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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6510-05T5

HJB ASSOCIATES, INC.,

Plaintiff-Appellant,

v.

COUNCIL OF THE BOROUGH OF
BELMAR and BOROUGH OF
BELMAR,

Defendants-Respondents.

Argued May 23, 2007 – Decided: July 11, 2007

Before Judges A. A. Rodríguez, Collester and Lyons.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, L-2640-05.

Paul V. Fernicola argued the cause for appellant (Bowe & Fernicola, attorneys; Mr. Fernicola, of counsel and on the brief; Robert E. Moore, on the brief).

Robert Beckelman argued the cause for respondents (Greenbaum, Rowe, Smith and Davis, attorneys; Mr. Beckelman, of counsel and on the brief).

PER CURIAM

Plaintiff, HJB Associates, Inc., owns property in an area that the Borough and Council of Belmar (Borough) designated as "in need of redevelopment" pursuant to the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -49. Such a designation subjects the property to taking by eminent domain. N.J.S.A. 40A:12A-8c; Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, ___ N.J. ___ (2007) (slip op. at 2-3). Plaintiff unsuccessfully challenged the Borough's designation in the Law Division. We reverse.

These are the salient facts. The Borough retained a consultant, Schoor DePalma, Inc., to investigate whether certain parcels located within the Borough, which became known as the "Transit Village Study Area" (Study Area), qualified as an area in need of redevelopment, pursuant to the LRHL. Plaintiff's property, which houses Freedman's Bakery, is within the Study Area. David Roberts of Schoor DePalma performed the investigation and made the following findings with respect to the Study Area: (1) the lack of proper utilization of the property causes a "not fully productive condition of land;" (2) the lack of investment in the Study Area "prevents outside developers, investors, or current property owners from making significant improvements" to the land; and (3) "create[s] an unattractive environment for private investment of any

significant commercial or residential development." Schoor DePalma recommended that these problems be corrected by the Borough redeveloping the area. Roberts in the Schoor DePalma investigation report opined that the criteria that "are pertinent to this redevelopment investigation are statutory criteria [N.J.S.A. 40A:12A-5(a), (d) and (e)]."

With respect to plaintiff's property, the Schoor DePalma investigation report concluded that it: (1) had a faulty and obsolete layout; and (2) had an "other condition" (contamination) that "causes a stagnant economic condition of the properties in the study area [that] may tend to depress property values." According to Schoor DePalma, plaintiff's property's faulty and obsolete layout satisfies the criteria set forth in N.J.S.A. 40A:12A-5(d) and (e), and the "other condition" satisfied the criteria set forth in N.J.S.A. 40A:12A-5(e).

The Schoor DePalma investigation report explained that in the early 1990's two abandoned 2,000 gallon heating oil tanks under the bakery had leaked into the Shark River and contaminated soil on plaintiff's property and on adjacent properties (including a borough-owned parking lot). Plaintiff's remediation efforts had cost $60,000 to $80,000 per year. In 2001, the New Jersey Department of Environmental Protection

(NJDEP) reported that the clean-up efforts had resulted in only "limited success."[1]

After reviewing the Schoor DePalma investigation report, the Borough's Planning Board (Board) held a public hearing on whether the Study Area should be designated in need of redevelopment. By resolution dated March 21, 2005, the Board adopted Schoor DePalma's findings and recommended that the Study Area be designated in need of redevelopment, pursuant to N.J.S.A. 40A:12A-5(a), (d) and (e). Additionally, the Board found that properties within the Study Area satisfied the criteria set forth in N.J.S.A. 40A:12A-3 and -5(a).

On April 13, 2005, the Mayor and Council passed a resolution adopting the Board's recommendation and authorizing the Board to prepare a redevelopment plan for the Study Area. Plaintiff challenged that designation in the Law Division, alleging that: (1) the designation was not supported by credible evidence; and (2) contrary to the LRHL, the Borough entered an agreement to redevelop the Study Area prior to adopting a redevelopment plan for it. Following oral argument, the judge issued a written opinion dismissing the complaint and finding that the Borough's decision was not arbitrary and

[1] Plaintiff's argue that the NJDEP report is out dated and that it is about to receive a "No Further Action" letter from the agency due to post-2001 remediation efforts.

capricious, and that the Borough did not enter an agreement to redevelop the Study Area prior to adopting a plan.

On appeal to us, plaintiff contends that the Borough failed to establish the criteria required by N.J.S.A. 40A:12A-5(d) because, the Borough "performed no analysis that the internal operation of Freedman's Bakery was a detriment to the public health safety and welfare." We agree that the Borough has made an insufficient showing that the criteria set forth in N.J.S.A. 40A:12A-5(d) has been met.

We begin our analysis by agreeing with plaintiff that the Borough's statutory interpretation of the LRHL is not entitled to a presumption of validity. When the Law Division reviews any decision where a municipal body is allowed to exercise discretion, the judge must recognize that the Legislature has vested the municipality with discretion to make the decision involved. Booth v. Bd. of Adjustment of the Twp. of Rockaway, 50 N.J. 302, 306 (1967). A rebuttable presumption arises that the municipal body has properly exercised its discretion. Harvard Enter., Inc. v. Bd. of Adjustment of the Twp. of Madison, 56 N.J. 362, 368 (1970). Therefore, the trial court may not substitute its judgment for that of the municipal body unless it is proven that: (1) the action was clearly arbitrary, capricious or unreasonable, ibid., Kriggo v. Twp. of Long Beach,

109 N.J. 601, 611 (1988), Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296-97 (1965); (2) the action violated legislative policies expressed or implied in the governing law; or (3) the findings on which the decision is based are not supported by the evidence. Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963); see Evesham Twp. Zoning Bd. of Adjustments v. Evesham Twp. Council, 86 N.J. 295, 302 (1981). However, statutory interpretation is a judicial, not administrative function. Mayflower Securities Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973). Thus, courts are in no way bound by the public body's interpretation of the law. Ibid.

Here, the Law Division judge accepted the Borough's expansive reading of N.J.S.A. 40A:12A-5(d). This was an error. That subsection of the LRHL provides:

> 40A:12A-5. Conditions within delineated area establishing need for redevelopment
>
> A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing . . . the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:
>
> . . .
>
> d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive

> land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.
>
> [Ibid.]

From our careful reading of the record, we conclude that this standard was not met here.

The statutory language of subsection 5(d) requires that the conditions listed in the first part of the sentence be "detrimental to the safety, health, morals or welfare of the community." Although the Schoor DePalma investigation report, on which the Borough relies, may have established Freedman's Bakery's: "obsolescence," "faulty arrangements or design," "excessive land coverage," "deleterious land use" or "obsolete layout," there is no proof whatsoever that these conditions are detrimental to the safety, health, morals or welfare of the community. See Spruce Manor Enter. v. Borough of Bellmwar, 315 N.J. Super. 286 (Law Div. 1998) (holding that failure to meet current design standards could not, by itself, serve as a basis for a designation that area was in need of redevelopment). Moreover, the Constitution restricts government redevelopment to "blighted areas." Gallenthin, supra, ___ N.J. ___ (slip op. at 41-42) (citing N.J. Const. art. VIII, § 3, ¶ 1). As the Supreme Court observed in Gallenthin, "[t]he New Jersey Constitution

does not permit government redevelopment of private property solely because the property is not used in an optimal manner." Ibid. Freedman's Bakery is not a blighted area even if its design is not optimal for its commercial purpose.

Plaintiff also contends that the Borough improperly applied N.J.S.A. 40A:12A-5(e) to the property's internal design and operation. That subsection requires, as a prerequisite to designation as in need of redevelopment, that there be,

> A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.
>
> [Ibid.]

After oral argument in this appeal, the Supreme Court decided the Gallenthin case.[2] In Gallenthin, the Court held that the Legislature intended N.J.S.A. 40A:12A-5(e) to apply in areas that, as a whole, are stagnant and unproductive because of "issues of title, diversity of ownership, or other conditions of the same kind." Gallenthin, supra, ___ N.J. ___ (slip op. at 42). The Court held that "[t]he phrase 'other conditions' is

[2] Pursuant to Rule 2:6-11(d), plaintiff and the Borough have submitted letters bringing the Gallenthin opinion to our attention.

not a universal catch-all that refers to any eventuality." Id. at 33. Rather, it refers to issues of title or diverse ownership. Ibid.

Applying that standard here, we conclude that the Borough has failed to establish the criteria set forth in N.J.S.A. 40A:12A-5(e). The claimed faulty and obsolete layout of the bakery has no relation to the safety, health, morals, or welfare of the community outlined in subsection 5(e). Neither does the contamination of a portion of plaintiff's property, which has been remediated, albeit with "limited success" according to the NJDEP. We agree with the plaintiff's contention that "the presence of environmental contamination at the property is insufficient to serve as grounds for a determination that the environmental condition qualifies as an 'other condition' as defined by N.J.S.A. 40A:12A-5(e)." See Gallenthin, supra, ___ N.J. ___ (slip op. at 37-38). The faulty and obsolete layout and contamination are not "other conditions" within that section of the statute, as interpreted by the Supreme Court. Ibid. Given this conclusion, we do not reach plaintiff's contention concerning the expert testimony it presented regarding the anticipated receipt of a "No Further Action" letter from the NJDEP. Nor do we reach plaintiff's contention that the judge should have voided the master redevelopment agreement with Gale

Belmar, LLC "as there was no redevelopment plan yet in place for the [] Study Area."

Accordingly, we reverse the Law Division's order, and invalidate the Borough's April 13, 2005 redevelopment designation with respect to plaintiff's property.

Reversed.