ML – Rendeiro, Peck, Hov-Bilt, Inc. v. Lincoln Park ???

Brief in Support of Motion for Summary Judgment

pgs. 16

ML000710 B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:MORRIS/MIDDLESEX
COUNTIES
DOCKET #L-6001-78 P.W.

JOSEPH RENDEIRO, GEORGE C. PECK and HOV-BILT, INC., A New Jersey Corporation,

Plaintiffs,

vs.

BOROUGH OF LINCOLN PARK, a Municipal Corporation located in Morris County,

Defendant.

CIVIL ACTION

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

SCANGARELLA & FEENEY
Attorneys for Defendant
565 Newark Pompton Turnpike
Pompton Plains, NJ 07444

INDEX

FACTUAL STATEMENT..... 1

Introduction..... 1

Phasing Ordinance..... 1

Limitations Ordinance..... 3

Procedural Effect..... 4

Judgment of Compliance..... 7

POINT I - INTERIM PHASING AND PRIORITY RANKING HAVE BEEN REPEALED AND THE ISSUES ARE THEREFORE ACADEMIC AND MOOT..... 8

POINT II - THE DOCTRINE OF RES AJUDICATA AND COLLATERAL ESTOPPEL PRECLUDES THE PLAINTIFF FROM LITIGATING THE REMAINING ISSUES SET FORTH IN THE COMPLAINT..... 10

POINT III - THERE REMAINS NO GENUINE FACT ISSUE AND THE BOROUGH IS ENTITLED TO JUDGMENT AS A MATTER OF LAW..... 13

CONCLUSION..... 14

FACTUAL STATEMENT

Introduction. This Brief is submitted in support of Defendant's Motion to Dismiss the Complaint of the Plaintiffs in this action or, in the alternative, for Summary Judgment because there is no significant issue as to any material fact and the Borough is entitled to judgment as a matter of law.

Plaintiffs, owner of properties designated as a portion of tax Lots 7, 10, 12 and 14 in Block 3 filed a civil action challenging the validity of the Borough's Phasing of Development Ordinance, (Phasing Ordinance), adopted on March 18, 1985. At the time the Complaint was filed, the Plaintiff had pending before the Planning Board an application for development in the Set-Aside Zones, pursuant to Article VIA, VIB, and VIC of Chapter 28 of the Code of the Borough of Lincoln Park.

Phasing Ordinance. The Phasing Ordinance established a Borough-wide limitation upon development approvals in all Set-Aside Zones, including the lands of the Plaintiffs.* In particular, the Ordinance prohibited the Planning Board from granting approval to more than 600 units (120 Set-Aside units) through December 31, 1986, and in a subsequent Phasing allocation under the same Ordinance, the Planning Board was prohibited from approving more than 890 units (178 Set-Aside

---

* The Phasing Ordinance is annexed as Exhibit "A" to the Affidavit of Susan Small (Small Affidavit).

units) through December 31, 1988. The Ordinance further established a priority ranking if more than one application for development had been submitted and had not yet received preliminary approval and such application would bring the total number of Set-Aside units to more than the limitation numbers; that is, either a total of 600 units through December 31, 1986, or 890 units through December 31, 1988. In such event, the Planning Board was then authorized to grant priority to pending applicants based upon certain factors, after which ranking determination, the lesser ranked applications would be subject to dismissal. (See Small Affidavit para. 3, 4 and 5).

Plaintiffs' 27-Count Complaint is based upon challenges to four aspects of the Phasing Ordinance; first, the limitations provisions in the ordinance, restricting the total numbers of units to be developed to 600 units (120 Set-Aside units) through December 31, 1986 and 890 units over-all (178 Set-Aside units) by December 31, 1988; second, the priority ranking provisions in the Phasing Ordinance; third, the contention that the Phasing Ordinance prevents or substantially restricts, municipal compliance with Mt. Laurel II, and constitutes an excessive cost generating restriction unrelated to the protection of health or safety; fourth, the contention that the Phasing Ordinance constitutes a breach of the August 17, 1984, Settlement Agreement.

Limitations Ordinance. On September 9, 1985, the Borough adopted a Limitations of Development Ordinance (Limitations Ordinance), which had the effect of repealing the title, initial phasing limits and priority ranking provisions of the Phasing Ordinance.* The Limitations of Development Ordinance limits the number of multi-family units to be constructed in Lincoln Park, pursuant to the Negotiated Settle ment and Supplemental Agreement, to 890 units over-all, including 178 set-aside units through December 31, 1990. (Small Affidavit, para. 10).

There exists, however, no interim limitation upon approval of a lesser number of units at an earlier date such as existed in the Phasing Ordinance. Development applications are to be considered and acted upon in chronological order of being declared complete, except as may be modified by extensions of time. When preliminary site plan approvals have been granted for 890 units, including at least 178 set-aside units, the Planning Board is restricted from granting further site plan approvals for set-aside development, or from processing additional applications for set-aside development. (id., para. 11).

However, if by December 31, 1987, less than 150 building permits for lower income units have been issued or it appears to the Planning Board that less than 178 units will be constructed

---

*The Limitations Ordinance is annexed to the Small Affidavit as Exhibit "B".

on approved sites prior to 1990, the Planning Board is required to receive additional applications and act upon such applications in chronological order until sufficient applications have been approved to make it realistically likely that 178 set-aside units shall be constructed and rented or sold prior to December 31, 1990.

The Limitations of Development Ordinance constitutes an amendment in title and scope of the Phasing of Development Ordinance and to such extent, a repealer of the following inconsistent provisions thereof:

1. Interim Phasing Limitation, effective December 31, 1986, of 600 over-all units including 120 Mt. Laurel Set-Aside units.
2. Ranking.
3. Prioritization.

(id., para. 12).

Procedural Effect. Pursuant to the Negotiated Settlement and Order of Compliance of the Court, entered on October 31, 1984, Lincoln Park granted preliminary and final site plan approval to Society Hill at Morris II, Inc., a Hovnanian development, authorizing the construction of 276 condominium units, including 56 Mt. Laurel Set-Aside units. (id., para. 6). At the time the Complaint in this action was filed, Hov-Built, Inc. had pending before the Planning Board, an application for development for a 360 unit condominium housing project, including 72 Mt. Laurel Set-Aside units. (id, para. 3).

In addition to the Hovnanian approvals previously granted, there was pending before the Planning Board at the same time that the Hov-Built application was being considered, an application for development for a 384 unit project, including 77 Mt. Laurel Set-Aside units (Custom Living). (id, para. 7). The combined total of the Hov-Built, and Custom Living projects was 774 units, including 149 Mt. Laurel, Set-Aside units. The combined total of Custom Living and Hov-Built, added to the previously approved Hovnanian II project, aggregated 1020 units, including 205 Mt. Laurel Set-Aside units. Ibid. Given the total number of units approved and the total number of units then pending for consideration, the ranking, phasing and prioritizing provisions of the Phasing Ordinance were triggered. (id.,para. 8).

In the exercise of its powers under the Phasing Ordinance, the Planning Board conducted public hearings resulting in according a first priority ranking to the Custom Living development. There was, however, no formal dismissal action of the Hov-Built application because at about the time of the public hearings, Lincoln Park Borough was informed by the Public Advocate of his disapproval of certain aspects of the Phasing Ordinance. (id., para. 9).

Even in advance of the adoption of the Limitations Ordinance, the Defendant Borough adopted a Resolution of Intent to introduce

for consideration at a Public Hearing, the Limitations of Development Ordinance, and based upon the authority of such Resolution and the Governing Body's subsequent introduction of that Ordinance, the Planning Board determined that it would continue to review and process the Plaintiffs' application for development approval notwithstanding the secondary ranking status accorded Plaintiffs' application as a result of a previous hearing. It should be noted that no dismissal action was taken with respect to Plaintiffs' application as a result of the ranking process, and in fact, no ranking resolution was adopted, pursuant to the Phasing Ordinance. (id., para 13 & 14).

In full knowledge of the intent of the Governing Body, the Planning Board continued to process the Hov-Built application holding a Public Hearing therefor, on September 5, 1985 at which time the application was denied, and on October 3, 1985, adopted a Resolution of Memorialization* denying final site plan approval. (id., para. 15).

Briefly, the basis for the Planning Board's denial action was Hov-built's non-compliance with storm water management standards; insufficient proof to grant a waiver of the fill requirements; negative recommendations from the Morris County Planning Board; the feasibility of granting a Stream Encroachment Permit by the Department of Environmental Protection, questioned in the U.S. Fish and Wildlife

---

* Resolution of Memorialization is annexed as Exhibit "C" to the Small Affadavit.

Services' letter; failure to provide an acceptable plan for the removal of large amounts of muck and replacement with suitable fill; and failure to provide an acceptable plan for the transportation of such soil from the site. The denial was further based upon Hov-Built's failure to prove that the project would not cause increased flood heights, additional threats to the public health, safety and welfare, and the possibility of substantially impairing the appropriate use of adjoining property owners' land. It also left unanswered the question of the public safety by virtue of the location of the development within the prohibited area as defined by the Airport Hazard Safety Act of the State of New Jersey. (id., para. 16).

Judgment of Compliance. A Final Judgment of Compliance, dated September 11, 1985, in the Morris 27 action was entered as to Lincoln Park Borough. In so doing, this Court considered and approved the terms and conditions of Lincoln Park's Limitations of Development Ordinance. No appeal has been taken from the Order of the Court. It should be noted that the Plaintiffs' were duly noticed and made an appearance at the Judgment of Compliance Hearing.

POINT I

INTERIM PHASING AND PRIORITY RANKING HAVE BEEN REPEALED AND THE ISSUES ARE THEREFORE ACADEMIC AND MOOT

Plaintiffs' Complaint, although 27 counts in length, essentially challenges five aspects of the Defendant Borough's Phasing Ordinance:

1. interim phasing limitations effective December 31, 1986, and December 31, 1988;
2. ultimate set-aside development limitation through December 31, 1990;
3. priority ranking (or prioritization and ranking);
4. that Phasing prohibits or substantially limits municipal compliance with Mount Laurel II and is costs generating;
5. the Phasing Ordinance constitutes a breach of the August 17, 1984, Settlement Agreement.

Interim phasing limitations effective December 31, 1986, and December 31, 1988, have been repealed by the Limitations Ordinance and substitued by a single set-aside development limitation of 890 units, (178 set-aside units), through December 31, 1990. Priority ranking has also been repealed by the Limitations Ordinance The issue of interim phasing limitations and priortiy ranking are therefore moot and academic and are not subject to judicial

review. In Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. 1976, the court stated:

> "It is well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review. Oxfeld v. N.J. State Bd. of Ed., 68 N.J. 301, 303-304 (1975); In re Geraghty, 68 N.J. 209, 212-213 (1975); Sente v. Clifton Mayor and Municipal Counsel; 66 N.J. 204, 206 (1974). There are two basic reasons for this doctrine. First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical,a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest.Second, it is a premise of the Anglo-American judicial system that a contest engenered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court. Therefore, where there is a change in circumstances so that a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismis cases of moot, regardless of the stage to which the litigation has progressed."

Given the foregoing, the issues of interim phasing, prioritization and ranking are not subject to judicial review and the several counts of the complaint addressing challenges to these matters should be dismissed.

POINT II

THE DOCTRINE OF RES AJUDICATA AND COLLATERAL ESTOPPEL PRECLUDES THE PLAINTIFF FROM LITIGATING THE REMAINING ISSUES SET FORTH IN THE COMPLAINT

The issues of interim phasing and priority ranking having been mooted, the remaining issues left for ajudication center upon the scope and effect of the Limitations Ordinance. This Court fully considered and approved that Ordinance and entered a Final Judgment of the Borough's Compliance with its Mount Laurel obligation following a hearing held on September 11, 1985.

The Plaintiff secured advance notice of the proceeding in accordance with the Courts Order setting a hearing date and approving the Form of Notice dated July 30, 1985. The Form of Notice, Court Order dated July 30, 1985, Limitations Ordinance, and all other papers in support of entry of Judgment of Compliance, were served on Plaintiff by the Borough on or before August 15, 1985.*

Contrary to the express terms of the Order, Plaintiffs failed to file any formal objections thereto, except that it addressed a letter dated September 6, 1985, objecting to entry of a Final Judgment of Compliance based upon the Borough's

---

* Affidavit of Margaret Gardner annexed to Small Affidavit as Exhibit "D".

adoption of a "net fill requirement ordinance". Plaintiff's appeared at the Compliance hearing on September 11, 1985, and notwithstanding its lengthy argument on the record, unsuccessfully sought the right to participate in the proceedings. It was not until September 11, 1985, in Court, that the Plaintiff first addressed any objection to the entry of a Judgment of Compliance based upon the Limitations Ordinance.

The determination of the Court to approve Defendant's Limitation of Development Ordinance, is a final decision and is therefore binding upon Plaintiffs, and the doctrine of res ajudicata precludes Plaintiff's suit. This state requires for the application of res ajudicata, identity of causes, of parties or their privies, and of issues. Eatough v. Board of Medical Examiners, 191 N.J. Super. 166 (App. Div. 1983). Even if Plaintiffs challenges its "party" status in the judgment of compliance proceedings, they are nevertheless barred undr principles of collateral estoppel.

Collateral estoppel precludes relitigation of questions 'distinctly put in issue' and 'directly determined' adversely to the party against which estoppel is asserted. Eatough v. Board of Medical Examiners, 191 N.J. Super. 166 (App. Div. 1983) citing, City of Plainfield v. Public Service Electric & Gas, 82 N.J. 245, 257, 258 (1980).

For collateral estoppel to apply and to conclude an issue against a party, "the parties to that action need not be identical to the parties who litigated the issue in a prior proceeding... But at least the party precluded must have had (or his privy must have had) a full and fair opportunity to litigate the issue in the first action." Eatough, supra, at 175, citing N.J. Manufacturer's Insurance Co. v. Brower, 161 N.J. Super. 293, 297. (App. Div. 1978). Surely these Plaintiffs have been accorded every opportunity to litigate the issues raised by the Limitations Ordinance.

The Limitation Ordinance and the compliance thereof with the Settlement Agreement in particiular and Mount Laurel II in general constituted the main issues considered by this Court in the Judgment of Compliance proceedings. The Court having determined that the Limitations Ordinance is compliant and having entered a final judgment, the Plaintiffs are collateraly estopped from relitigating the same issues in this action.

POINT III

THERE REMAINS NO GENUINE FACT ISSUE AND THE BOROUGH IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

In the often cited case of Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 74, 110 A.2d 24, 27 (1954), the Court, in an opinion by then Associate Justice Brennan, stated that the summary judgment procedure "Is designed to provide for a prompt, businesslike, and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions, and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at trial." See also, Linn v. Rand, et als. 140 N.J. Super 212, 216, 356 A2d 15, 17 (App. Div. 1976).

R 4:46-2 sets forth the current test to be applied by the Court when ruling on a motion for summary judgment. "The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

All issues in this case have been either mooted as a result of the repeal of the Phasing Ordinance or judicially determined

by virtue of the entry of the judgement of compliance and the proceedings held thereon. Accordingly there exists no general issue for this court to ajudicate and the defendant Borough is entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth above the Defendant Borough of Lincoln Park, respectfully requests that Summary Judgment be entered or alternatively that the Planitff's Complaint be dismissed.

Respectfully submitted,

FRANK SCANGARELLA,
Linclon Park Borough Attorney