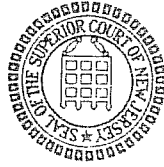


SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
MARIANNE ESPINOSA
JUDGE



COURTHOUSE
ELIZABETH, NEW JERSEY
07207

November 5, 2007

Robert A. Kasuba, Esq.
Sills, Cummis & Gross, P.C.
650 College Road East
Princeton, New Jersey 08540

Jeffrey R. Surenian, Esq.
2052 Route 35, Suite 201
Wall, New Jersey 07719

Re: Roselle Park VP, LLC v. Borough of Roselle Park, et al.
Docket No. UNN-L-338-07

Dear Counsel:

This letter shall set forth the findings of fact and reasons for the rulings in the enclosed Orders dated November 5, 2007.

The salient facts are summarized as follows:

Plaintiff Roselle Park VP, LLC filed the Complaint in this *Mt. Laurel* litigation against the Borough of Roselle Park, the Planning Board and the Borough Council on January 31, 2007.

Pursuant to regulations adopted by the Council on Affordable Housing ("COAH") in 1986, Roselle Park was obliged to provide 53 affordable housing units, consisting of 40 rehabilitation units and 13 new construction units in the period from 1986 through 1993. COAH calculated Roselle Park's second round obligations for the period 1987-99 to be 36 units (20 rehabilitation units and 16 new construction units). Pursuant to the third round regulations COAH adopted for 1999-2014, Roselle Park's prior round obligation was calculated to be 16 units and Roselle Park's rehabilitation share was

recalculated to be 50 units. In addition to satisfying these obligations, Roselle Park is required to meet its growth share obligation.

Notwithstanding the decades-old obligation to take affirmative action to provide “a realistic opportunity for the construction of its fair share of low and moderate income housing,” *Southern Burlington County N.A.A.C.P. V. Twp. Of Mount Laurel*, 92 N.J. 148, 222 (1983) (“*Mt. Laurel II*”), Roselle Park has not received approval of a Fair Share Plan by either COAH or the Superior Court. Roselle Park did not file a Fair Share Plan and Housing Element with COAH before this lawsuit was filed. Roselle Park failed to include a Housing Element, a Fair Share Plan or an affirmative marketing plan in its 1997 Master Plan and failed to draft implementing ordinances.

It is undisputed that, prior to the filing of this lawsuit, Roselle Park had not adopted land use ordinances that addressed the Borough’s fair share of affordable housing. The Borough took some steps regarding redevelopment and the adoption of a Housing Element and Fair Share Plan toward addressing its fair share obligation. However, the Housing Element and Fair Share Plan was not adopted until June 2007. The Borough admits that it has not created 50 creditworthy rehabilitation units and that the 2007 plan acknowledges that Roselle Park is not entitled to credits toward that obligation.

It is undisputed that the Borough intended to rely upon the redevelopment of a 4.8 acre site owned by 450 West Westfield Realty, LLC (“the Romerovski site”) for construction of a substantial portion of its fair share of low and moderate income housing. In September 2006, the Planning Board officially recommended the use of this site to the Borough Council as a “Redevelopment Area.” Indeed, this site is the only property discussed in the Redevelopment Plan.

In November 2006, 450 West Westfield Realty, LLC entered into a joint venture agreement with AvalonBay Communities, Inc., forming plaintiff Roselle Park VP, LLC, for the purpose of developing the property.

Israel Braunstein, the managing member of 450 West Westfield, LLC, had participated in discussions with the mayor and municipal officials as well as a number of developers over a period of time regarding the redevelopment of his property. In February 2006, he submitted a “concept plan” depicting 208-221 residential apartment

units to the mayor and discussed the possibility of developing as many as 280-300 units. In August and again in December 2006, Braunstein and Ron Ladell, a developer associated with Avalon Bay Communities, met with borough officials and discussed their desire to develop a 300 residential unit development. The parties disagree as to whether affordable housing was discussed as a component of this development.

Plaintiff contends that the defendants expressed singular distaste for the development of a rental apartment complex on the site. The defendants dispute this contention. It is, however, noteworthy that the Redevelopment Plan proposed prior to the litigation and adopted in March 2007, after the lawsuit was filed, prohibited an apartment rental complex on the site. Roselle Park now concedes that rental units are required for compliance with its *Mt. Laurel* obligations. The Redevelopment Plan has been amended, eliminating this restriction, and the amended Plan has been adopted by ordinance.

Plaintiff has filed motions and a cross-motion for partial summary judgment seeking the following declarations:

1. Roselle Park has not complied with its affordable housing obligation.
2. Roselle Park's Redevelopment Plan is invalid to the extent that it prohibits an apartment rental community.¹
3. Plaintiff engaged in sufficient pre-suit negotiations.
4. Plaintiff's proposed 15% set aside constitutes a "substantial contribution" toward Roselle Park's affordable housing obligation.

In addition, Plaintiff requests the appointment of a special master, a stay of discovery and an order compelling Roselle Park to enter into good faith settlement discussions.

Defendants have filed a motion for summary judgment to dismiss the Complaint. In addition, defendants seek permission to file a Housing Element and Fair Share Plan with COAH, temporary immunity and an order compelling discovery.

I. Partial Summary Judgment is granted, declaring that the Defendants have not satisfied their *Mount Laurel* Obligation.

The Supreme Court defined the *Mount Laurel* obligation as follows:

¹ This motion was mooted by the Borough's amendments to its Redevelopment Plan and ordinance.

Satisfaction of the *Mount Laurel* obligation shall be determined solely on an objective basis: if the municipality has *in fact* provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the *Mount Laurel* obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it.

[*Mt. Laurel II, supra*, 92 N.J. at 220-221

(Emphasis in original)]

The Court could not have been clearer in instructing that the good faith or bona fides of a municipal effort that fell short of such actual compliance “shall no longer suffice” and was, in fact, “irrelevant” in determining this issue. *Id.* at 221, 222.

While this lawsuit was pending, both the Redevelopment Plan and ordinance were revised to eliminate the prohibited exclusion of rental properties from the redevelopment area. The constitutional sufficiency of the ordinance is reviewed as amended. *Van Dalen v. Washington Twp.*, 205 N.J. Super. 308, 333 (Law Div. 1984). However, even as amended, the ordinance has failed to provide “a realistic opportunity for the construction of its fair share of low and moderate income housing.” All that the revision accomplished was to eliminate an exclusion of rental housing that was legally prohibited. What remains is an ordinance that still includes provisions that have an adverse impact upon the construction of low and moderate income housing. Therefore, the ordinance does not pass constitutional muster.

Although the defendants have not explicitly admitted that Roselle Park has failed to comply with its *Mt. Laurel* obligation, they do concede the essential facts that support such a conclusion. Therefore, the preliminary determination here – that Roselle Park has not met its *Mt. Laurel* obligation – is an ineluctable conclusion.

Therefore, the course of action here, as dictated by the Supreme Court in *Mt. Laurel II*, is that the court “shall order the municipality to revise its zoning ordinance within a set time period to comply with the constitutional mandate.” *Mt. Laurel II, supra*, 92 N.J. at 278. The Court further directed that, “if the municipality fails adequately to revise its ordinance within that time, the court shall implement the remedies for

noncompliance outlined below; and if plaintiff is a developer, the court shall determine whether a builder's remedy should be granted." *Id.*

Accordingly, the court directs the defendants to revise Roselle Park's zoning ordinance to satisfy its *Mt. Laurel* obligations by February 5, 2008. To this end, the defendants shall incorporate such affirmative devices as those discussed in *Mt. Laurel II*, as may be necessary to accomplish this goal. In the event that this goal remains unsatisfied, the remedies for noncompliance shall be reviewed at that time.

A special master shall be appointed to facilitate this process and the parties are directed to submit the names and curriculum vitae of no more than three candidates for this appointment no later than November 16, 2007 if they cannot agree upon a special master themselves. The reasonable fees of the special master shall be paid by the municipality.

II. The defendants' request to permit it to file a Housing Element and Fair Share Plan with COAH is denied.

Where, as here, a municipality has not filed a Fair Share Plan and Housing Element with COAH before litigation is instituted, the party who institutes *Mt. Laurel* litigation should not be required to pursue and exhaust administrative remedies, resulting in a further delay in resolution of the matter. *Deland v. Twp. of Berkeley*, 361 N.J. Super. 1, 17 (App. Div.), certif. den., 178 N.J. 32 (2003); *Toll Bros. v. Twp. of West Windsor*, 334 N.J. Super. 77, 92 (App. Div. 2000), certif. den., 168 N.J. 295 (2001) ("the FHA gives a municipality 'the option to adopt a fair share plan that conforms to COAH regulations or take its chances in court.'"); N.J.S.A. 52:27D-309(b). Given the history of this matter, the court does not consider this case appropriate for a transfer to COAH at this time.

III. The defendants' request for temporary immunity from builders' remedy suits is granted until February 5, 2008.

Plaintiff's argument that this request should not be granted in the absence of an admission by the municipality that it has failed to comply with its obligation is unpersuasive. As noted earlier, although there has not been such an explicit concession by the defendants, the municipality has not argued that it has actually satisfied its

obligation and does not dispute that further action is required to satisfy its obligation. While these efforts cannot substitute for the actual satisfaction of the obligation as defined in *Mt. Laurel II*, they do distinguish Roselle Park from municipalities that have vigorously opposed and litigated efforts to require them to take action to comply with the constitutional mandate. Equitable principles that support the grant of temporary immunity are not limited to circumstances in which there is such an explicit concession. See, e.g., *Allan-Deane Corp. v. Twp. of Bedminster*, 205 N.J. Super. 87, 138 (Law Div. 1987). Decreasing the borough's exposure to multiple actions that could limit its zoning options through such a grant of temporary immunity inures to the benefit of all parties here. See, *J.W. Field Co. v. Twp. of Franklin*, 204 N.J. Super. 445, 456 (Law Div. 1985).

IV. Defendants' motion for summary judgment dismissing the Complaint is denied.

The thrust of the defendants' argument is that the plaintiff's conduct is insufficient to establish its entitlement to a builder's remedy. Specifically, the defendants argue that the plaintiff has failed to attempt to obtain relief without litigation; that the plaintiff has not acted in good faith throughout the process; that the plaintiff has failed to create a proposed project that could be evaluated by the borough before instituting suit; that the plaintiff has failed to show that it succeeded in litigation and was the catalyst for change, and that the proposed set aside does not qualify as "substantial."

Whether the plaintiff ultimately succeeds in establishing its entitlement to a builder's remedy is not the issue to be determined within the context of this summary judgment motion. Of the arguments presented by defendants, the only issues that would warrant the dismissal of the complaint at this point are those that posit that the plaintiff's conduct or lack thereof constitutes an absolute bar to a builder's remedy.

The record here fails to support a conclusion that the plaintiff acted in bad faith. This is not a case in which *Mt. Laurel* litigation has been instituted for the purpose of advancing an unrelated interest. The successful development of the property here requires modification of Roselle Park's ordinance that is directly related to the satisfaction of its *Mt. Laurel* obligation. The Supreme Court rejected a similar claim of bad faith against a developer in *Toll Bros.*, noting that the developer "communicated with

the Planning Board, cautioning that zoning ordinances would have to be amended to implement its project and expressing its willingness to settle.” *Toll Bros. v. Twp. of West Windsor*, 173 N.J. 502 560 (2002). The plaintiff’s conduct here was similar. It is undisputed that Mr. Braunstein and later, Mr. Ladell and the plaintiff joint venture, engaged in discussions with the municipality regarding the redevelopment of the property with some degree of cooperation up to a certain point. It appears that the defendants were both surprised and displeased when Mr. Braunstein chose to participate in a joint venture with a developer that was not selected by the municipality in an “open” process. However, as the owner of the property, it was his right to do so. In the absence of a condemnation proceeding, the defendants do not have the prerogative to choose a redeveloper or dictate the plan to be followed. The fact that the plaintiff did not defer to the municipality’s preferences in this regard does not constitute bad faith. *Cf., Mt. Laurel II*, 92 N.J. at 280 (“We emphasize that the builder’s remedy should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site.”)

While it is necessary that there be some effort on the part of the developer to obtain relief prior to litigation, it is not clear what is required. In the absence of a bright line test and giving the plaintiff the benefit of all reasonable inferences due within the context of a summary judgment motion, it appears that there is a genuine issue of fact regarding the sufficiency of the plaintiff’s efforts here. The *Mt. Laurel II* court noted that neither intensive litigation nor the investment of considerable fund was essential. 92 N.J. 158, 280. Defendants have urged that the level of effort and success in litigation must be such as to constitute a “catalyst for change.” However, the excerpt in *Toll Bros.* which contains that language appears to be more descriptive of the builder’s efforts there rather than establishing a pre-requisite which builders must satisfy before they are entitled to a builder’s remedy. In light of the fact that the Redevelopment Plan and ordinance here were amended in direct response to this lawsuit, it could be said that the plaintiff here was in fact a catalyst for change. However, again within the context of a summary judgment motion, it appears that the prolonged interaction between Mr. Braunstein and later, the plaintiff, with the municipality far exceeds the level of action that has been deemed to be insufficient. For example, in *Mt. Olive Complex v. Twp. of Mt. Olive*, 356

N.J. Super. 500, 506-07 (App. Div.), certif. den., 176 N.J. 73 (2003), the court found that the builder was not entitled to a builder's remedy. In comparing the builder's efforts in *Toll Bros.* to that of the builder in *Mt. Olive*, the court noted that the plaintiff was not a named party in the exclusionary zoning litigation that had been brought by the Public Advocate, leading to a settlement and Judgment of Compliance. The Appellate Division affirmed the trial court's decision that the plaintiff was not a "major player" in the earlier litigation and therefore its lack of success in litigation precluded a builder's remedy. Certainly, the involvement of the plaintiff in the redevelopment process and in eliciting a judicial determination of non-compliance here is that of a "major player."

V. Plaintiff's cross-motion for partial summary judgment, seeking a declaration that it engaged in sufficient pre-suit negotiations, is denied without prejudice.

In oral argument, counsel for plaintiff indicated that the plaintiff was not seeking a builder's remedy at this juncture in the litigation. To the extent that this cross-motion addresses the defendants' argument that a lack of pre-suit negotiations constituted a bar to the Complaint, it has been addressed in the denial of the defendants' motion for summary judgment. To the extent that this cross-motion addresses a prong of the builder's remedy test, the court will deny the cross-motion without prejudice to the possible argument of this issue in the event that Roselle Park fails to achieve compliance in the 90 day period established by the court.

VI. Plaintiff's motion for partial summary judgment, seeking a declaration that a 15% set aside is a "substantial contribution" toward the defendants' fair share obligation, is denied without prejudice.

Plaintiff argues that its proposed 15% set aside should be deemed a "substantial contribution" because it is consistent with COAH guidelines and because the net amount of affordable housing units to be built in its proposal exceeds the number of units that would result under the defendants' Redevelopment Plan. Plaintiff's plan calls for the construction of 45 affordable housing units in a 300 unit development (15%). Under the defendants' Redevelopment Plan, 20% of the 215 unit development or 43 affordable housing units would be built.

Although courts are to follow COAH decisions, criteria and guidelines when possible, the question of what constitutes "substantial" in a given case is a decision for the court to make. *Mt. Laurel II, supra*, 92 N.J. at 279, n.37. Obviously, when the difference between 15% and 20% amounts to two units, we are not speaking of an insurmountable discrepancy. Nonetheless, within the context of a summary judgment motion, the record is insufficient to permit the declaration sought by the plaintiff at this time. There are considerations beyond the sheer number of units provided here, such as the density to be permitted, that will be addressed in the course of the 90 day period for revision of the ordinance. If that process is unsuccessful, this matter will return to court for a determination of what remedies for noncompliance should be implemented and this question can be revisited.

VII. Discovery will be stayed until February 5, 2008.

In an effort to focus the parties' efforts, time and resources during the revision period, discovery will be stayed during the time in which the parties work toward the resolution of this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Marianne Espinosa".

Marianne Espinosa, J.S.C.

ME/lam