

Deland and Scarpa v. Berkeley Heights 1988

Order to Show Cause with Temporary Restraints on  
Sewer Allocations and Sale and Development  
of Vacant Land

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Attorneys for Plaintiffs

VIVIAN DELAND and ANTHONY J.  
SCARPA, trading as HIGH OAK  
Estates,  
Plaintiffs,

v.

THE TOWNSHIP OF BERKELEY  
HEIGHTS, A Municipal  
Corporation of the State of  
New Jersey, located in Union  
County, New Jersey,

Defendant.

and

DONALD E. STITZENBERG and  
MARY ANN STITZENBERG,

Intervenors.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
UNION/OCEAN COUNTY  
DOCKET NO. L-73036-87 P.W.

Civil Action

(Mount Laurel II)

ORDER TO SHOW CAUSE WITH  
TEMPORARY RESTRAINTS ON  
SEWER ALLOCATIONS AND  
SALE AND DEVELOPMENT  
OF VACANT LAND

This matter having been opened to the Court by McDonough,  
Murray & Korn, P.A., (Jonathan E. Drill, Esq., appearing),  
attorney for plaintiff, by way of application for an Order to  
Show Cause with Temporary Restraints; and notice of the

application having been given to: Donald T. DiFrancesco, Esq., (Hooley, Butler, DiFrancesco & Kelly, attorneys), attorney for defendant; Daniel S. Bernstein, Esq., (Bernstein, Hoffman & Clark, P.C.), attorney for the Berkeley Heights Board of Adjustment; and Barry Hoffman, Esq. (Bernstein, Hoffman & Clark, P.C.), attorney for the Berkeley Heights Planning Board; and the Court considering all papers filed in support of and in opposition to the entry of the within Order to Show Cause with Temporary Restraints; and the Court having conducted a telephone conference on January 15, 1988 between counsel for plaintiff and counsel for defendant; and the Court having conducted a telephone conference on February 3, 1988 between all counsel listed above; and the Court determining that: 1) plaintiffs have a reasonable probability of success on the merits of their claim regarding both the unconstitutionality of defendant's Ordinances as being violatative of the Mount Laurel doctrine and the fair share obligation number of defendant, 2) allocation of sewers in Berkeley Heights is a scarce resource which, if not restrained from further allocation, will cause immediate and irreparable harm in that defendant will be

hindered in its ability to satisfy its Mount Laurel obligations, 3) vacant land in Berkeley Heights is a scarce resource which, if not restrained from sale or unconditional development by Berkeley Heights will cause immediate and irreparable harm in that Berkeley Heights will be hindered in its ability to satisfy its Mount Laurel obligations; and 4) a balancing of the hardships weighs against defendant and in favor of plaintiffs and low and moderate income persons, and for good cause otherwise shown;

It is on this 8 day of February, 1988, ORDERED as follows:

1. Defendant shall show cause before the Honorable Eugene D. Serpentelli, A.J.S.C., Union/Ocean County, at the Ocean County Court House, Toms River, New Jersey on the 16 day of February, 1988 at ~~9:30~~<sup>2:00</sup> in the ~~A.M.~~<sup>P.M.</sup>, or as soon thereafter as counsel may be heard, why an Order should not be entered converting the temporary restraints and order set forth below in Paragraph 2 and 3 of this Order into an interlocutory injunction.

2. Defendant, its agencies, departments and officers are hereby temporarily restrained, nunc pro tunc as of January 15, 1988, until the return date of this Order to Show Cause or further Order of this Court, from:

(a) allocating and/or reserving sewer flow and/or sewer capacity and from granting and/or approving sewer extensions and/or sewer hookups with respect to any person or entity seeking more than 1 unit of sewer

capacity or more than 380 gallons per day of sewer flow;

(b) public auction of and/or sale of any and all municipally owned land;

(c) contracting with any person or entity for the purpose of development of any and all municipally owned land; except for the firehouse and rescue squad sites (Lots Block ) which are specifically exempted from this Order; and

(d) vesting of any and all rights, without prior court approval, under the provisions of any and all ordinances which may be enacted by the Township of Berkeley Heights which pertain to the development for any purpose of any and all land in the Township of Berkeley Heights.

3. It is hereby further ordered nunc pro tunc as of February 3, 1988, as follows:

(a) Any and all developmental approvals, including but not limited to subdivision and site plan approvals and variances (but excluding building permits), which may be granted by defendant, its agencies, departments and officers (including but not limited to the Planning Board and Zoning Board of Adjustment) for any and all publicly owned land in the Township of Berkeley Heights and for any and all privately owned land in the Township of Berkeley Heights in excess of 2 acres (which acreage shall be determined by totalling the entire area of contiguous lots included in the development or within the same ownership or control) shall be granted conditioned upon this Court's approval of a Berkeley Heights compliance package and/or settlement of the instant suit, which compliance package and/or settlement does not utilize the property (which is the subject of the conditional approval at issue) for the construction of low and moderate income housing;

(b) No rights shall be vested by the grant of any such conditional approvals;

(c) More specifically, the Planning Board and the Zoning Board of Adjustment may continue to process

all applications for development filed with them and to hold hearings and render determinations thereon, but in the case of any such applications which fall within the scope or purview of this Order, the municipal agency having jurisdiction over the application for development, if it determines that it will approve the application, shall approve the application conditioned as set forth above. Furthermore, if the municipal agency fails to act on an application for development (which falls within the scope or purview of this Order) within the time set forth by the appropriate provisions of the Municipal Land Use Law, ("MLUL"), N.J.S.A. 40:55D-1 et. seq., any automatic or default approval shall be deemed conditioned as set forth above. Additionally, if the municipal agency otherwise acts to approve or deny a complete application for development (which falls within the scope or purview of this Order) within the time period prescribed by the appropriate provisions of the MLUL, the said agency shall not be subject, by reason of the conditions imposed by this Order, to the claim of any applicant or interested party that it has failed to act on the application within the time period prescribed by the MLUL or to any claim that an automatic or default approval has occurred; and

- (d) No building permits or certificates of occupancy shall be issued or granted to applicants for developments which fall within the scope or purview of this Order.

4. Any person or entity (including but not limited to applicants and interested parties) affected by the temporary restraints regarding sewers contained herein or the order regarding developmental approvals contained herein shall have the right to seek a waiver or exemption from the terms thereof by submitting a request for same, with a proposed form of Order attached thereto, to the Court upon notice to plaintiffs' counsel. If plaintiffs fail to object within 10 days of the receipt of the request and proposed form of Order the Court shall grant the request for

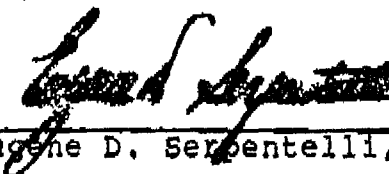
the waiver or exemption. If plaintiffs wish to object, a timely objection must be submitted to the Court with a copy to the proponent of the request.

5. Defendant shall have leave to move for the dissolution or modification of the temporary restraints and order contained in this Order to Show Cause on two days notice. Any such motion shall be accompanied by a Brief in addition to any papers the movant may file.

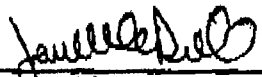
6. The Briefs submitted on behalf of plaintiffs in support of the previously filed Motion for Partial Summary Judgment, the restraints on sewer allocations, and the restraints on the sale and development of vacant land shall constitute plaintiff's Briefs in support of the application for the interlocutory injunctions on the return date of this Order to Show Cause. Plaintiffs may supplement their Briefs prior the return date if they so desire.

7. If defendant or any other person or entity effected by this Order to Show Cause wish to file a Brief or any papers in opposition to the relief sought prior to the return date of this Order to Show Cause same shall be filed at least 8 days prior thereto.

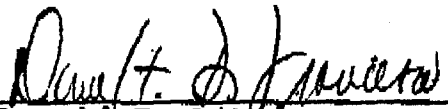
8. A copy of the within Order shall be forthwith served upon all Counsel hereto and counsel to the Berkeley Heights Planning Board and Board of Adjustment.

  
Eugene D. Serpentelli, A.J.S.C.

I consent to the form of the within Order.

  
Jonathan E. Drill, Esq.  
Attorney for Plaintiffs

I consent to the form of the within Order, but object to the entry of the within Order on the merits.

  
Donald T. DiFrancesco, Esq.  
Attorney for Defendant