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Via Email and Regular Mail
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Re: **Application of Hartz Mountain Industries, Inc. to Weehawken Planning Board**
Subject Property: Block 34.03, Lots 1.01, 1.02, 2.03 and 4.21
Weehawken, New Jersey

Dear Ms. Di Nardo:

As you know, this firm represents Rock Eagle Properties, LLC in this matter. Rock Eagle is the owner of 1700 Park Avenue, which is located within 200 feet of the subject property. The purpose of this letter is to fully set forth Rock Eagle's jurisdictional objection to the application for development at the above-referenced property that was initially considered by the Weehawken Planning Board over my objection on May 21, 2019. As I explained at the hearing, I was unable to provide this letter in advance because when I sought a copy of the Township's land development ordinances, I was only provided with Subchapters 1-7 of Chapter 23 (Zoning), and did not obtain a copy of the relevant sections of the Zoning Code (Subchapter 10) until late in the afternoon on May 21, 2019 when Mr. Rhatican provided me a copy.

As I indicated at the hearing, the Board lacks the legal authority under the Redevelopment Plan to grant variances that are cognizable under *N.J.S.A.* 40:55D-70(d). This much seems clear. Also clear is that the Applicant is proposing a residential use, which is a permitted use in the Redevelopment Zone pursuant to the second bullet point in Section 4 of the Redevelopment Plan since it is part of a planned development.

As you know, there are certain limits on residential development in subsection 23-10.4. Chief among them are building height and floor area ratio. The Applicant's plans submitted in advance of the hearing and the testimony of its architect on May 21, 2019 confirm that the height of the proposed development is in excess of 200 feet. The maximum height permitted in the Redevelopment Zone is fifty (50') feet, as there are already more than six buildings south of the Kings Bluff Dividing Line in excess of that height. *See* 23-10.4(g)(2)(a). Even if other tall buildings had not been developed, the total maximum height permissible under the Ordinance would be 160 feet. *See* 23-10.4(g)(2)(b). Accordingly, the Applicant's proposed development exceeds the maximum height permissible by more than ten feet and requires "D" variance relief pursuant to *N.J.S.A.* 40:55D-70(d)(6).

Another restriction that appears to impact the Board's ability to review the application, as I mentioned at the hearing is the proposed floor area ratio. The development appears to exceed the limitation in subsection 23-10.4(f). The plans depict square feet of 360,368 gross floor area of residential space and 16,478 square feet of indoor amenity space for a total of 376,856 square feet of floor area and approximately 563,230.8 square feet of lot area (without delineating the area of the Property that is over water). The zoning ordinance limits the Floor Area Ratio in the Redevelopment Zone to 0.25 plus 0.6 for the area of the Property that is over water. While there are certain "as of right" floor area incentives identified in subsection 23-10.4(f)((2), this development does not appear to be eligible for any of them. Furthermore, since the Applicant's plans do not describe the area of the Property that is over water (or, at least, a sufficient description was not made available to the public in the documents on file at the Municipal Building), it has not demonstrated the permissible floor area ratio on the Property, and the proposed .67 FAR is unauthorized.

As I indicated during the hearing on May 21, 2019, the floor area ratio discretionary bonuses purportedly authorized by subsection 23-10.4(f)(3) appear to be in violation of the Municipal Land Use Law. I mentioned the case of *PRB Enterprises, Inv. v. South Brunswick,* 105 *N.J.* 1 (1987), at the hearing, and it is Rock Eagle's position that it governs resolution of this issue.

In *PRB,* the ordinance purported to permit "low traffic generating retail [uses] . . . which directly benefit the residents of the surrounding area." *Id.* at 4. The applicant in that case sought approval for a Wawa food store that the board determined was not a low traffic generating retail use. The developer challenged the denial and alleged that the ordinance was invalid.

In reviewing the ordinance, the Supreme Court of New Jersey found as follows:

> The principle defect in the ordinance is that the Purpose clause diverts to the Planning Board the power to determine whether or not certain uses are permitted in the C-1 zone. This delegation of authority is inconsistent with the Municipal Land Use Law, *N.J.S.A.* 40:55D-1 to -112, which reserves to the governing body the power to enact zoning ordinances, *N.J.S.A.* 40:55D-62,

> including the exclusive power to determine the permitted uses of land in the various districts established by the ordinances. *N.J.S.A.* 40:55D-65. Where a use is not permitted by the zoning ordinance, the statutory scheme permits applicants to seek use variances from the board of adjustment. *N.J.S.A.* 40:55D-70d. The role of the planning board, with respect to permitted commercial or industrial uses, is the grant or denial of site plan approval. *N.J.S.A.* 40:55D-37. Although site plan review affords a planning board wide discretion to insure compliance with the objectives and requirements of the site plan ordinance, *see Kozesnik v. Township of Montgomery,* 24 *N.J.* 154, 186 (1957), it "was never intended to include the legislative or quasi-judicial power to prohibit a permitted use." *Lionel's Center, Inc. v. Citta,* 156 *N.J. Super.* 257, 264 (Law Div. 1978).
> [*Id.* at 7]

The Court went on to note that "it is evident that the municipality has impermissibly delegated its zoning authority to the Planning Board." *Id.* at 9. This is the same problem with the effort to delegate authority to the Planning Board in subsection 23-10.4(f)(3), even though the delegation here relates to the bulk of the building rather than the proposed use. It is Eagle Rock's position that the only entity that can allow an increase in the permissible floor area ratio established in the Zoning Ordinance is the Board of Adjustment by way of the grant of a floor area ratio variance under *N.J.S.A.* 40:55D-70(d)(4).

I should also point out that *PRB* is not the only case that addresses the concept of creating exceptions to zoning within an ordinance outside the context of a variance request. In *Nuckel v. Little Ferry, slip. op.*, 2014 WL 7906847 (App. Div. Feb. 24, 2015)(copy attached as Exhibit "A"), the Appellate Division rejected an ordinance that attempted to provide the municipal governing body with the ability to grant an exception to the otherwise applicable density requirements in the ordinance. There, the count found that the ability to grant density variances was limited to boards of adjustment "for special reasons," and "[n]othing in the MLUL permits a governing body to exercise similar powers and to exempt a landowner from the requirements of the zoning regulations it has adopted." *Id.* at 11. The court went on to state that "a governing body may not confer . . . a power to control land use development when that power is not authorized by statute." *Id.* Plainly, if the governing body cannot decide to exempt a developer from the requirements in the zoning ordinance, the Board has no power to decide that the discrete regulations imposed by the governing body are inapplicable.

In this vein, I recognize that the Redevelopment Plan states that the Planning Board may determine the maximum permissible building height, density and number of units, square footage (but not floor area ratio) of buildings in the Redevelopment Zone. I also recognize that there are differences between zoning ordinances and redevelopment plans, but frankly, the Planning Board only has those powers accorded to it by statute - which are found in the Municipal Land Use Law. It has the power to review site plans in connection with an application for development,

but not to determine the bulk standards applicable to an application for development. In fact, the language in the Redevelopment Plan - "The Planning Board shall have the authority to determine" - is more objectionable than the ordinance that the Supreme Court rejected in *PRB.* The Redevelopment Plan plainly tries to assign to the Planning Board the power to zone, which is something that it is statutorily unauthorized.

Additionally, subsection 23-10.4(l)(2) limits the number of units in the proposed residential-only development to a maximum of 300 and limits the total floor area to 321,000 square feet. The proposed development exceeds both limits and is therefore a prohibited principal structure that requires use variance relief under *N.J.S.A.* 40:55D-70(d)(1).

In sum, the Applicant requires "D" variance relief for the project before the Board. The Board does not have the legal authority to grant such relief, and the provisions of the Redevelopment Plan that purport to convey such authority are contrary to law. We therefore formally object to the consideration of an application that is beyond the jurisdiction of the Board. In this vein, I note the comments of the Board to allow the Applicant to present its case before objecting on jurisdiction. The problem with this approach is that without jurisdiction, the hearings are a nullity, *see Najduch v. Independence Twp. Planning Bd.*, 411 *N.J. Super.* 268 (App. Div. 2009), and I have no desire to subject the Board, the public nor my client to what appears to be a lengthy hearing process and then provide a jurisdictional objection after the Applicant concludes its case. There is no basis to proceed in the absence of jurisdiction over the application.

Additionally, I note that the Applicant's public notice fails to identify that it is a planned development, which requires separate approval from the Board that must be identified in the notice. This is because there are specific findings required for planned developments under the MLUL and the Township's Zoning Ordinance, and a layperson who reviewed the notice or even the documents on file at the Municipal Building would have no way of knowing that. Even if the Board elects to proceed with the Application, it must require new notice that identifies the nature of the matters to be considered to be provided.

Finally, please allow this letter to serve as Rock Eagle's request that the Applicant provide this office with copies of all documents and plans submitted to the Board concurrent with their submission. Doing so will enable this office to avoid burdening the Township's administrative staff with OPRA requests to determine if new plans have been submitted and enable timely preparation for all hearings. We will provide the Applicant's counsel with copies of any documents we submit to the Board.

I trust that this advises you of Rock Eagle's position.

Very truly yours,

BEATTIE PADOVANO, LLC
Counsel for Rock Eagle Properties, LLC

By: /s/ Daniel L. Steinhagen
Daniel L. Steinhagen

cc: Weehawken Planning Board
Jay Rhatican, Esq.
Nicholas Sekas, Esq.
Rock Eagle Properties, LLC

EXHIBIT A

2014 WL 7906847
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Donald NUCKEL, North Village I, L.L.C., North Village II, and Gilbert Manor, L.L.C., Plaintiffs–Appellants,
v.
BOROUGH OF LITTLE FERRY, a Municipal Corporation of the State of New Jersey, County of Bergen, The Mayor And Council of the Borough of Little Ferry, The Borough of Little Ferry Planning Board, 110 Bergen Turnpike, L.L.C., Defendants–Respondents.
North Village I, L.L.C., North Village II, L.L.C, Gilbert Manor, L . L.C., Donald Nuckel & Company, and Donald Nuckel, individually, Plaintiffs–Appellants,
v.
Borough of Little Ferry Planning Board, Defendant–Respondent.

A-0673-13T1, A-0672-13T1
|
Argued Nov. 6, 2014.
|
Decided Feb. 24, 2015.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L–3280–12 and L–4741–11.

Attorneys and Law Firms

Ira E. Weiner argued the cause for appellants (Beattie Padovano, L.L.C., attorneys; Mr. Weiner, of counsel and on the brief; Daniel L. Steinhagen, on the brief).

Joseph G. Monaghan argued the cause for respondent Borough of Little Ferry and The Mayor and Council of the Borough of Little Ferry.

Brian T. Giblin argued the cause for respondent Planning Board of the Borough of Little Ferry (Giblin & Giblin, P.C., attorneys; Mr. Giblin, on the brief).

Archer & Greiner, P.C., attorneys for respondent 110 Bergen Turnpike, L.L.C., join in the brief of respondents Borough of Little Ferry and the Mayor and Council of the Borough of Little Ferry.

Before Judges FUENTES, ASHRAFI, and O'CONNOR.

Opinion

PER CURIAM.

***1** We decide in a single opinion two appeals raising *Mt. Laurel*[1] challenges to zoning ordinances of the Borough of Little Ferry. Previously, with respect to essentially the same parties, we affirmed a judgment of compliance and repose determining that Little Ferry's *Mt. Laurel* plan fulfilled its current affordable housing obligation pursuant to the Fair Housing Act, *N.J.S.A.* 52:27D–301 to–329. *Nuckel v. Borough of Little Ferry,* No. A–4940–11 (App.Div. Aug. 15, 2013) (slip op. at 4, 26).

We noted in our prior decision that plaintiffs had two other actions pending against defendants. *Id.* at 14. Those actions challenged the Housing Element and Fair Share Plan (HEFSP) that the Planning Board and the Borough Council of Little Ferry adopted during the pendency of plaintiffs' earlier action and the "overlay" zoning ordinance enacted to implement the HEFSP. *Id.* at 26. The current appeals are from the trial court's final judgments in each of those two other cases.

To distinguish the three actions, we will refer to plaintiffs' original action which we previously affirmed in A–4940–11 as the "builder's remedy" action, the current appeal in A–673–13 as the "HEFSP" action, and the current appeal in A–672–13 as the "overlay ordinance" action. For purposes of the current appeals, we adopt and incorporate the statement of facts and procedural history stated in our prior opinion in the builder's remedy action. *Id.* at 1–14.

We now affirm the trial court's HEFSP judgment in A–673–13, and we reverse its overlay ordinance judgment in A–672–13 with respect to one aspect of the zoning ordinance.

I.

HEFSP Action, A–673–13

Since 2006, plaintiffs have litigated against Little Ferry's zoning ordinances applicable to their property adjacent to the Hackensack River. Plaintiffs sought approval for a development project that would replace about 208 occupied and maintained garden apartments currently located on that property with a higher density residential complex, including two fourteen-story apartment buildings. As an incentive to gain approval, plaintiffs proposed *Mt. Laurel* affordable housing as part of their development plan. *Id.* at 2–3.

Plaintiffs' builder's remedy action originally succeeded. The trial court found that Little Ferry's zoning ordinances did not provide a realistic opportunity for inclusion of low and moderate income housing, and it granted a limited builder's remedy in 2008. The court's judgment permitted plaintiffs to build apartment buildings limited to eight stories rather than the fourteen-stories they requested. Plaintiffs decided that the project as so restricted was not financially feasible and opted out of the builder's remedy they had won.

Little Ferry then entered into a developer's agreement with a different developer and nearby landowner, 110 Bergen Turnpike, LLC ("110 Bergen"). *Id.* at 11–12. Ironically, the agreement with 110 Bergen permitted fourteen-story buildings to be built on that developer's site. *Id.* at 12. However, the proposed development would include a mix of commercial and residential uses, with the residential uses consisting only of the appropriate number of affordable dwelling units needed to comply with the borough's *Mt. Laurel* obligation. *Ibid.* By the agreement, Little Ferry permitted high-rise, mixed-use structures but limited the total number of residential units that could be built.

***2** On April 20 and May 3, 2011, the planning board and the borough council of Little Ferry acted to adopt an HEFSP. Then, as part of plaintiffs' builder's remedy action, the trial court conducted a fairness and compliance review hearing on May 20, 2011, with respect to the borough's *Mt. Laurel* plan. The court issued a written opinion on February 10, 2012, deciding that the HEFSP was in compliance with the borough's affordable housing obligations. The court entered a judgment of compliance and repose for Little Ferry on April 26, 2012, and we affirmed that judgment by our prior decision of August 15, 2013. *Nuckel, supra,* slip op. at 4, 26.

Before their builder's remedy action was thus decided, plaintiffs filed a complaint in lieu of prerogative writs on June 2, 2011. They challenged the HEFSP adopted the previous month on both procedural and substantive grounds. Plaintiffs' complaint complied with *Rule* 4:5–1(b)(2) in that it identified related pending actions, including their builder's remedy action. In December 2011, defendant planning board filed an answer to the HEFSP complaint in which it raised only one affirmative defense, that plaintiffs' complaint did not state a claim upon which relief can be granted.

At the prerogative writs trial of the HEFSP action on October 19, 2012, defendant planning board maintained that plaintiffs' action was barred by the doctrine of collateral estoppel because the validity of the HEFSP had been litigated in the builder's remedy action. The trial court agreed. On August 26, 2013, shortly after we affirmed the judgment of compliance and repose in the prior appeal, the trial court issued a written decision and an Order for Judgment in the HEFSP action. The court upheld the adoption of the HEFSP and dismissed the HEFSP action on grounds of collateral estoppel.

On appeal, plaintiffs press only one ground challenging the HEFSP—that its adoption failed to comply with a provision of the FHA, *N.J.S.A.* 52:27D–310(b), that requires the HEFSP to include a ten-year projection of affordable housing stock in Little Ferry and to identify the properties most appropriate for development of affordable housing. Plaintiffs contend their claim is not barred by the doctrine of collateral estoppel because their challenge pursuant to that statute was not an issue presented to or decided by the trial court in the prior builder's remedy action.

Defendant planning board responds that the court's prior judgment took into consideration all aspects of the HEFSP, and adds that plaintiffs' complaint should also be barred because it is contrary to the entire controversy doctrine, *Rule* 4:30A, and because the HEFSP in fact complies with the requirements of *N.J.S.A.* 52:27D–310(b).

Our review of the trial court's decision on grounds of collateral estoppel is a question of law and, therefore, our standard of review is plenary. *See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

***3** The doctrine of collateral estoppel "serve[s] the important policy goals of 'finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness.' " *First Union Nat'l Bank v.. Penn Salem Marina, Inc.,* 190 *N.J.* 342, 352 (2007) (quoting *City of Hackensack v. Winner,* 82 *N.J.* 1, 32–33 (1980)). Whether an action is barred by collateral estoppel is evaluated under the test the Supreme Court set forth in *First Union*—collateral estoppel bars a claim or defense if:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> [*Ibid.*]

We agree with plaintiffs that whether Little Ferry's HEFSP complies with *N.J.S.A.* 52:27D–310(b) is not an issue identical to the compliance and fairness review of the HEFSP conducted in May 2011, and that the issue was not actually litigated in the prior builder's remedy action. The trial court's decision of February 10, 2012, addressed whether the HEFSP satisfies the municipality's "second round" affordable housing obligation under the FHA. That issue is not identical to whether a ten-year projection of housing stock and available properties for development is included in the HEFSP. While the builder's remedy action and the HEFSP action are related and based on much of the same documentary evidence, they focus on different legal questions.

The builder's remedy action focused on the number of affordable housing units the municipality was either credited for or required to construct or rehabilitate. The HEFSP action challenges one aspect of the planning board's and the borough's adoption of the HEFSP—the sufficiency of its ten-year housing stock projection and identification of available lands for development. The two actions concern different arguments and law. We conclude, therefore, that the trial court erroneously dismissed plaintiffs' HEFSP prerogative writs action as collaterally estopped by the prior builder's remedy judgment.

Nevertheless, an appeal is taken from the court's judgment and not from the specific reasons for that judgment. *Walker v. Briarwood Condo Ass'n,* 274 *N.J.Super.* 422, 426 (App.Div.1994). "It is a commonplace of appellate review that if the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of its affirmance." *Isko v. Planning Bd. of Livingston,* 51 *N.J.* 162, 175 (1968); *see Grow Co. v. Chokshi,* 403 *N.J.Super.* 443, 467 n. 8 (App.Div.2008); *Khalil v. Motwani,* 376 *N.J.Super.* 496, 499 (App.Div.2005); *Ellison v. Evergreen Cemetery,* 266 *N.J.Super.* 74, 78 (App.Div.1993).

***4** Here, the trial court's judgment dismissing plaintiffs' HEFSP complaint was correct because the later action was barred by the entire controversy doctrine, and also because plaintiffs' claim could not succeed on its merits.

Contrary to plaintiffs' contention, our prior decision on the appeal of the builder's remedy action did not hold that the HEFSP action could be prosecuted separately in the trial court. Rather, we acknowledged that plaintiffs had filed three separate actions. *Nuckel, supra,* slip op. at 14. We also took note of the admonition in *East/West Venture v. Borough of Fort Lee,* 286 *N.J.Super.* 311, 328–29 (App.Div.1996), that final judgment should ordinarily await conclusion of all related *Mt. Laurel* challenges to a municipality's zoning ordinance. However, because the builder's remedy action was fully briefed for the appeal, we chose not to remand the matter to the trial court to decide first the other pending actions. *Nuckel, supra,* slip op. at 26. That decision did not mean that the other actions were properly prosecuted in separate lawsuits. The entire controversy doctrine required that they be brought together in a single action if they could have been so brought.

It is true, as plaintiffs argue, that defendant planning board did not plead or expressly argue the requirements of the entire controversy doctrine before the trial court.

"[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.' " *Nieder v. Royal Indem. Ins. Co.*, 62 *N.J.* 229, 234 (1973) (quoting *Reynolds Offset Co., Inc. v. Summer*, 58 *N.J.Super.* 542, 548 (App.Div.1959), *certif. denied*, 31 *N.J.* 554 (1960)); *accord Zaman v. Felton*, 219 *N.J.* 199, 226–27 (2014). Moreover, the entire controversy doctrine is an affirmative defense, and it is waived if not timely raised. *Aikens v. Schmidt*, 329 *N.J.Super.* 335, 339–40 (App.Div.2000); *Kopin v. Orange Prods., Inc.*, 297 *N.J.Super.* 353, 375–76 (App.Div.), *certif. denied*, 149 *N.J.* 409 (1997).

However, the planning board did argue before the trial court that the matter had been previously adjudicated, thus implying that the issues raised in the HEFSP action were the same or should have been part of the builder's remedy action. The *Mt. Laurel* issues are important to the residents of Little Ferry and others. Moreover, the entire controversy doctrine is meant to protect the interests of the court as well as the parties and the public. *See, e.g., Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co.*, 207 *N.J.* 428, 443 (2011) ("Underlying the Entire Controversy Doctrine are the twin goals of ensuring fairness to parties and achieving economy of judicial resources."). The trial court could have taken it upon itself to raise the entire controversy doctrine as a bar to plaintiffs' HEFSP action even in the absence of an affirmative defense raised in the planning board's answer.

***5** Such an action by the trial court would have been warranted especially because the merits of the single issue plaintiffs press on appeal could readily have been addressed as part of the earlier builder's remedy litigation and the judgment of compliance and repose. Although the HEFSP was adopted only weeks before the fairness and compliance review hearing held on May 20, 2011, the trial court's decision was not issued until February 10, 2012, and its judgment not entered until April 26, 2012. Plaintiffs could and should have moved to join the HEFSP action they filed in June 2011 with the pending builder's remedy action that was awaiting a judgment. Nothing in our record indicates that they attempted to do so until after final judgment was issued in the builder's remedy action and the appeal was pending before us. Their failure to seek joinder of the actions in the trial court is contrary to the beneficial purposes of the entire controversy doctrine and a sufficient ground to reject their appeal in the HEFSP action.

Moreover, even without consideration of the entire controversy doctrine, the HEFSP action fails on its merits. *See O'Shea v. N.J. Schs. Const. Corp.*, 388 *N.J.Super.* 312, 319 (App.Div.2006) ("assert[ing] our original jurisdiction [*R.* 2:10–5] inasmuch as th[e] issue is a question of law, no facts bearing on that question of law are in dispute, and the issue implicates the public interest").

In addressing the requirement that a municipality adopt an HEFSP, the FHA provides in *N.J.S.A.* 52:27D–310:

> A municipality's housing element ... shall contain at least:
>
> ....
>
> b. A projection of the municipality's housing stock, including the probable future construction of low and moderate income housing, for the next ten years, taking into account, but not necessarily limited to, construction permits issued, approvals of applications for development and probable residential development of lands....

See Toll Bros., Inc. v. Twp. of W. Windsor, 173 *N.J.* 502, 577–78 (2002) (the components listed in *N.J.S.A.* 52:27D–310 must be included in the housing element).

Plaintiffs assert that the HEFSP should have provided a specific number of projected affordable housing units and identified the specific properties that could be utilized to develop them. They contend the "general language" the planning board included in its HEFSP does not satisfy the statutory requirements. They also argue that the HEFSP contains appendices tracking the requirements of subsections (a), (c), and (d) of *N.J.S.A.* 52:27D–310, but no appendix addressing subsection (b).

The planning board asserts the following discussion in the HEFSP satisfies the statutory requirements of subsection (b):

> Projected Housing, Demographic and Employment Changes in Little Ferry:
>
> The Borough of Little Ferry is largely built out, with few vacant parcels remaining to be developed over which

Little Ferry has zoning control. Land in Little Ferry that falls under the jurisdiction of the Meadowlands Commission may have some development potential, but that area is outside the control of the Borough. Left in place with no changes, the current zoning of the Borough of Little Ferry would accommodate little or no growth. There are, however, some previously developed parcels in the Borough, especially along the Hackensack River but outside the Meadowlands jurisdiction, that have additional development potential, provided sufficient incentives could be offered to encourage their owners to make the investment.

***6** Significant portions of the riverfront area are impacted by the Hackensack River flood plain, and any new development will need to be elevated above the base flood elevation and will also need to comply with NJDEP's zero net fill Rule. These challenges would not preclude development of the affected sites, but they will require more extensive site engineering and more expensive construction measures in order to address them. Consequently, sufficient incentives must be built into any regulations for the development of this area (in the form of the development intensity allowed) so that developers will be willing to take on the challenges, develop the properties, and also provide the affordable housing needs to satisfy Little Ferry's constitutional low and moderate income housing.

To satisfy the balance of its affordable housing obligation for the prior round, the Borough has prepared and will be adopting a revised Ordinance creating a Riverfront Development Inclusionary Overlay A Zone (RF–A Overlay) covering all of Block 25.... The Ordinance is designed in part to implement an Agreement with 110 Bergen Turnpike, L.L.C., in which 110 Bergen Turnpike, L.L.C., has agreed to build a minimum of 12 and as many as 28 low and moderate income units in fulfillment of the Borough's entire prior round obligation as part of its development of Lot 2, Block 25, with a hotel and various other uses as permitted in the RF–A zone.

The provisions for the RF–A zone are intended to provide the incentives needed to stimulate development along the portion of the riverfront lying south of Route 46 in the form of increased building height, which will result in higher intensity of development and an enhanced opportunity to address NJDEP flood plain regulations. The increased intensity of development is also intended to provide a compensatory benefit to developers in exchange for the provision of low and moderate income housing. The RF–A Overlay zone will cover a geographical area of roughly 17.5 acres of Block 25. Of these 17.5 or so acres, 5.24 acres are encompassed by Lot 2, Block 25. This is the former Walker Porous site, which, while located wholly within the Hackensack River flood plain, is now vacant and is proposed for a type of development permitted and regulated by the new RF–A Overlay Zone.

While these paragraphs of the HEFSP identify only one property intended for development of affordable housing and recite only the projected affordable housing on that one property, they designate the very limited area in the borough that might be developed to fulfill Little Ferry's affordable housing obligations in the future. In the circumstances of a small, fully developed municipality such as Little Ferry, the quoted language complies with the requirements of *N.J.S.A.* 52:27D–310(b).

In sum, the trial court did not err in dismissing plaintiffs' challenge to Little Ferry's HEFSP, although not on grounds of collateral estoppel.

II.

Overlay Ordinance Action, A–672–13

***7** As part of the fairness and compliance review hearing conducted on May 20, 2011, Little Ferry proposed its Ordinance No. 1362–17–12 to implement its HEFSP and to comply with its *Mt. Laurel* affordable housing obligations. The ordinance would create an overlay zone on the entirety of a single block on the municipal tax map, Block 25, which is located along the riverfront. The ordinance would not replace the underlying zoning ordinance but would provide alternative criteria for development in an effort to create incentives for the construction of affordable housing. The ordinance would also recognize explicitly that Little Ferry entered into a developer's agreement with 110 Bergen as part of its *Mt. Laurel* compliance and it would authorize the terms of that agreement.

By a complaint in lieu of prerogative writs filed on April 27, 2012, plaintiffs challenged the overlay ordinance, raising claims including the adequacy of the public notice

Little Ferry issued before the ordinance was adopted and the lawfulness of an exemption provision contained in the ordinance. [2] After conducting a prerogative writs trial on May 24, 2013, the trial court issued a written opinion and accompanying order dated August 21, 2013. The court concluded that the borough's notice was sufficient and that the ordinance is not contrary to law. The court dismissed plaintiffs' overlay ordinance action.

On appeal, plaintiffs assert the trial court erred because: (1) inadequate notice of the proposed ordinance was given to the public, in violation of *N.J.S.A.* 40:55D–62.1 and the case law interpreting that and similar land use notice statutes; and (2) the ordinance is contrary to law because it authorizes the governing body of the borough to grant exemptions from the residential density requirements of the ordinance. We reject the notice argument but agree that a provision of the ordinance unlawfully grants powers to the governing body of Little Ferry that are not authorized by the Municipal Land Use Law (MLUL), *N.J.S.A.* 40:55D–1 to–163, or any other statute.

On February 24, 2012, Little Ferry sent to property owners within 200 feet of Block 25 a notice stating that the overlay ordinance had been introduced and passed on first reading, and that a public hearing was scheduled for March 13, 2012, to consider its adoption. The notice included the title of the ordinance: "AN ORDINANCE AMENDING CHAPTER 35, LAND USE, OF THE CODE OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY, NEW JERSEY, TO ESTABLISH A NEW RF–A RIVERFRONT DEVELOPMENT INCLUSIONARY OVERLAY A ZONE ENCOMPASSING BLOCK 25 AND ALSO SETTLING LITIGATION." A copy of the entire ordinance accompanied the notice.

Plaintiffs contend the notice did not comply with all the requirements of *N.J.S.A.* 40:55D–62.1 and also did not use plain language to state the purpose and nature of the matter to be considered by the governing body. They claim that public notice of a zoning change must be worded in language understandable to "the ordinary layperson," as this court held in *Perlmart of Lacey, Inc. v. Lacey Township Planning Board,* 295 *N.J.Super.* 234, 239 (App.Div.1996). According to plaintiffs, merely publishing the title and the full text of the ordinance provides insufficient notice to the public of the nature and purpose of the proposed ordinance.

***8** *N.J.S.A.* 40:55D–62.1 provides, in pertinent part:

> Notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district ... shall state the date, time and place of the hearing, the nature of the matter to be considered and an identification of the affected zoning districts and proposed boundary changes, if any, by street names, common names or other identifiable landmarks, and by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office.

In *Perlmart, supra,* 295 *N.J.Super.* at 237 (internal citations omitted), we stated that "the purpose for notifying the public of the 'nature of the matters to be considered' is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof...." We added that "the critical element of such notice has consistently been found to be an accurate description of what the property will be used for under the application." *Id.* at 238.

We held that a public notice was deficient in *Pond Run Watershed Ass'n v. Township of Hamilton Zoning Board of Adjustment,* 397 *N.J.Super.* 335, 355 (App.Div.2008), because it failed to reference a 5000–square–foot restaurant that was a significant component of the proposed development and thus the notice did not adequately apprise the public "of what the property would actually be used for."

Unlike in *Perlmart* and *Pond Run,* the notice in this case neither used overly generalized or technical language nor failed to describe a major use proposed for the overlay zone. The proposed ordinance was written in reasonably understandable language and explained the nature and purpose of the proposed zoning change.

The first page of the ordinance outlined its purposes, including "to facilitate the private sector's development of previously developed and vacant land along the Hackensack River waterfront." The ordinance stated that it would permit high-density development, including high-rise, multi-family residential structures and added that "any such residential development will be subject to an affordable housing set-aside." The ordinance also stated in its introductory provisions that it "confers substantial benefit upon any owner/developer of land within the overlay zone due to significant increase in density and intensity of land use achievable through the additional building heights permitted."

A section of the ordinance marked "Purpose" sets forth the *Mt. Laurel* inclusionary zoning objective of the ordinance:

> The purpose of the RF–A Riverfront Development Inclusionary Overlay A Zone is to create a realistic opportunity for the construction of affordable housing through mixed use development, in which there is a mandatory residential component with an affordable housing set-aside, in a setting that will also provide opportunities for economic development of regional business uses and an incentive to improve the riverfront area for the benefit of all residents of the Borough of Little Ferry.

***9** These statements and other parts of the ordinance were adequate to inform the general public of the purpose and nature of the proposed zoning change.

Contrary to plaintiffs' argument, we have not held that publication of the entire ordinance is contrary to the statutory notice requirements. In *Rockaway ShopRite Associates, Inc. v. City of Linden,* 424 *N.J.Super.* 337, 345 (App.Div.2011), *certif. denied,* 209 *N.J.* 233 (2012), we considered statutory provisions that permit a municipality to publish only a summary of a proposed ordinance rather than the entire ordinance. We held that "the 'summary' being substituted for the full text of the ordinance [must] apprise interested readers throughout the municipality of the zoning changes contemplated as well as their nature and import." *Ibid.* We did not hold that publication of the entire ordinance is improper. In this case, the language we have quoted from the ordinance alerted the public of the purposes and nature of the proposed ordinance, and it did so as well or better than a summary might have done.

Nor was the notice defective in identifying the location of the zoning change. The first page of the ordinance identified the boundary of the proposed overlay zone as "the entirety of Block 25." Page two added the following description of the properties included within the zoning change:

> [T]he within zoning amendment creates an overlay zone (the RF–A Zone) along a portion of the Little Ferry riverfront that permits appropriate development of all of the properties within Block 25, including the property of 110 Bergen Turnpike, LLC, consistent with the intent of the Borough for the riverfront area but tailored to the specific problems and issues associated with the properties located to the south of Route 46....

N.J.S.A. 40:55D–62.1 requires that a notice include "street names, common names or other identifiable landmarks" where boundary changes will be made by the proposed zoning ordinance. Here, the overlay zone did not change the boundaries of the zoning district but only affected the permitted uses in the existing, identified district.

In *Northgate Condominium Ass'n, Inc. v. Borough of Hillsdale Planning Board,* 214 *N.J.* 120, 138 (2013), the Supreme Court confirmed that proper notice is a jurisdictional requirement for a municipal agency to take zoning action, and that defective notice renders municipal action null and void. The Court also considered identification of the affected property although in the context of an application for development of a particular parcel, not for a zoning change. The Court concluded

that using a block number and descriptive terms to identify the location of the property was sufficient in the circumstances of that case. *Id.* at 141–43. Here, too, the affected properties were adequately identified by means of the block number and plain descriptive language of the geographical area affected by the overlay zone.

***10** We agree with the trial court that the notice of the hearing at which the overlay zoning ordinance was adopted was adequate to apprise the public of the purpose and nature of the zoning change as well as its location.

The ordinance, however, includes a provision that is not authorized by the MLUL or any other law.

At the time of the fairness and compliance review hearing on May 20, 2011, Little Ferry presented for the court's review an earlier version of the proposed implementing ordinance, including reference to its developer's agreement with 110 Bergen. That agreement permitted 110 Bergen to construct a high-rise structure with primarily commercial uses and to deviate from the residential density requirement of the proposed overlay ordinance. In exchange for that deviation, the agreement provided that 110 Bergen's project would include between twelve and twenty-eight units of *Mt. Laurel* affordable housing but not any market rate residential units.

The trial judge referred to the provision of the MLUL that requires uniform treatment of similar landowners, *N.J.S.A.* 40:55D–62, and expressed concern that other developers and landowners would seek a similar opportunity to deviate from the density requirements of the ordinance. In response to the court's concern, Little Ferry added an exemption provision to the proposed ordinance that plaintiffs now correctly challenge as unlawful.

In its section 3.F.2., the residential component of Little Ferry's Ordinance 1362–17–12 requires both a minimum and a maximum density of residential units—twenty-five to sixty residential units per acre. Minimum residential density was included in the ordinance so that the borough could require a set-aside of residential units for *Mt. Laurel* affordable housing. The provision that the borough added and that plaintiffs now challenge allows an exemption from the minimum residential density requirement for landowners that may seek a similar arrangement as 110 Bergen.

The disputed provision of section 3.F.2. states:

> [I]t is acknowledged that the Agreement with 110 Bergen Turnpike, LLC ... exempts the developer of that lot from the minimum residential development requirements set forth herein. *Such an exemption also may be requested by any developer and approved by the Borough for any other development in the RF–A Riverfront Development Inclusionary Overlay A Zone based on an executed agreement between the developer and the Borough of Little Ferry wherein the developer will provide the number of affordable units otherwise required based upon the mandatory residential component without having to construct any market-rate residential units.*
>
> [(emphasis added).]

Plaintiffs contend the underscored provision grants unlawful discretionary authority to the governing body to determine whether a landowner is exempted from the density requirements of the ordinance. Plaintiffs contend that only a zoning board, and not a governing body of a municipality, may exercise such a power under the MLUL to permit a deviation from the requirements of a zoning ordinance. We agree.

***11** In *Goerke v. Township of Middletown,* 85 *N.J.Super.* 519, 521 (App.Div.1964), this court disapproved an amendment to a local zoning ordinance that "empowered the township committee to issue temporary use permits for 'temporary activities for a limited period of time which activities may be prohibited by other provisions of this Ordinance....' " Observing that the governing body was effectively given the "power to grant an exemption from the prohibitory regulations of the zoning ordinance," *ibid.,* we held such powers were not authorized by any zoning statute, and therefore, the ordinance was invalid. *Id.* at 522. Our holding in *Goerke* applies here.

N.J.S.A. 40:55D–62 requires that "[t]he regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structure or uses of land...." *N.J.S.A.* 40:55D–70(d) authorizes a board of adjustment to grant variances from the zoning regulations "for special reasons" and in specifically enumerated circumstances. In addition, *N.J.S.A.* 40:55D–60(a) authorizes a planning board to exercise ancillary jurisdiction in granting certain kinds of variances from the requirements of the zoning regulations.

Nothing in the MLUL permits a governing body to exercise similar powers and to exempt a landowner from the requirements of the zoning regulations it has adopted.

In arguing to uphold the ordinance, Little Ferry refers to the trial court's prompting of the exemption provision for purposes of uniform treatment of all landowners, and also emphasizes the salutary purpose of the provision as part of the borough's innovative compliance with its obligations under the *Mt. Laurel* doctrine. Little Ferry further contends that we already considered the validity of the ordinance in our affirmance of the trial court's judgment of compliance and repose.

None of these arguments addresses whether the exemption provision is authorized by the MLUL or any other law. We agree with plaintiffs that a governing body may not confer upon itself a power to control land use development when that power is not authorized by statute. Little Ferry has not cited any legal authority establishing a governing body's power to grant exemptions from a zoning ordinance.

The ordinance in this case is unusual. The parties and the two experts who testified at the prerogative writs trial interpreted the ordinance as mandating the inclusion of "market rate" residential units as well as a set-aside for affordable housing. This interpretation comes from section 3.E.1.i. of the ordinance, which states that one of the permitted principal uses within the new overlay zone is "[m]ulti-family residential buildings consisting of both market rate and affordable housing units as provided and required in Subsection F.9. herein." [3] However, the ordinance does not define the term "market-rate" units. [4] The regulations applicable to the Council on Affordable Housing include the following definition of "Market rate units": "housing within an inclusionary development, not restricted to low and moderate income households, that may sell at any price determined by a willing seller and a willing buyer." *N.J.A.C.* 5:93–1.3. Similarly, the regulations define "[a]ffordable" as "a sales price or rent within the means of a low or moderate income household as defined in *N.J.A.C.* 5:93–7.4."

***12** The record on this appeal does not reveal to us by what authority and for what purpose a municipality may mandate that a developer include "market rate" units as so defined. The mandate of the *Mt. Laurel* doctrine and the FHA is to facilitate a realistic opportunity to construct affordable housing. Construction of market rate units is the developer's choice, not a mandate. Presumably, a developer could construct a project consisting entirely of "affordable" housing as defined in the regulation if it had a reason to do so, was not motivated by economic considerations, and met the minimum density and other requirements of the zoning ordinance.

The disputed exemption language in the ordinance is meant for the developer who, like 110 Bergen, is agreeable to building only affordable housing in its project but on the condition that it be granted a deviation from the minimum density requirement of the ordinance. While the governing body may have a role in such an arrangement in that it can require a developer's agreement, [5] the governing body is not the appropriate municipal body to determine which landowners should be permitted to deviate from the ordinance's minimum density requirement. Under the MLUL, that decision requires an application to and action by either the zoning board of adjustment or the planning board. *See also Wawa Food Mkt. v. Planning Bd. of Ship Bottom,* 227 *N.J.Super.* 29, 34–36 (App.Div.), *certif. denied,* 114 *N.J.* 299 (1988) (Deviations from the zoning ordinance may only be accomplished by the variance procedure.). [6] Alternatively, the ordinance must itself indicate optional requirements for affordable housing that deviate from the density requirements for combined market rate and affordable residential development.

Because the ordinance places in the governing body of Little Ferry authority to grant an exemption from the density requirements of the ordinance, that provision of the ordinance is contrary to law and must be set aside.

The ordinance contains a severability provision so that only the portion of section 3.F.8. that we underscored previously is invalid. We have not been asked to and make no determination as to other provisions of the ordinance.

Affirmed in part, reversed in part.

All Citations

Not Reported in A.3d, 2014 WL 7906847

Footnotes

1 *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel* (*Mt. Laurel I*), 67 *N.J.* 151, *cert. denied and appeal dismissed,* 432 *U.S.* 808, 96 *S.Ct.* 18, 46 *L. Ed.*2d 28 (1975); *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel* (*Mt. Laurel II*), 92 *N.J.* 158 (1983).

2 The ordinance was proposed and adopted after the date of the trial court's February 10, 2012 decision in the builder's remedy action. The grounds for plaintiffs' challenge to the ordinance did not exist before its adoption, and so, could not be considered as part of the entire controversy that was pending before the court in the builder's remedy action.

3 The reference to "F.9" is apparently a typographical error. It should be "F.8," which sets forth the inclusionary affordable housing component of residential development under the ordinance.

4 The FHA defines "moderate income," "low income," and "very low income" housing, *see N.J.S.A.* 52:27D–304, but it does not define the term "market rate" units or housing.

5 Section F.8.e. of the ordinance requires that a developer enter into a "Developer's Agreement" with "the Mayor and Council" of Little Ferry to ensure that the affordable housing component of the development will be constructed in accordance with applicable regulations and rules, be marketed to appropriate buyers, and retain its status as affordable housing in the future.

6 Since it has not been argued, we do not determine what kind of variance would be required under *N.J.S.A.* 40:55D–70 to deviate from a minimum density regulation.

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