "a veiled reference to the Silverman Group, which is suing him for opposing a corporate headquarters on South Street." The article quoted the Mayor's speech as stating "There are property owners in town who thought they could shoehorn giant buildings in the middle of our quaint downtown shopping area without a fight. Not in our town, ... We cannot allow the wrong project to

overburden our streetscape to make property owners a quick buck at the expense of our town's culture, identity and future.”

42. On January 14, 2020 Silverman received a January 10, 2020 memorandum from the Board's planner (“January 10 Memo”) entitled “Jurisdictional Memorandum #3.” The January 10 Memo stated its purpose was “to provide a supplemental evaluation of jurisdictional issues” based upon the November 15, 2019 submission.

43. The January 10 Memo did not make a determination that the Application was “complete for purposes of commencing the applicable time period for action” pursuant to N.J.S.A. 40:55D-10.3.

44. Instead, notwithstanding Silverman's substantial revisions to the Application and additional submissions to the Board, the January 10 Memo continued to recommend that the Application be administratively transferred to the Zoning Board of Adjustment, stating “the Applicant's proposal continues to exceed the maximum permitted F.A.R. and therefore requires variance relief under N.J.S.A. 40:55D-70(d)(4), among other potential ‘D’ variances, which may only be granted by the Zoning Board of Adjustment.”

45. On January 21, 2020, Silverman wrote to notify the Planning Board that the Application was deemed complete by operation of law as of December 30, 2019 pursuant to N.J.S.A 40:55D-10.3, the Board was required to make a decision to grant or deny the Application by no later than April 28, 2020, and that Silverman reserved its rights pursuant to N.J.S.A. 40:55D-61 if the Board did not vote on the merits on the Application by April 28, 2020.

46. On February 11, 2020, Silverman received a letter from the Zoning Officer stating that the Application did not comply with FAR requirements, that “jurisdiction over this

Application is properly vested with the Zoning Board of Adjustment” and referring Silverman to the Zoning Board of Adjustment.

47. On April 15, 2020, Silverman received a letter from the Zoning Officer stating that “the Application has been administratively closed by the Planning Board since there is no statutory authority for it to assume jurisdiction over the Application.”

48. The Planning Board did not issue a decision on the merits of the Application and did not afford Silverman any opportunity to be heard on the Application. All actions of the Board regarding this Application have occurred without providing Silverman a hearing and without any vote being taken by the Board.

COUNT ONE

49. Plaintiffs repeat the foregoing allegations as if set forth at length herein.

50. The MLUL, N.J.S.A. 40:55D-61, required the Planning Board to decide the Application within 120 days.

51. The Application was deemed complete by operation of law on December 30, 2019.

52. The Planning Board administratively terminated the Application and failed to act on the Application in accordance with N.J.S.A. 40:55D-61.

53. The MLUL, N.J.S.A. 40:55D-61, specifically states:

Whenever an application for approval of a subdivision plat, site plan or conditional use includes a request for relief pursuant to section 47 of this act, the planning board shall grant or deny approval of the application within 120 days after submission by a developer of a completed application to the administrative officer or within such further time as may be consented to by the applicant. ... Failure of the planning board to act within the period prescribed shall constitute approval of the application and a certificate of the administrative officer as to the failure of the planning board to act shall be issued on request of the applicant, and it shall be sufficient

in lieu of the written endorsement or other evidence of approval herein required, and shall be so accepted by the county recording officer for purposes of filing subdivision plats.

54. As a result of the Planning Board's failure to act on the Application within 120 days of December 30, 2019, when the Application was deemed complete, Plaintiffs are entitled to automatic approval of the Application as proposed for the Property as required by *Amerada Hess Corp. v. Burlington County Planning Bd.*, 195 N.J. 616, 620 (2008).

WHEREFORE, Plaintiffs demand judgment against the Planning Board of the Town of Morristown as follows:

- A. Declaring that the Planning Board failed to act on the Application in accordance with N.J.S.A. 40:55D-61;
- B. Declaring that the Application is approved in its entirety;
- C. Awarding attorneys' fees and costs of suit; and
- D. Granting such other relief as the court deems just and proper.

COUNT TWO

55. Plaintiffs repeat the foregoing allegations as if set forth at length herein.

56. The MLUL, N.J.S.A. 40:55D-10.3, required the Planning Board to certify the Application to be complete within 45 days of the November 15, 2019 submission to the Planning Board or by December 30, 2019.

57. The Board failed certify the Application to be complete by December 30, 2019.

58. The Application was deemed complete by operation of law on December 30, 2019.

59. If the Court does not find that the Application is approved in its entirety pursuant to N.J.S.A. 40:55D-61 then, in the alternative, the Court should find that the Planning Board

violated N.J.S.A. 40:55D-10.3 and direct the Board to act on the merits of the Application without further delay and by a date certain to be set by the Court.

WHEREFORE, Plaintiffs demand judgment against the Planning Board of the Town of Morristown as follows:

A. Declaring that the Planning Board failed certify the Application to be complete in accordance with N.J.S.A. 40:55D-10.3;

B. Declaring that the Application as revised by the November 15, 2019 submission is complete pursuant to N.J.S.A. 40:55D-10.3 for purposes of commencing the applicable time period for action by the Planning Board pursuant to N.J.S.A. 40:55D-61;

C. Directing the Planning Board to take action on the Application in accordance with N.J.S.A. 40:55D-61.

D. Awarding attorneys' fees and costs of suit; and

E. Granting such other relief as the court deems just and proper.

DESIGNATION OF TRIAL COUNSEL

Kevin J. Coakley, Esq. is hereby designated as trial counsel.

CONNELL FOLEY LLP
Attorneys for Plaintiffs

By: /s/ Kevin J. Coakley
Kevin J. Coakley

Dated: April 28, 2020

CERTIFICATION PURSUANT TO RULE 4:5-1

I certify that the within matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding. There are no other known parties who should be joined in this action at this time. However, one or more of the plaintiffs in this action are plaintiffs in a lawsuit filed against Timothy P. Dougherty, individually and as Mayor of Morristown and the Town of Morristown, captioned *54-74 South Street, LLC, Shops at South Street, L.L.C. and The Silverman Group v. Timothy P. Dougherty et. al*, Docket No. MRS-L-001101-19.

I certify that the foregoing statements made by me are true. I am aware if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: /s/ Kevin J. Coakley
Kevin J. Coakley

Dated: April 28, 2020

R. 4:69-4 CERTIFICATION

I certify that all necessary transcripts of local agency proceedings in the case have been ordered or obtained.

By: /s/ Kevin J. Coakley
Kevin J. Coakley

Dated: April 28, 2020

CERTIFICATION PURSUANT TO RULE 1:38-7(c)

I hereby certify that confidential personal identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

By: /s/ Kevin J. Coakley
Kevin J. Coakley

Dated: April 28, 2020

Civil Case Information Statement

Case Details: MORRIS | Civil Part Docket# L-000955-20

Case Caption: THE SILVERMAN GROUP VS
MORRISTOWN PLANNING BOA

Case Initiation Date: 04/28/2020

Attorney Name: KEVIN J COAKLEY

Firm Name: CONNELL FOLEY LLP

Address: 56 LIVINGSTON AVE

ROSELAND NJ 070681765

Phone: 9735350500

Name of Party: PLAINTIFF : The Silverman Group

Name of Defendant's Primary Insurance Company
(if known): Unknown

Case Type: ACTIONS IN LIEU OF PREROGATIVE WRITS

Document Type: Complaint

Jury Demand: NONE

Is this a professional malpractice case? NO

Related cases pending: NO

If yes, list docket numbers:

Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

Are sexual abuse claims alleged? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? YES

If yes, is that relationship: Business

Does the statute governing this case provide for payment of fees by the losing party? NO

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO

If yes, please identify the requested accommodation:

Will an interpreter be needed? NO

If yes, for what language:

Please check off each applicable category: Putative Class Action? NO Title 59? NO Consumer Fraud? NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule 1:38-7(b)*

04/28/2020

Dated

/s/ KEVIN J COAKLEY

Signed