

Affordable Living Corp v. West Windsor Twp. (1985)
(5/3)
Stenographic Transcript of Judge's Decision

9 pgs

ML0003715

In Union with the People
3505-210(1401) 1

*Conceptual
Appeals*

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MERCER/OCEAN OCEAN COUNTY
Docket No. L-17812-84PW

AFFORDABLE LIVING CORP., INC.,
a New Jersey corporation,

Plaintiff,

vs.

STENOGRAPHIC TRANSCRIPT
of
JUDGE'S DECISION

WEST WINDSOR TOWNSHIP,
MERCER COUNTY,

Defendant.

Place:

Ocean County Courthouse
Toms River, N.J.

Date:

May 3, 1985

BEFORE:

THE HONORABLE EUGENE D. SERPENTELLI, J.S.C.

TRANSCRIPT ORDERED BY: JAMES H. KNOX, Esq.
(Gebhart & Keifer)

APPEARANCES:

MESSRS. BISGAIRE & PANCOTTO
By CARL S. BISGAIRE, Esq.
Attorneys for Plaintiff.

Reported by:
DAVID G. VORSTEG, C.S.R.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 APPEARANCES (Continuing):

2 MESSRS. LUM, HOENS, ABELES,
3 CONANT & DANZIS
4 By PAUL A. SANDARS, III, Esq.,
Attorneys for Plaintiff Intervenors
Dr. And Mrs. C. Akeselrad.

5 MESSRS. GEBHARDT & KIEFER
6 By JAMES H. KNOX, Esq.,
Attorneys for Plaintiff Intervenor
Maneely, Inc.

7 MESSRS. SCHRAGGER, SCHRAGGER & LAVINE
8 By BRUCE M. SCHRAGGER, Esq.,
9 Attorneys for Defendant.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 THE COURT: That it does.

2 All right, well, I think we've rather
3 exhaustively covered this and the briefs were
4 extremely thorough. There are some issues which are
5 really not immediately pertinent to the legal issue
6 involved, that is, reliance, of course, which is a
7 factual issue and would have to be approached by a
8 plenary hearing, if we were to get there.

9 I don't intend to repeat all of the comments I
10 made concerning the state of the law as part of my
11 question to counsel. I think that would be a waste of
12 time, and I think my opinions in that regard are clear
13 from the record.

14 It should be clear that there is a statutory
15 provision for informal review of concept plans for
16 development. This has not been argued by either side
17 at great length; by the Planning Board, the planner.

18 The Municipal Land Use Act recognized at some
19 stage after the adoption of the Act, in the initial
20 adoption in 1975, that there was a lack of flexibility
21 in the application procedure and that the straight
22 preliminary final deliniation of the Act sometimes was
23 not in the interest of either the developer or the
24 municipalities.

25 Therefore, in 1979 Section 10.1 was added, and

1 that section reads, and I quote, "At the request of
2 the developer, the Planning Board shall grant an
3 informal review of a concept plan for a development
4 for which the developer intends to prepare and submit
5 an application for development. The developer shall
6 not be required to submit any fees for such an
7 informal review. The developer shall not be bound by
8 any concept plan for which the review is requested,
9 and the Planning Board shall not be bound by any such
10 review."

11 Now, having been intimately involved in the
12 initial drafting of the Municipal Land Use Act and
13 subsequent review of it while I was still practicing,
14 the purpose and thrust of that was to provide a
15 expeditious process by which a developer could get
16 some idea of how the municipalities would react,
17 without involving a great deal of expense. I might
18 note that, as I read, it anticipated there would not
19 be any fees involved in the application. What was
20 meant by "fees" is not clear to me either, by virtue
21 of personal knowledge about the statute.

22 But in any event it says what it says. I do
23 also know that as a result of that, and I know this
24 from the basis of having these matters presented to
25 me, that a number of municipal ordinances have now

1 incorporated a conceptual approval approach to large
2 scale development, be it residential or otherwise.
3 And, as I indicated at the outset, the Township of
4 Bernards adopted such an approach and had a conceptual
5 review process, which apparently provided for a
6 ten-year vesting of certain rights upon the obtaining
7 of such conceptual approval, and there was a rather
8 broad-scale application as there is here.

9 I think there could be no doubt that the state
10 of this application was extensive. I tend to believe
11 that it was not as extensive as a full-blown
12 preliminary would have been had that approach taken
13 place, and I think counsel candidly conceded that this
14 was the most expeditious manner by which a review of a
15 project of this magnitude could be obtained.

16 The issue really is twofold: One is whether
17 the Township intended to create a vested right
18 equivalent to the rights granted pursuant to the
19 Municipal Land Use Law and the rights granted to what
20 they designate as a "Preliminary Approval" as opposed
21 to a "Preliminary A Approval"; and, secondly, if they
22 did intend that, whether, in fact, they had the
23 authority and power to do that.

24 I am satisfied on both counts that the answer
25 to both questions is no, that the Preliminary A was

1 intended as a conceptual review, that its scope was a
2 creation of local option, that the statute does not
3 define the extent of the scope other than to talk of
4 these -- it may be burdensome, but then again it was
5 option, and the builder here had a choice not to
6 pursue that avenue and could have gone directly to the
7 preliminary.

8 It's clear to me from a reading of the
9 ordinance that the builder was on notice of the option
10 and that there was an alternative, of course, and that
11 a Preliminary B was necessary before final or with
12 final, and for that reason it's clear to me that the
13 builder had no right to rely upon the approvals
14 given. It's also clear to me that even if the
15 ordinance purported, the resolution purported to do
16 that, that the resolution itself would be ultra vires,
17 and I don't believe that the resolution did purport to
18 do that.

19 So that it is amply clear -- I don't even
20 think, very candidly, that it's a close call. I think
21 that the municipality has made it amply clear in its
22 ordinance as the procedure to be followed, and the
23 builder here chose not to follow that procedure and,
24 now, has, unfortunately, been caught what it perceives
25 to be a bad turn of events. I stress "what it

1 perceives to be a bad turn of events"; I'm not sure
2 that is a fact.

3 Now, I will reserve to Maneely the right to
4 argue reliance until we dispose of that as a matter of
5 law, because I think it can be disposed of as a matter
6 of law. But it hasn't been briefed, and I wouldn't
7 want the prejudice counsel in that respect. I will
8 also reserve the issue of whether the ordinance
9 itself, the resolution itself could possibly waive the
10 15 percent.

11 I am satisfied on my reading of the law that it
12 could not have and that Maneely, even if it were to
13 prevail, and even if the appellate review of my ruling
14 were to find that the action of the Planning Board
15 vested some rights, that the Planning Board could not
16 have waived the provisions of the municipal ordinance
17 as it did, and that it's clear to me that they did
18 waive the provisions of the municipal ordinance or at
19 least it perceived it its right to do so.

20 I believe that it did not have that right and
21 absent an amendment to the ordinance that Maneely is
22 and would continue to be bound by the 15 percent,
23 continue to be bound today if the resolution is
24 sustainable in other respects. Maneely has a right to
25 continue in this litigation based upon its

1 intervention.

2 I would encourage the parties to talk further
3 with regard to this. There was some suggestion that
4 the municipality was not cooperative. I don't want to
5 get into that. I know Mr. Schragger would say that's
6 not true. But it seems to me that the resistance of
7 the intervenor here to the zoning may not be in the
8 best interest of anyone involved in this litigation.
9 But that's a judgment that Maneely and the Township
10 will have to make together.

11 There may be a way to accommodate your
12 interests, and the Court will certainly seek to assist
13 in any way possible as far as that's concerned. But
14 at this point I am going to ask that Mr. Schragger
15 submit an order in conformance with what the Court
16 said, and I will deny the motion made by Maneely for
17 partial summary judgment.

18 All right, anything further?

19 MR. KNOX: Your Honor, I have the second
20 motion. That's the only other thing.

21 THE COURT: I mean on that issue.

22 With respect to --

23 MR. BISGAIRE: Your Honor, excuse me.

24 THE COURT: Yes.

25 MR. BISGAIER: I may have missed something. It

1 sounded to me at some point that you ruled on your
2 interpretation of the ordinance as to the 15 percent
3 requirement, but you initiated that discussion by
4 saying you were reserving the issue. I just wanted to
5 clarify.

6 THE COURT: Yes, it's reserved, because I don't
7 think counsel has had the opportunity to address it in
8 the brief. It wasn't raised in any of the pleadings
9 submitted. I raised it and I think in fairness,
10 although I've indicated my thinking, my understanding
11 of the law, in fairness counsel should have the
12 opportunity to review it.

13 MR. SCHRAGGER: Do you want to set a time frame
14 for that?

15 THE COURT: Yes. I would like to receive any
16 supplemental briefs within a period of ten days on
17 that issue, if that's not too stressful; a little more
18 time, it's all right too.

19 You both can meet it, that's fine.

20 -ooo-

21
22
23
24
25