

Demisa v. Holmdel

6/20

20 June 1986

Memorandum In Support of Motion For Protective  
Order

PI # 5190

Pgs 7

ML 000145 D

FRIZELL & POZYCKI  
296 Amboy Avenue  
Metuchen, New Jersey 08840  
(201) 494-3500  
Attorneys for Plaintiffs

Frank DiMisa and  
Ronald Acquaviva, trading under  
the name of Palmer Square Ltd.

Plaintiffs

vs.

Holmdel Township, a municipal  
corporation, and Bayshore  
Regional Sewerage Authority

Defendants

New Brunswick Hampton, Inc.

Plaintiff

vs.

Township of Holmdel

Defendant

Real Estate Equities, Inc., et al.

Plaintiffs

vs.

Holmdel Township, et al.

. SUPERIOR COURT OF NEW  
. JERSEY  
. LAW DIVISION  
. MONMOUTH/OCEAN COUNTY

. Docket No. L-054996-84PW

. MOUNT LAUREL  
. CIVIL ACTION

. On Transfer to The  
. Council on Affordable  
. Housing  
. Case Number

. Docket No. L-33910-84PW

. Docket No. L-015209-84PW

MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

## PROCEDURAL HISTORY

This motion is being made to the Affordable Housing Council pursuant to N.J.A.C.5:91-11.1 for interim relief to protect a limited water supply in Holmdel Township. Holmdel is one of twelve municipalities which succeeded in having exclusionary zoning cases pending against them transferred to the Affordable Housing Council as part of the New Jersey Supreme Court decision in Hills Development Company v. Township of Bernards \_\_ N.J. \_\_ , decided, February 20, 1986.

On March 21, 1986, Palmer Square Ltd. made a protective resources motion before Judge Eugene Serpentelli, A.J.S.C. requesting that he issue an order protecting the scarce water resources in Holmdel Township pending a determination by the Affordable Housing Council on Holmdel's petition for substantive certification. Oral argument was held by the Court and on May 22, 1986 an interim protective order was entered in this matter by Judge Serpentelli. (See A-1) As part of the Order, Palmer Square, Ltd. was directed to make application to the Affordable Housing Council for a scarce resources administrative order. Judge Serpentelli's order also provided that "at such time as the Council is able to act on the application for restraints and enters or declines to enter a scarce resources order, the order of the Court shall expire and be deemed superseded." (A-2)

### STATEMENT OF FACTS

At the hearing before Judge Serpentelli, the shortage of water was not disputed. Ronald Acquaviva submitted an affidavit on behalf of Palmer Square Ltd. stating that the Shorelands Water Company (which changed its name from West Keansburg Water Company on April 15, 1986) is responsible for water service in northern Holmdel Township. Its franchise area is almost exactly the same as the growth area in Holmdel Township. In his affidavit, Acquaviva stated that West Keansburg has unreserved water capacity for only 300 single family homes. In a reply affidavit, dated April 15, 1986, Michael Walsh, General Manager of Shorelands, stated that Acquaviva's number overstated Shoreland's water supply. According to Walsh, Shorelands had unreserved water supply for only 176 single family equivalent services units rather than 300 as Acquaviva stated.

Acquaviva concluded in his affidavit (paragraph 9) that a single family equivalent reservation could serve between 1.6 to 2.0 higher density units in a Mount Laurel inclusionary development; the reason for the higher number is that smaller homes have less persons living in them and therefore less water is used. Using Acquaviva's multiplier, 176 single family equivalent units of water could supply an inclusionary development of between 281 to 352 units. With a 20% set-aside requirement, such a development would produce 56 to 70 units of lower income housing. Using Acquaviva's projection of water supply for 300 service units, there is a water supply

for 480 to 600 inclusionary units, or 96 to 120 low and moderate income units.

The Council has assigned Holmdel a pre-credited fair share need of 642, after making a reduction for a 20% cap adjustment. It is apparent that even if the full remaining supply projected by either Acquaviva or Walsh were reserved for lower income housing, there would not be sufficient water to meet Holmdel's full fair share.

## LEGAL ARGUMENT

### I. THIS COUNCIL HAS AUTHORITY TO GRANT A PROTECTIVE SCARCE RESOURCES ORDER

The proposed procedural rules of the Council on Affordable Housing envision the type of Order which Palmer Square requests. The proposed Rule N.J.A.C.5:91-11.1 states:

at any time, upon its own determination, and upon the application of any interested party, and after a hearing and an opportunity to be heard, the Council may issue such orders as may be necessary to require that a participating municipality take appropriate measures to preserve scarce resources that may be essential to the satisfaction of the municipality's obligation to provide for its fair share of its region's present and prospective need for low and moderate income housing.

The Rule is consistent with the Supreme Court decision in Hills Development Company supra. There the Court concluded that "the Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate measures to preserve 'scarce resources', namely those resources that will probably be essential to the satisfaction of its Mt. Laurel obligation." Hills at p. 86 (slip opinion). Based on Hills and N.J.A.C.5:91-11-1 the Council has authority to grant the relief that Palmer Square seeks.

II. THE FACTS OF THIS CASE ESTABLISH THE NEED FOR A SCARCE  
RESOURCES PROTECTIVE ORDER

In Hills the Supreme Court suggested that the standard on a scarce resources motion is whether use of the scarce resources in the absence of a protective order is "likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future". See Hills supra page 87.

The facts in this case demonstrate beyond doubt that there will be a substantial adverse impact unless the remaining water supply is protected. With a protective order, Holmdel can achieve now some portion of its fair share; without the protective order, Holmdel is unlikely to achieve any of it in the near future because there will be no water for inclusionary Mt. Laurel developments. Furthermore, as Acquaviva in his affidavit (paragraph 7) states, the water company has no plans as to how in the future it can or will provide additional water on new developments beyond its present limited capacity. Thus, there is no source of water even on the drawing boards beyond the scarce resources that plaintiffs seek to protect. Finally, the record demonstrates the likelihood that the small remaining capacity will be utilized for some purpose other than Mt. Laurel if no order issues.

This danger is best illustrated by the testimony of Walsh, Shoreland's General Manager. In October 1984, Walsh testified in Court that Shorelands had a remaining unreserved

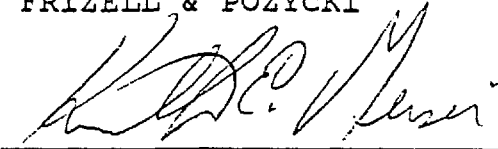
water capacity for 500 single family units (see p. 34 of transcript, line 16-24); in April, 1986 his affidavit stated that there was now only capacity for 176 units. At this pace, it is foreseeable that there will be no water capacity in Holmdel by January, 1987 unless a protective order is issued.

If no protective order is issued, there is a substantial likelihood that the Affordable Housing Council will be asked to approve a housing element for a municipality which has zero water capacity. A protective order is necessary to protect the status quo and to assure that there will be water supply to permit the construction of at least some part of Holmdel's fair share Mount Laurel obligation in the near future. For this reason, the applicants ask the Affordable Housing Council to enter an order prohibiting any new approval of developments by the Holmdel Township Planning Board if the applicant will get its water from the Shorelands Water Company. Such order should exempt Mt. Laurel developers providing it contains at least 20% low and moderate income housing, and should remain in effect at least until Holmdel obtains substantive certification.

Respectfully Submitted

FRIZELL & POZYCKI

by:

  
Kenneth E. Meiser, Esq.

Dated: June 20, 1986