U.L. v. Carteret

Dec 20, 1984

Piscataway

Brief In Support of Motion For Leave To Appeal An Interlocutory Order & For Stay Of Enforcement Pending Appeal.

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	:	
Plaintiff/Appellee,	:	Civil Action
vs.	:	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTARET, et al.,	:	Sat Below: Hon. Eugene Serpentelli
Defendant/Appellant.	:	

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL AN INTERLOCUTORY ORDER AND FOR STAY OF ENFORCEMENT PENDING APPEAL

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

During November, 1984, plaintiff/respondent Urban League (now "Civic League") of Greater New Brunswick filed a Notice of Motion for Temporary Restraining Order and Interlocutory Injunction with the Superior Court of New Jersey, Chancery Division (Middlesex/Ocean County) (A1) seeking to enjoin Piscataway from taking any action with respect to any site within its borders designated as "suitable" for Mount Laurel development by the court-appointed expert, Carla Lerman. Together therewith, the Civic League filed a Memorandum in Support of Motion for Temporary Restraining Order and Interlocutory Injunction (A3) and an Affidavit in Support of Motion for Temporary Restraining Order and Interlocutory Injunction of Barbara J. Williams (A10). Thereafter, Piscataway filed a Memorandum in Opposition to Motion for Temporary Restraining Order and Interlocutory Injunction. (A17). Oral argument was thereafter entertained by the trial court.

On December 11, 1984, following the filing of objections to the form of Order submitted (A24),the court below issued an interlocutory order (A32) for temporary restraints and a preliminary injunction providing, among other things, that Piscataway and any of its official bodies, officers or agents may not (a) approve for development any site within the Township of Piscataway designated as "suitable" for Mount Laurel development in the report of

court-appointed expert Carla Lerman, or (b) issue any building permit with respect to any such site, pending a hearing on the aforesaid expert's report.

On December 14, 1984, the Township of Piscataway made a telephone request for stay of enforcement of the aforesaid order pending appeal, which request was denied in an Order dated December 17, 1984. (A35).

POINT I

LEAVE TO APPEAL AN INTERLOCUTORY ORDER FOR TEMPORARY RESTRAINTS AND A PRELIMINARY INJUNCTION SHOULD BE GRANTED IN FURTHERANCE OF THE "INTERESTS OF JUSTICE"

Rule 2:2-4 provides that the Appellate Division may grant leave, in the "interests of justice", to appeal from an interlocutory order where the order, if final, would be appealable as of right. The subject order would, if final, be appealable as of right under Rule 2:2-3(a) as a final judgment of a trial division of the Superior Court, and is therefore an order from which leave to appeal may be granted interlocutorily.

Leave to appeal the within order should be granted in furtherance of the interests of justice. Our courts have long recognized that "there is no power, the exercise of which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction." Benton v. Kerman, 126 N.J. Eq. 343, 346 (E&A, 1939).

The potentially harsh effects of injunctive relief, and the irreparable harm that may result from an unwarranted injunction, distinguish it from other types of interlocutory orders. In view of this, our courts and court rules have historically singled out interlocutory orders with respect to injunctions as calling for greater flexibi-

lity in terms of whether or not leave to appeal should be granted. See, generally, In re Appeal of Pennsylvania Railroad Co., 20 N.J. 398, 404-409 (1956).

In any matter where leave to appeal an interlocutory order is sought, the court will strike a balance between (a) the inconvenience and expense of piecemeal review and the public interest in favor of complete trials, and (b) "the dangers of individual injustices which may result from the denial of any appellate review until after final judgment at the trial level." Id. at p. 404.

As the Appellate Division stated in Romano v. Maglio, 41 N.J. Super. 561, 567-568 (App. Div., 1956):

> "We will not grant leave to appeal in order to correct minor injustices, such as those commonly attendant on orders erroneously granting or denying interrogatories or discovery. Redress for such grievances can be had only through an appeal from the final judgment, providing the judgment results from the interlocutory orders complained of. [Citation omitted]. However, we may grant leave to appeal where some grave damage or injustice may be caused by the order below, such as may occur when the trial court grants, continues, modifies, refuses or dissolves an injunction ..." (emphasis added).

Unlike orders with respect to discovery, or orders addressing an incidental legal question that arose during the course of trial, an order providing for temporary restraints and an interlocutory injunction imposes a remedy

in a very practical sense. Moreover, it does so before the taking of testimony has been concluded and before the factual information needed as a basis for conclusions of fact and law and determination of the respective rights and obligations of the parties has been made available to the court. Because a remedy is imposed before the facts are known, the availability of appellate review is especially crucial.

As is pointed out in Piscataway's Memorandum in Opposition to Motion for Temporary Restraining Order and Interlocutory Injunction, (A17), on which Piscataway relies as a part of its argument herein, the remedy sought by the Civic League and imposed by the court below, is in the nature of a blanket prior restraint against any action on the part of Piscataway in connection with applications to develop certain parcels of land within its borders. Piscataway has, in effect, been estopped from exercising one of its primary municipal functions - the power to regulate land use - to its detriment and that of its 43,500 residents, before the trial court has rendered any decision as to the invalidity of its zoning.

The harsh effect of the remedy imposed below on the rights of Piscataway, and on the rights of its residents, without benefit of a hearing, make the instant case one in which "the dangers of individual injustices which may result from the denial of any appellate review until after final judgment at the trial level" (20 N.J. at p. 404) far outweigh any public interest in favor of complete trials.

POINT II

ENFORCEMENT OF THE ORDER BELOW SHOULD BE STAYED PENDING APPEAL TO PREVENT IRREPARABLE HARM TO PISCATAWAY

Rule 2:9-5 permits an appellate court to stay the enforcement of an order of the trial court pending appeal. Such a stay should be granted when necessary to preserve the status quo pending outcome of the litigation, and where there is no showing that the other party to the action will suffer exceptional hardship. See, e.g., Tracy v. Tracy, 140 N.J. Eq. 496, 502 (E&A, 1947).

The temporary restraints and interlocutory injunction ordered by the court below leave Piscataway powerless to perform its normal governmental functions, and deprive it of its right to regulate land use within its borders. Moreover, there are no means by which Piscataway can be compensated for the loss of its rights in the event it ultimately prevails on appeal.

The Civic League, on the other hand, will suffer no harm whatsoever if enforcement of the order below is stayed. As Piscataway's Memorandum in Opposition to Motion for Temporary Restraining Order and Interlocutory Injunction points out, (A17), (and on which Memorandum Piscataway relies as part of its argument herein), the Civic League is not in need of broad injunctive relief in any event. Under a system previously established by the trial court and in effect until entry of the order from which leave to appeal

is being sought, Piscataway was required to notify the Civic League when any application for a site designated as "suitable" for Mount Laurel development was scheduled for discussion, and to provide the Civic League with an opportunity to act to protect its interest. Piscataway has complied fully with this obligation. Moreover, any approval granted by Piscataway with respect to development of any such site would not be effective against the Civic League pending outcome of the litigation.

The system of case-by-case scrutiny previously devised by the court below provides ample protection for the rights of the Civic League. Staying enforcement of the temporary restraining order and interlocutory injunction, and reinstating the system of case-by-case review, certainly will not cause harm to the Civic League pending appeal, and will insure that the rights of Piscataway and its residents and taxpayers do not suffer irreparable harm by having virtually every parcel of vacant property within its borders deemed suitable for higher-density residential development restrained as though a final judgment had been entered.

The reviewing court should be aware that, pursuant to the "consensus methodology" adopted by the trial court in AMG, et cet., v. Township of Warren, (unreported insofar as counsel is aware), a Mt. Laurel case, Piscataway's fair

share number is 4,200 units affordable by households of low and moderate income. Piscataway's total vacant land approximates 1,900 acres. The Civic League asserts that no more than 1,100 of these are suitable for Mt. Laurel development. Piscataway has presented credible evidence to support its entitlement to substantial credits against this fair share number, including, but not limited to, the existence of approximately 1,200 single-family homes affordable by low income families, the existence of approximately 2,600 garden apartments affordable by moderate income families; the existence of 348 family housing units owned by Rutgers, the State University, affordable by low income families (and conceded to be a credit against Piscataway's fair share number the Civic League's expert witness, Alan Mallech); the existence of some 1,700 dormitory rooms on the Busch and Livingston campus of Rutgers, the State University; and the existence of hundreds of single student apartments owned by Rutgers and occupied by students of low and moderate income.* Therefore, if it is probable, arguably, that Piscataway's fair share number may be substantially lower than that which is produced prima facie by the application of the fair share methodology, following the

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* As well as, of course, some 400 acres previously zoned for high-density residential development, all of which are recommended for such developers by the court's experts.

Court's consideration of these factors. This situation suggests that the trial court's blanket restraints are doubly inappropriate, where Piscataway's fair share might well be met by the use of substantially less than the totality of its developable vacant land.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the relief sought by defendant/appellant be granted.

Respectfully submitted,

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By _____
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Dated: December 20, 1984