

CA Old Bridge 4/2/1981

OBY v. O.B.

D's

Notice of Motion for Summary Judgment
for ~~failure to~~ and dismiss ~~claim~~ for
for failure to state a claim and failure
to exhaust administrative remedies (+)
Memo in support

pgs = 12

CA 002307N

YACKER, GRANATA & CLEARY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

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81 APR 3

A10: 15

THOMAS J. DELANEUX
COUNTY CLERK

April 2, 1981

Woop Sewerage

Motion to Dismiss

5/11/81 Refused to trial for fee

Clerk, Superior Court
State House
Trenton, NJ 08625

Re: O & Y Old Bridge Development Corp.
v. The Township of Old Bridge
Docket No. L-32516-80

P.W.

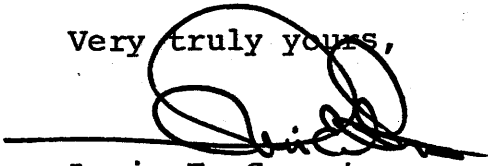
Ln

Dear Sir:

Enclosed please find an original and one copy of notice of motion, affidavit and exhibits for filing in the above matter. This motion is returnable May 1, 1981.

I am, by copy of this letter forwarding a copy of same to the Honorable John C. Demos, Louis J. Alfonso, Esq., Antonio & Flynn, Esqs., Thomas Norman, Esq. and Brener, Wallack & Hill, Esqs.

Very truly yours,



Louis E. Granata

LEG:dc
enc.

cc: Honorable John C. Demos ✓
Louis J. Alfonso, Esq.
Antonio & Flynn, Esqs.
Thomas Norman, Esq.
Brener, Wallack & Hill, Esqs.
Old Bridge Township Sewerage Authority

REC'D AT CHAMBERS

APR 3 1981

JUDGE DEMOS

RECEIVED & FILED
MIDDLESEX COUNTY CLERK
NEW BRUNSWICK, N.J.

81 APR 3 A10:15

THOMAS J. HOLYNEUX
COUNTY CLERK

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ATTORNEYS FOR Defendant Old Bridge
Township Sewerage Authority

Plaintiff

O & Y OLD BRIDGE DEVELOPMENT CORP., a
Delaware Corporation

vs.

Defendant

THE TOWNSHIP OF OLD BRIDGE in the County
OF MIDDLESEX, a municipal corporation of
the State of New Jersey, et al.

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-32516-80 P.W. ✓
Sm

CIVIL ACTION

NOTICE OF MOTION FOR
SUMMARY JUDGMENT

TO: BRENER, WALLACK & HILL, ESQS.
Attorneys for Plaintiff
15 Chambers Street
Princeton, N. J. 08540

SIRS:

PLEASE TAKE NOTICE that on the 1st day of May, 1981,
at 9:00 a.m. in the forenoon, or as soon thereafter as counsel may
be heard, the undersigned attorney for the defendant, Old Bridge
Township Sewerage Authority, shall move before the Superior Court
of New Jersey, Law Division, Middlesex County, Court House, New
Brunswick, New Jersey, for an order for summary judgment for

dismissal of the complaint for failing to state a claim upon which relief can be granted pursuant to R. 4:6-2, for failing to exhaust administrative remedies pursuant to R. 4:69-5 and because the Court lacks jurisdiction of the subject matter of this matter pursuant to R. 4:6-2.

At such time and place, the undersigned shall rely upon the pleadings, memorandum, affidavit and exhibits attached hereto.

YACKER, GRANATA & CLEARY, P. A.
Attorneys for the Defendant Old
Bridge Township Sewerage Authority

BY: 
LOUIS E. GRANATA

April 2, 1981

I hereby certify that a copy of the within motion has been served upon the attorneys for the plaintiff, Brener, Wallack & Hill, Esqs. and attorneys appearing for defendants in this matter, and the original has been forwarded to the Clerk of Superior Court for filing, and a copy sent to John C. Demos, A.J.S.C.

YACKER, GRANATA & CLEARY, P. A.
Attorneys for Defendant Old
Bridge Township Sewerage Authority

BY: 
LOUIS E. GRANATA

April 2, 1981

O & Y BRIDGE DEVELOPMENT CORP., a
Delaware Corporation,

plaintiff

vs.

THE TOWNSHIP OF OLD BRIDGE in the
County of MIDDLESEX, a municipal
corporation of the State of New
Jersey, et al.,

defendant

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-32516-80

FILED
MIDDLESEX COUNTY CLERK
NEW BRUNSWICK, N.J.
31 APR 3 10:15
THOMAS J. JACOBSON
COUNTY CLERK

MEMORANDUM ON BEHALF OF DEFENDANT
OLD BRIDGE TOWNSHIP SEWERAGE AUTHORITY

YACKER, GRANATA & CLEARY, P. A.
210 Main Street, P. O. Box 389
Matawan, New Jersey 07747
(201) 583-3636

By: Louis E. Granata, Esquire

STATEMENT OF FACTS

On or about the 19th day of February, 1981, the Old Bridge Township Sewerage Authority was served with a Summons and Complaint in this matter.

The Executive director has made a thorough review of its records and finds no application or payment made by the plaintiff. (App. II)

The plaintiff seeks in its Sixth Count to have the Rules and Regulations of the defendant, Old Bridge Township Sewerage Authority, declared invalid.

The Old Bridge Township Sewerage Authority has adopted Rules and Regulations (relevant excerpts are attached as App. I) which provide mean by which an application can be processed and in particular cases grant exception. (App. I, pg. iv) and assist or reimburse a developer for work done at the insistence of the authority. (App. I, pg 6)

The Old Bridge Township Sewerage Authority has never conspired or entered into any unlawful agreements with any other municipal body or authority. (Executive Dire Aff. App. II)

The plaintiff can set forth no facts upon which an issue can be raised as to any of the allegations contained in the Complaint.

POINT I

THE PLAINTIFF HAS FAILED TO EXHAUST
ITS REMEDIES, AND CANNOT
MAINTAIN THIS ACTION.

This action is a complaint in lieu of prerogative writ, filed by the the plaintiff. It names the Old Bridge Township Sewerage Authority (herein referred to as O.B.T.S.A.) as a defendant in Counts 6, 7, 10 and 11.

Count 6 is the substantive Count seeking the extraordinary relief to be afforded by way of writ to:

1. Declare the Rules and Regulations invalid.
2. Require the Old Bridge Township Sewerage Authority adopt reasonable rules and regulations.
3. Pay plaintiff's attorney's fees.
4. And other relief.

In order for the action to be maintainable the plaintiff must exhaust all its administrative remedies, R. 4:69-5.

"Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 (Actions in Lieu of Prerogative Writs) shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted." (emphasis added)

The plaintiff has not instituted a review before the Old Bridge Township Sewerage Authority, no less exhausted that remedy.

The rules and regulations of the Old Bridge Township Sewerage Authority provide a three step application process and provide every applicant the right to:

" . . . demonstrate that, because of peculiar conditions pertaining to (sic.) his application, the literal enforcement of one or more of these Rules and Regulations is impractical or will exact undue hardship , The Sewerage Authority may grant

such exceptions as may be reasonable and within the general purposes and intent of these Rules and Regulations."

O.B.T.S.A. Rules and Regulations, March 1979,
pg. iv. (App I)

Under normal circumstances, all administrative remedies must be exhausted before resort may be had to the Courts by way of prerogative writ. Exhaustion of administrative remedies is neither jurisdiction nor absolute and may be departed from where, in the Court's opinion, justice requires. Matawan Borough v. Monmouth County Tax Board, 51 N. J. 291 (1968). When there are only issues of law involved, the exhaustion in remedy will not be invoked. Nolan v. Fitzpatrick, 9 N. J. 477 (1952). Deviations from the normal course of appeal should not be lightly countenanced. Central R. R. Co. of N. J. v. Neeld, 26 N. J. 172 (1958), cert. den. 357 U. S. 928.

As Chief Justice Hughes, then a judge a Superior Court, wrote in Baldwin Construction Co. v. Essex County Board of Taxation, 24 N. J. Super 252, 274 (Law Div. 1952);

"(t)raditionally, the former prerogative writs quickened where justice pointed to the urgency of relief and the futility of the administrative process, as where the jurisdiction of the statutory tribunal was questioned short of final judgment; where a constitutional question existed, insoluble in the administrative forum; where the facts and the applicable law were clear; where a pure legal question existed; where the statutory remedy was not final and effective; where principles of law required a prompt judicial construction." (citations omitted)

Not one of those conditions are present in this matter. Any applicant, the plaintiff in particular, aggrieved by the Old Bridge Township Sewerage Authority regulations may, after having

the opportunity to present all its facts and reasons, request a waiver. If not satisfied by the results, then file an appeal. By this procedure, a full administrative review is made available to the applicant. Administrative agencies have been held to be especially fitted for the task and to possess the expertise necessary to provide adequate relief. Pleasantville Taxpayers v. City of Pleasantville, 115 N. J. Super 85, 88 (App. Div. 1971); J. H. Becker, Inc. v. Marlboro Twsp., 82 N. J. Super 519, 529 (App. Div. 1964) Cf. Delaware, Lackawanna & Western R. R. Co. v. Neeld, 23 N. J. 561, 575 (1957).

The Old Bridge Township Sewerage Authority rules and regulations provide a very simple procedure to invoke its jurisdiction. All that is required is a preliminary application together with the required filing fee of \$10.00 per unit (not per dwelling as plaintiff misstates in its complaint) (See Old Bridge Township Sewerage Authority Rules, page 4, 5, and preliminary application Ex. "A" to Rules (App. I)

The availability of an administrative remedy and the requirement of exhaustion of that remedy serves several purposes:

"First, it is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the Courts."
Paterson Redevelopment Agency v. Schulman,
78 N. J. 378, 386 (1979).

The O.B.T.S. A. Rules ensure that all claims will be heard, as a preliminary matter, by the body having expertise in the area. (See N.J.S.A. 40:14A-2, 40:14A-6(c) - App. III, IV) This should be and is particularly important where the ultimate decision rests upon factual determinations lying within the expertise of the

agency or where agency interpretations of statutes or regulations are desirable. Paterson Redevelopment, supra,

"A second reason for requiring exhaustion of administrative remedies is to further the general policy of avoiding unnecessary adjudication. The administrative process provides a statutory framework in which the issues may often be settled on statutory grounds without judicial adjudication of constitution claims. The Agency decision may, in many cases, satisfy the claimant, thus obviating the need for the courts to act and alleviating their caseload burden." Paterson Redevelopment, supra at 387.

The plaintiff alleges without more, that the fees, charges and rates are "illegal and cost generative." A mere allegation without requesting a waiver or submitting an application does not justify judicial interference. J. H. Becker, supra at 529. This matter is not ripe for a judicial determination.

In Smith v. Middletown, 23 N. J. 580 (1957) a writ of mandamus was not allowed to issue to control the mode or manner in which the discretionary powers of an administrative body should be exercised. The writ would only apply to compel initially the exercise of such discretion, at 587:

"The generally accepted limitations upon the exercise of the ancient extraordinary remedy of mandamus obtain in New Jersey. It is a coercive process that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result. Mandamus lies to compel but not to control the exercise discretion. Unless the particular duty be peremptory, the fair use of judgment and discretion is the province of the functioning authority." (emphasis added)

The plaintiff seeks the Court's extraordinary powers to: a) appoint a master to rewrite the Sewerage Authority regulations,

b) require the Sewerage Authority to process its applications,
c) suspend the Sewerage Authority's statutory powers, and d)
provide it with sewage service at a reasonable expense, why?
Because they are dissatisfied, not with the results of the
O.B.T.S.A.'s action, but what they presume the result will be.
How can this Court act under such conditions? How can this
Court review an application in a vacuum? How can this Court
take such extraordinary action in the first place when the
Legislature has, in its wisdom, created the O.B.T.S.A. and
established it. " . . . as an instrumentality exercising public
health and welfare . . ." N.J.S.A. 40:14A-7 (App. V) The
Legislature even went as far as establishing it as a complete and
independent authority for the performance of its authorized
activities, and to having its charges or other matters not subject
to regulation by any other State board, commission, office, etc.
see N.J.S.A. 40:14A-35 (App. VI)

The interests of justice require that the O.B.T.S.A. ~~can~~
exercise its primary jurisdiction, in this way the concern for
the proper relationship between the Courts and administrative
agencies will be maintained. Bd. of Ed., Asbury Park v.
Asbury Ed. Assn., 155 N. J. Super 76 (App. Div. 1977)

POINT II

THE PLAINTIFF MADE NO
PAYMENT TO THE OLD BRIDGE
TOWNSHIP SEWERAGE AUTHORITY
UPON WHICH RELIEF CAN BE GRANTED

The affidavit of the Executive Director indicates that the plaintiff has made no payments to the O.B.T.S.A. Having made no payments, it cannot receive a judgment "Requiring the Sewerage Authority to return the unauthorized \$5,000.00 payment."

As is further indicated in the proceeding, Point I, the plaintiff has not filed an application with the O.B.T.S.A., nor has the plaintiff requested any information."

POINT III

THE ALLEGATIONS OF PLAINTIFF
IN COUNTS 10 and 11 ARE
PREMATURE AND WITHOUT BASIS

The plaintiff seeks a determination by the Court that a conspiracy has taken place against it and other developers. There has been no "overt act" or acts which the plaintiff can point to the other than a statement in the complaint " . . . the Sewerage Authority . . . conspired to enforce land use policies which have a substantial external impact contrary to the general welfare . . . to violate the specific direction of . . . Oakwood at Madison . . . to prevent developers . . . from providing least cost housing . . . to prevent development of federal and state subsidized low and moderate income housing." As is set forth in the affidavit of the Executive Director and as particularly set forth in Points I and II, this plaintiff has not done anything concerning the O.B.T.S.A. Nor has it done anything to the plaintiff which would warrant any trial in this matter. The

The plaintiff is unable to raise an issue of such fact. The plaintiff may surprise itself and find that it is satisfied with the Sewerage Authority's action and decision if it would simply follow the administrative remedy available to it. Paterson Redevelopment Agency, supra.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the complaint should be dismissed for failing to state a claim and failure to exhaust administrative remedies as provided by Rule.

RESPECTFULLY SUBMITTED

BY: _____


LOUIS E. GRANATA