

NOT FOR PUBLICATION WITHOUT APPROVAL
FROM THE COMMITTEE ON OPINIONS

ANGELA AGAZZI

Plaintiff

vs

GOVERNING BODY OF THE BOROUGH
OF RED BANK

Defendant

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:
: SUPERIOR COURT OF NEW JERSEY
:
: MONMOUTH COUNTY
:
: LAW DIVISION

: DOCKET NO. L 3653-12
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Argued: March 17, March 18, 2014

Decided: April 7, 2014

R. S. Gasiorowski, Esq., Attorney for Plaintiff Angela Agazzi

Daniel J. O'Hern, Jr., Esq., Attorney for Defendant Governing Body of the Borough
of Red Bank

Scully, J.S.C.

This matter comes before the Court by plaintiff Angela Agazzi, as an action in lieu of a prerogative writs wherein the plaintiff challenges a series of Zoning Ordinances which were enacted in 2013, specifically Ordinance Nos. 2012-15, 2012-16 and 2012-17.

This Court has reviewed the moving papers, considered the testimony of licensed Professional Planner David Zimmerman on behalf of the plaintiff and licensed professional planner Richard Cramer on behalf of the defendant Red Bank Governing Body, and considered the oral argument provided by both parties. Having previously reserved decision the court now makes the following findings of fact and conclusions of law pursuant to R.1:7-4.

1. STATEMENT OF FACTS

This matter addressed a challenge to Red Bank Ordinance Nos. 2012-15, 2012-16 and 2012-17, which were enacted by the Borough of Red Bank in 2013. An application by Hampton Inn to develop a project on Lot 1, Block 1, on the site of an abandoned Exxon gasoline station prompted an examination of existing ordinances related to this section of Red Bank. As the result of the application made by Hampton Inn, an interpretation request was made by Stephen Mitchell and Tinton Falls Lodging Realty to review existing Borough of Red Bank Planning and Development Regulations. The focus of the request was those regulations relative to the height and elevation requirements for the Waterfront Development Zone District, specifically Lot 1, Block 1. The request for interpretation requested a review and analysis of Section 25-10.16(c), subparagraph 6 of the Borough's Planning and Development Regulations which set forth in pertinent part:

MAXIMUM STRUCTURE HEIGHT.

The elevation of the highest point of any flat roof deck (parapet elevation to be used if parapets exceed 30 inches in height), of the mean height level between the eaves and ridge for gable or hipped roofs of the deck line for mansard roofs shall not exceed:

- (a) Elevation 50 (USC & GS Datum MSL=0) between the Navesink River and a line halfway between the Navesink River and the nearest parallel roadway (Front Street, Riverside Avenue, Rector Place or Shrewsbury Avenue).
- (b) Elevation 75 (USC & GS Datum MSL=0)
- (c) Further, and notwithstanding any other provisions of the subsection, any property within this zone may build to an elevation not to exceed 140 feet (USC & GS Datum MSL=0) inclusive of all chimneys, ventilators, skylights, tanks, stair towers, elevator and mechanical penthouses, non commercial radio and television antennas, HVAC equipment and other similar rooftop appurtenances and provided further that:

- (1) The property to be developed has buildings with a structure height of not less than elevation 100 feet (USC & GS Datum MSL=0) located within 600 feet of both sides of the property (as measured along the road right-of-way from the sidelines of the property to be developed; and
- (2) That the principal structure of any proposed building shall comply with the rear yard setback requirements of Subsection F(3) of this section; and
- (3) Any portion of a proposed principal building and use which extends more than three (3) feet above the average street elevation measured along the center line of the right-of-way and between the sidelines of the property to be developed shall be set back at least 60 feet from the right-of-way.

Pursuant to this request the Red Bank Zoning Board of Adjustment conducted public hearings on March 1, March 15, April 19 and May 17, 2012. In addition to the parties challenging the Hampton Inn project, RBank Capital, represented by counsel, participated in these hearings.

On May 17, 2012 the Red Bank Zoning Board of Adjustment issued the interpretation which was embodied in Resolution No. 2012-20 and adopted by the board on June 21, 2012. The Interpretation Resolution, in reaching the conclusion that the property was subject to a (50) foot height elevation made a finding that the existing ordinance was both ambiguous and extremely confusing. The Board, included in the resolution:

- As written, the existing ordinance is confusing and vague
- Over the course of three (3) months the Red Bank Zoning Board Members have heard persuasive arguments from opposing counsel, testimony from a variety of opposing experienced engineers/planners and studied/analyzed approximately 58 pieces of evidence and, despite the same, there is no universally accepted consensus as to how the vague height/elevation standards of the subject ordinance are to be applied and under what circumstances.

- The confusing height/elevation standards in the ordinance, with its three (3) potential variations, has proven difficult to read, comprehend, interpret and/or apply.
- The existing ordinance is technically confusing and a literal reading of the same leads a reasonable person into an architectural and engineering quagmire/abyss.
- The absence of a clearly defined ordinance which identifies the maximum allowable structure height in the zone has caused, and will continue to cause, confusion amongst the borough's zoning office, developers, objectors and the public at large.
- In light of the confusion, the zoning board will consider the possibility of requesting the Borough Council of the Borough of Red Bank to clarify its confusing ordinance (as the same relates to the height/elevation standards).

The attorney for the Zoning Board of Adjustment made a formal request, by letter, at the conclusion of the board's interpretation hearings regarding the existing height ordinance. In his June 25, 2012 letter to the Borough Clerk, Kevin Kennedy, Esq. the Zoning Board of Adjustment attorney for Red Bank recommended that the governing body conduct a review and assessment of this ordinance in order to address a number of the issues and problems which came to light during the course of the interpretation hearings. Kennedy cited concerns raised by a number of Zoning Board of Adjustment members and the fact that the ordinance was both confusing and ambiguous. The board encountered significant obstacles in conducting these protracted public hearings.

As the result of that request, the borough undertook such a review utilizing the services of professional planner, Richard S. Cramer of T & M Associates, to analyze and review the existing height ordinance and make any recommendation as appropriate. Included in the review requested was an assessment of the status of a number of residential properties on Rector Place and whether it would be appropriate for the governing body to move those properties from the waterfront development zone into a residential zone.

Mr. Cramer ultimately made the recommendation to the governing body that the height ordinance be amended to set a single maximum height elevation of seventy-five (75) feet (USC & GS Datum MSL=0) within the waterfront development zone and further recommended the elimination of the two (2) other existing height standards of 50 feet and 140 feet. He included in his report his conclusion that amending the height ordinance would resolve a number of the problems with interpretation and administering the standard by creating one uniform standard of seventy-five (75) feet that would be compatible with the standard set forth for that zone by the Master Plan. These recommendations set forth in the June 21, 2012 report of Richard Cramer, resulted in the governing body amending the permitted use section of the use regulation controlling the waterfront development districts.

Key to the issues before this Court is Ordinance 2012-17 which increases the waterfront district Lot 1, Block 1, height to an elevation of 75 feet and it removes the overlay portion of Rector Place, thus under the "permitted uses" section it removed 16 properties from the waterfront development zone. The governing body, by enacting Ordinance 2012-15 places all sixteen (16) of the deleted Waterfront Development Zone residential properties in the R-B2 residential zone district. In addressing these issues the Governing Body, per Ordinance 2012-16, requires that any future development of the sixteen (16) deleted properties must include a twenty-five (25) foot access easement along river frontage. Prior to the acceptance of the three (3) ordinances, which is the subject matter of this lawsuit, the Borough Planning Board reviewed the same and recommended adoption thereof, concluding them all to be consistent with the borough's Master Plan.

II. APPLICABLE LAW

There is a strong presumption in favor of the validity of zoning regulations Rumson Est. v. Mayor of Fair Haven, 177 N.J. 338, 350 (2003). The burden of establishing the invalidity of a zoning ordinance is upon the person attacking it, and the burden is to show affirmatively that the ordinance bears no rational relationship to the public health, morals, safety or welfare. In order to overcome the presumption of validity, the party attacking the ordinance must show that the ordinance is clearly arbitrary, capricious or unreasonable or plainly

contrary to the fundamental principles of zoning or the zoning statute. Riggs v. Long Beach Township, 109 N.J. 601 (1988)

N.J.S.A. 40:55D-62 sets forth in pertinent part:

The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings or structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or amendment or revision thereto shall either be substantially consistent with the land use plan element of the master plan or designed to effectuate such plan elements.

Any ordinance regulating land use that is not adopted in accordance with the requirements of N.J.S.A. 40:55D-62 is invalid. Norahan v. Bd. of Adjustment of Clinton, 392 N. J. Super 283 (App Div. 2007).

There are four (4) criteria to be applied in determining the validity of a land use ordinance. First, the ordinance must advance the Municipal Land Use Laws' declared purpose of promoting the public health, safety, morals and general welfare; second, the ordinance must be "substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such elements"; third, the ordinance must "comport with the constitutional constraints on the zoning power, including those pertaining to due process"; and finally, the ordinance must be adopted in accordance with statutory and municipal procedural requirements. Med Ctr. of Princeton v. Princeton Township Zoning, 343 N. J. Super 177, 213, 214 (App Div. 2001). The New Jersey Supreme Court has held that the requirement that a zoning ordinance be substantially consistent with a master plan should be "strictly enforced". Riggs v. Long Beach Twp., 109 N. J. 601, 619-622 (1988) concurring opinion)

A zoning ordinance may only be adopted after the planning board has adopted the land use plan element and housing plan elements of the master plan. N.J.S.A. 40:55D-62(a). The ordinance must be consistent with that plan. The statute requires that every zoning ordinance

“either be substantially consistent with the land use plan element and the housing plan element of the plan or designed to effectuate the plan” N.J.S.A. 40:55D-62(a). An inconsistency is not fatal, but rather triggers two (2) procedural requirements. Willoughby v. Planning Board of Township of Deptford, 326 N. J. Super 158, 165 (App Div. 1999). Thus, “a zoning ordinance need not be consistent with the master plan, provided the inconsistency is the result of a reasoned decision to deviate. East Mill Associates v. Township Council of Twp. of East Brunswick, 241 N. J. Super 403, 406 (App Div. 1990).

A governing body is given power, however, to enact a zoning ordinance or amendment which in whole or in part is inconsistent with or not designed to effectuate the land use plan element or housing plan element, but only by an affirmative vote of the majority of the full authorized membership of the governing body and then only if the governing body adopts a resolution setting forth its reasons for deviating from the land use or housing plan element N.J.S.A. 40:55D-62(a) Willoughby v. Planning Board, supra at 165-166.

Where the planning board has determined that the Master Plan and Zoning Ordinance are consistent, such a determination of consistency by the board is entitled to “deference and great weight”. Manalapan Realty v. Township Committee, 140 N. J. 366, 383 (1995).

The threshold issue as to the sufficiency of notice must be addressed prior to dealing with the remaining legal arguments in this case. The plaintiff argues that the personal notice requirements of N.J.S.A. 40:55D-62.1 were not adhered to by the governing body in their consideration of Ordinance 2012-17 as said ordinance, it is asserted by plaintiff, changes both the classification and boundaries of the affected zone. The defendant Governing Body disagrees and maintains they were not required to provide individualized notice with regard to Ordinance No. 2012 by virtue of the fact that the zoning changes effectuated by the ordinance did not constitute a change in the classification in the Waterfront Development Zone. Defendant argues the modification of height requirements for the Waterfront Development Zone effectuated by 2012-17 do not dramatically or substantially impact the use, character or intensity of the use of the properties in that zone. It is further argued by the defendant Governing Body that Ordinance 2012-17 did not change the boundaries of the zone and that Ordinance 2012-15 reclassified a group of properties located in the Rector Place residential overling zone (16 in total) from the Waterfront Development Zone to the

R-B2 Zone and all property owners located on Rector Place or within 200 feet of the zone were given the individual notice required by the Municipal Land Use Law.

In carefully reviewing the Appellate Division's findings in Pacilli v. Twp. of Woolrich, 394 N.J. Super 319, 333 (App Div. 2007) it appears clear that this Court is obligated to assess the substantive effect of the amendment. Does this amendment, as was the case in Woolrich, constitute an amendment which "dramatically" alters the intensity of the use within a zone and likely affects the character of future development within the zone thus requiring personal notice? Does this amendment resulting in the sweeping, dramatic changes the court spoke of in the Woolrich case and to what extent has evidence of that potential affect been presented to the Court? These fundamental questions must be addressed in order for this Court to entertain any remaining issues in the matter. It is ultimately argued by the defendant that, in the instant matter, the Court is not presented with a Woolrich type case requiring personal notification, there was no dramatic change affected and the character of the Waterfront Development Zone would not substantially change. Conversely, the plaintiff argues that although "classification is not defined in the Municipal Land Use Law, its ordinary meaning should control". Plaintiff herein ultimately argues that an ordinance which either adds density or decreases density of the use to add multiple stories and units to a hotel where the density was not permitted or the face of the ordinance represents, is the type of zone classification contemplated by the court in Woolrich.

Unquestionably, no specific definition exists as to what constitutes a change of classification and thus the court is called upon to make a subjective determination based upon this record, the testimony provided by Mr. Zimmerman and Mr. Cramer and the legal arguments advanced by both parties to resolve the issue of jurisdiction.

Based on this record and the authorities cited by both parties, the Court is unable to conclude that Ordinance 2012-17 resulted in a dramatic alteration in the intensity of the uses within the Waterfront Development Zone. While the Woolrich standard, in this Court's view, is applicable to this matter, the facts and circumstances of this matter and the ultimate affect is markedly distinguishable. Accordingly, this Court cannot and does not find that the deficiencies in notice cited by the plaintiff render Ordinance 2012-17 invalid.

A thorough review of the exhibits introduced by the plaintiff fails to demonstrate, along with all other facts, the sweeping "change in character" plaintiff asserts.

Having concluded that issues of notice are not the basis upon which to invalidate this action taken by the Borough of Red Bank Governing Body, the Court turns to the issue of the consistency of this action with the Borough of Red Bank Master Plan.

In determining whether the governing body complied with the Municipal Land Use Law, the court must examine the Master Plan (P-10 in evidence), consider the testimony of David Zimmerman, on behalf of the plaintiff, and Richard Cramer, on behalf of the defendant (both professional planners) and the arguments of counsel. Plaintiff argues here that the adoption of Ordinance 2012-17 is violative of the procedural requirements of the Municipal Land Use Law by virtue of the fact that it is inconsistent with the Municipal Land Use Law. Med Ctr. of Princeton v. Princeton Township Zoning, 343 N.J. Super 177, 213-214 (App Div.) set forth the criteria to be utilized in determining the validity of a land use ordinance. The four (4) factors to be considered are (1) the ordinance must advance the MLVL's declared purpose of promoting the health, safety, morals and general welfare; (2) the ordinance must be "substantially consistent with the land use plan element and the housing plan element of the Master Plan or designed to effectuate such elements; (3) the ordinance must "comport with the constitutional constraints on the zoning power, including those pertaining to due process" and; (4) the ordinance must be adopted in accordance with the statutory and municipal procedural requirements.

It is argued by the defendant that the changes in zoning articulated in Ordinance 2012-17 are substantially consistent with the borough's Master Plan and highlights the testimony of their expert, Richard Cramer, who provided testimony on the impact on the area in general and further testifies that no lot presently exists within the Waterfront Development Zone District on which a 140 foot building could be built. Defendant argues further that the plaintiff's expert did not provide a thorough analysis of the area and focused solely on Lot 1 Block 1 and the proposed hotel building.

It is argued by the defendant board, that Mr. Cramer, the expert they presented, provided a far more detailed, substantive analysis of the area, the surrounding structures and uses thereof and a thorough review of the Master Plan. In his report to the governing body, Mr. Cramer concluded that the purpose of the proposed ordinance was consistent with the Master Plan and would effectuate the Master Plan.

The defendant board urges the Court focus on the request made by zoning board of adjustment attorney, Kevin Kennedy, Esq. to conduct a study to clarify the ambiguities and problems with the existing height standard as evidenced from the tortured record created over the course of four (4) separate public hearings. This request to “clean up the ordinance” is what prompted the enactment of the amendments and the resultant clarification, it is argued, is not consistent with the Master Plan. The expert testimony relied upon by the plaintiff to advance the argument of inconsistency, it is important to note, did not take into account that the starting point for measurement of height is mean sea level, only in the Waterfront Development Zone.

The plaintiff herein contends that the letter for clarification was not a request for change. It is ultimately argued by the plaintiff that the Governing Body went well beyond clarification and changed the bulk standards based on the opinion and analyses of Mr. Cramer.

The third and final issue presented by the plaintiff is the allegation that the certain action taken by the governing body in response to this request for clarification amounts to spot zoning. The plaintiff relies on the court’s holdings in Cresskill v. Dumont, 15 N. J. 238 (1954) and Palisades Properties Inc. v. Brunette, 44 N.J. 117, 132 (1965) in defining “spot zoning” as “where a zone change is designed to relieve a property owner from the burden of a general regulation it will be stricken”. In this instance, the plaintiff argues, the governing body of the borough used its zoning power to benefit particular private interests rather than the collective interests of the community. Taxpayers Association of Weymouth Township v. Weymouth Township, 80 N.J. 6, 18 (1976). Thus, it is argued, the timing and substance of these amendments benefit only one party, the developers of Hampton Inn and no public interest is promoted by this enactment, according to the opinion provided by the plaintiff’s expert planner, Zimmerman.

The defendant borough argues that 2012-17 was adopted to create a uniform height standard in the Waterfront Development Zone District applicable to all properties in the zone, not only the proposed Hampton Inn project. It is further advanced that the ordinance will provide uniformity and certainty to all future applicants in the Waterfront Development Zone District that is beneficial to all properties in the zone, as well as the community at large, and, accordingly, cannot be characterized as spot zoning.

In considering the arguments of both parties, this Court must resolve the question as to whether the zoning change in question is made with the purpose or effect of establishing or a comprehensive zoning scheme calculated to achieve the statutory objectives, or whether it is “designed” merely to relieve the lot of the burden of the restriction of the general regulation by reason of conditions alleged to cause such regulation to bear with particular harshness upon it. Conlon v Board of Public Works of City of Paterson, 11 N.J. 363, 366 (1953). The defendant urges the court to conclude that the Governing Body, in the final analysis, adopted Ordinance 2012-17 not to benefit any one particular applicant or project, and, that the true motivation for such enactment was for the collective interests of the borough and in furtherance of sound zoning principles. Those sound zoning principles are to amend what had been proven to be an extremely ambiguous and different ordinance to understand, interpret and ultimately apply.

Given the fact that the four (4) protracted, contentious public hearings prompted the request for the Zoning Board of Adjustment to the governing body, and applying the definition articulated by the courts of our state, this Court, on this record simply cannot conclude that the enactment of this amendment constitute “spot zoning” in any manner.

III. CONCLUSION

Based on the aforementioned reasons, this court finds that the action taken by the Borough of Red Bank Governing Body was not arbitrary, capricious or unreasonable. That a thorough review of the testimony, exhibits and record here establishes that there had been no sweeping and/or dramatic change to the character of the Waterfront Development Zone District brought about by the enactment of this ordinance, thus, in this court’s view, the defendant governing body was in compliance with applicable Municipal Land Use Law notice requirements. The court is further convinced after reviewing, in detail, the Master Plan adopted by the Borough of Red Bank and considering the expert testimony interpreting the same, that Ordinance 2012-17, in the final analysis, is indeed consistent with that plan. Additionally, in reviewing the definition of spot zoning, set forth in Riya Finnegan v. S. Brunswick Twp., 962 A.2d 484, 197 N.J. 184, 195 (2005) and analyzing the action taken by the governing body, the reason they took the action and the ultimate impact thereof, this Court is convinced that the

collective interests of the community were ultimately the primary motivating factor for the action taken.

The adoption of the ordinance in the matter is consistent with all criteria for such action and, accordingly, this Court concludes the governing body's action was lawful and the complaint is hereby denied.

Mr. O'Hern is directed to provide an Order to the court in accordance with this decision within ten (10) days.