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Brief of  $\Delta$ , Typ of Tewksbury, in ~~Opp.~~  
opposition to T's motion for partial  
summary judgment

P-13

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ROBERT E. RIVELL, : SUPERIOR COURT OF NEW JERSEY  
 : LAW DIVISION  
 Plaintiff, : HUNTERDON COUNTY/  
 : MIDDLESEX COUNTY  
 vs. : MOUNT LAUREL  
 :  
 TOWNSHIP OF TEWKSBURY, : DOCKET NO. L-040993-84PW  
 a municipal corporation located :  
 in Hunterdon County, New Jersey : CIVIL ACTION  
 :  
 Defendant, :

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BRIEF OF DEFENDANT, TOWNSHIP OF TEWKSBURY, IN OPPOSITION  
 TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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## STATEMENT OF FACTS

This action, in lieu of prerogative writs, was commenced by Robert E. Rivell against the Township of Tewksbury substantially based on Mt. Laurel II claims. (So. Burlington County NAACP v. Mt. Laurel Twp., 92 N.J. 158 [1983]). Many factual issues have been raised by the pleadings and through discovery. These issues include the compliance of the Township's land use ordinance (a portion of which establishes a zone affording substantial density bonuses and requires a mandatory set-aside for lower income housing, as well as other provisions specifically addressing lower income housing), the "fair share" of the Township, and the appropriateness of the State Development Guide Plan designation of the limits of a "growth area" affecting a portion of the Township.

Plaintiff has now filed a motion for partial summary judgment. This motion is confined to the "constitutionality" of Defendant's Development Regulations Ordinance.

In support of this motion, Plaintiff has filed a certification of his attorney, Thomas J. Beetel. (An additional joint Certification of Robert Tublitz and Robert E. Rivell has been filed, but this Certification is stated, in its title, to be filed in response to Defendant's motion, requesting transfer to the Council on Affordable Housing.)

As will be more extensively discussed below, Mr. Beetel's certification is almost exclusively composed of opinion of the attorney, argument, and hearsay or other "factual" material which is not within the personal knowledge of the party making the certification. The certification notes suspicions about the manner of introduction and passage of the ordinance which "should be explored at the trial of this matter." (Beetel Certification, paragraph 4). It refers to statements allegedly made in a deposition and by real estate appraisers, though there is no submission on this motion of the deposition referred to or any certifications from the appraisers.

Defendant has filed in opposition to this motion certifications from its professional planner, William Queale, Jr., from its Township Clerk and Planning Board Secretary, Harlan K. Welsh, and from the custodian of the records in its Construction Office, Rose Wickham.

LEGAL ARGUMENT

POINT I

THE CERTIFICATION SUPPORTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT IS IMPROPER

In support of his Motion for Summary Judgment and in opposition to Defendant Township of Tewksbury's Motion for Transfer to the Council on Affordable Housing, Plaintiff has submitted certifications from his attorney, his planner and on his own behalf. Each and every certification so submitted is basically composed of objectionable hearsay, statements which are not within the personal knowledge of the individual certifying as to their truth, conclusions, opinions and legal argument.

R. 1:6-6 provides as follows:

The motion for summary judgment shall be served with briefs and with or without supporting affidavits. 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...

The certifications submitted on behalf of Plaintiff are not in compliance with this court rule and are improper and should be disregarded. "The affidavits may not be based merely upon information and belief or other objectionable hearsay or they will be disregarded." Beckwith v. Bethlehem Steel, 185

N.J. Super. 50, 56-57 (Law Div. 1982). See also Smithey v. Johnson Motor Lines, 140 N.J. Super. 202, 206 (App. Div. 1976) and Patrolman's Benevolent Assoc. v. Montclair, 70 N.J. 130, 134 fn.1. (1976).

The certifications submitted by Plaintiff are so extensively founded on objectionable hearsay, conclusions, and opinions that they should be completely disregarded. For example, Paragraph 3 of the Certification of Thomas Beetel, Esquire, alleges that Defendant's ordinance was passed without any studies being made. The statement is purportedly based on a deposition of Gerhardt Fuchs but there is no direct quote from the transcript and no copy of it is attached. The Certification goes on: "I have been advised on good authority that this (the ordinance) was merely an attempt to have something on the books..." No certification is provided from this "good authority," and it seems unlikely that, even if this "good authority" did make the certification, his statement could ever be more than a lay opinion.

In Paragraph 4, further assertions based on hearsay are made, this time from statements supposedly made by Dale Blazure. No certification is submitted from Dale Blazure.

In Paragraph 6, the certification cites further hearsay that "leads to the conclusion that the Defendant in realty [sic] is continuing its exclusionary zoning practices..." The certification continues in a similar manner throughout; almost every paragraph is filled with objectionable matter.

The Joint Certification of Robert Rivell (which he also makes on behalf of his wife) and of Robert Tublitz is stated, in its title, to be filed in opposition to a motion to transfer the case to the Council on Affordable Housing. Nevertheless, it is appropriate to note that this Certification also is filled with hearsay and objectionable matter and should be disregarded pursuant to R. 1:6-6.

Certifications of the sort Plaintiff has filed present a particular problem for Defendant. To respond to them, Defendant must either, following a sort of Gresham's Law, file similarly objectionable certifications, based perhaps on Defendant's attorney's understanding of things; or, in the alternative, chase about madly trying to obtain certifications from all sorts of people to scotch the hearsay and rumors and deal with the argumentative and tendentious comments, on the chance that the Court might give them some credit.

How does one deal, for example, with a statement that "Defendant realized its Ordinances were defective, either constitutionally, procedurally or practically..." (Beetel Certification, Paragraph 8)? To be on the safe side, should the Mayor certify to the Court otherwise and burden the Court with a certification as useless as Plaintiff's, or should Defendant trust the Court will disregard the language in the Plaintiff's certification.

Finally, and most importantly, it is extremely objectionable and quite distressing to have statements included in certifications, as part of a court record, about settlement negotiations, including inferences that the Plaintiff was reasonable in these negotiations and Defendant was not. While the writer of this Brief can recall many occasions over the years when the content of negotiations may have been disclosed off the record and in camera in an effort to resolve cases, he can think of no instance when any attorney utilized a characterization of negotiations as "evidence" on a motion. Besides being contrary to the long established law and sound policy which excludes from evidence the content, or even the fact, of settlement negotiations, using settlement negotiations, as here, in a certification puts the possibility of any further negotiations in jeopardy. Can a party be expected to continue to negotiate in any case if his opponent can use the opponent's version of settlement talk in evidence before a court. How can one party refute the other's characterization of negotiations in a certification except by responding with his own characterization, which perhaps must go so far as to make evidential the actual settlement offers in an effort to establish whose were more reasonable. Defendant urges the Court to strike from Plaintiff's certifications all references to settlement negotiations.

POINT II

THE CONSTITUTIONALITY OF TOWNSHIP OF  
TEWKSBURY'S ZONING ORDINANCE IS NOT  
APPROPRIATE FOR SUMMARY DISPOSITION

Summary judgment is appropriate only where "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." R. 4:46-2.

"[I]t is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact..." All inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated. (Cite omitted.) Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954).

In the instant case, Plaintiff, the moving party, has not excluded any reasonable doubt as to the constitutionality of Defendant, Township of Tewksbury's zoning ordinance. First, as Defendant has previously argued, the Certification submitted by Plaintiff in support of this motion do not comply with the Rules of Court and should be disregarded. Second, even were the offending certification to be considered, it in no way shows

that no material questions of fact exist concerning the constitutionality of the ordinance. The Certification of Thomas Beetel, asserts that Defendant's July, 1984, ordinance was "rushed through" without adequate studies having been made. (Beetel Certification, Paragraph 4). William Queale, Jr., Defendant's planner, states in his Certification in opposition to the motion that the ordinance was preceded by and based on extensive study and consideration. (Queale Certification, Paragraph 2). On pages 1 through 6 extracted from his prior report filed with the Court and appended to his present Certification, Mr. Queale recounts the history of study and Township action leading to the ordinance. Moreover, Harlan K. Welsh, the Township Clerk and Planning Board Clerk, certifies that the ordinance was referred to and reported on by the Township Planning Board.

Mr. Beetel's certification further contends that Plaintiff's agents have determined that the land zoned for low and moderate income housing by Defendant are unsuitable or somehow unavailable for development. Mr. Queale's certification and report maintains the contrary is true. (Queale Certification, Paragraph 2 and attached report, pp. 4-6, 19-31).

Furthermore, there is factual dispute concerning the valuation of the land zoned for low and moderate income housing which bears on the economic feasibility for development of areas zoned for lower income housing. This factual dispute is readily apparent from a perusal of Plaintiff's Brief on this motion at Page 2.

Additionally, there are factual disputes between the parties as to the propriety of the SDGP growth area designation in Tewksbury Township and as to the "fair share" number which should be applicable to the Township. These issues are directly involved in determining whether the areas zoned for lower income housing production in the Township are appropriate. (See Beutel Certification, Paragraph 8 and report attached to Queale Certification, pp. 4-6, 21-31).

Plaintiff's Brief on this motion goes to great lengths to discuss these issues and their bearing on the Township's present ordinance. Indeed, the Brief reads like a trial brief rather than one supporting a summary judgment. Arguments are made why the SDGP designation should be altered (Plaintiff's Brief, pp. 5-16), and it is acknowledged throughout the text that this will be a factual issue for resolution at trial. Similarly, Plaintiff's Brief presents extended discussion about determination of a fair share (Plaintiff's Brief, pp. 17-31). It discusses various approaches, acknowledges deficiencies (Plaintiff's Brief, p. 28), and, interestingly, advances fair share numbers which are different from those contained in a previous report filed by Mr. Tublitz with the Court (cf. Plaintiff's Brief, pp. 19-20 and Tublitz report, "Determination of Tewksbury Township's Low and Moderate Income Housing Obligation," Oct. 1, 1984).

Beyond any other argument, in view of the multiplicity of issues and their interrelated nature, it is simply not feasible to entertain a summary judgment of the limited nature Plaintiff

asks. It also seems that, even assuming such a limited summary adjudication could be granted, there would be no simplification of issues or shortening of a trial.

Clearly, substantial factual issues, contested by the parties, bear on the constitutionality of Tewksbury's ordinance. These issues require testimony and an evaluation by a trier of fact. The court on a motion for summary judgment is not supposed to weigh the evidence. "Issues of credibility are ordinarily for the trier of fact, and the judge does not function as a trier of fact in determining a motion for summary judgment." Judson, 17 N.J. at 75.

Municipal ordinances are entitled to presumptive validity, Hutton Park Gardens v. Town Council, Town of West Orange, 68 N.J. 543, 564-65 (1975), even the court's ruling in Mt. Laurel II does not remove the presumptive validity which attaches to a municipal zoning ordinance, other than for one adopted after a court order invalidating a prior one. Id., 92 N.J. at 306. Summary judgment is regarded as being particularly inappropriate to an action in lieu of prerogative writs. "Note that the summary judgment technique is inappropriate in summary judgment litigation involving either an attack on the constitutionality of a zoning ordinance or an appeal from local action on a variance application. In both cases, the action is to be heard by way of a non-jury plenary trial on the record below, supplemented if necessary in respect of the constitutional issues by trial testimony. See Odabash v. Mayor and Council,

Dumont 65 N.J. 115, 121, fn.4 (1974)." Pressler, N.J. Court Rules (1985) at 835.

Summary judgment is inappropriate in the case at bar due to the substantial factual issues in dispute, and Plaintiff's total lack of meeting the burden of proof required to establish either a right to summary judgment or the unconstitutionality of the ordinance in question. Defendant, Township of Tewksbury, requests that Plaintiff's Motion for Summary Judgment be denied.

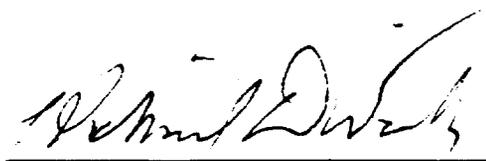
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Motion for Partial Summary Judgment be denied.

Respectfully submitted,

GEBHARDT & KIEFER

BY

  
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RICHARD DIETERLY