

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5512-05T1

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF CARLSTADT, and
PLANNING BOARD OF CARLSTADT,

Defendants-Appellants,

and

NEW JERSEY MEADOWLANDS
COMMISSION,

Defendant-Respondent.

DOCKET NO. A-5621-05T1

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF EAST RUTHERFORD, and
PLANNING BOARD OF EAST RUTHERFORD,

Defendants-Appellants,

and

NEW JERSEY MEADOWLANDS
COMMISSION,

Defendant-Respondent.

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF CARLSTADT, PLANNING
BOARD OF CARLSTADT, BOROUGH OF
EAST RUTHERFORD, PLANNING BOARD
OF EAST RUTHERFORD,

Defendants-Respondents,

and

NEW JERSEY MEADOWLANDS COMMISSION,

Defendant-Appellant.

Submitted: April 9, 2008 - Decided: August 29, 2008

Before Judges Axelrad, Payne, and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-5894-03 and L-5895-03.

Kipp & Allen, attorneys for appellants Borough of Carlstadt and Planning Board of Carlstadt in A-5512-05T1 (Richard J. Allen, Jr., on the brief).

Calo Agostino, attorneys for appellants Borough of East Rutherford and Planning Board of East Rutherford in A-5621-05T1 (Beverly M. Wurth, on the brief).

Anne Milgram, Attorney General, attorney for appellant New Jersey Meadowlands Commission in A-5741-05T1 (Michael J. Haas, Assistant Attorney General, of counsel; Christine Piatek, Deputy Attorney General, on the brief).

Anne Milgram, Attorney General, attorney for respondent New Jersey Meadowlands Commission in A-5512-05T1 and A-5621-05T1 (Patrick DeAlmeida, Assistant Attorney General, of counsel; Christine Piatek, Deputy Attorney General, on the brief).

Sills Cummis & Gross, attorneys for respondent Tomu Development Company in A-5512-05T1, A-5621-05T1 and A-5741-05T1 (James M. Hirschhorn and Thomas Jay Hall, of counsel; Robert Kasuba, on the brief).

Respondents Borough of Carlstadt, Planning Board of Carlstadt, Borough of East Rutherford, and Planning Board of East Rutherford have not filed a brief in A-5741-05T1.

PER CURIAM

These three back-to-back appeals arise from two consolidated "builder's remedy" suits brought by plaintiff Tomu Development Company, Inc. (Tomu) alleging that two southern Bergen County municipalities, the Borough of Carlstadt (Carlstadt) and the Borough of East Rutherford (East Rutherford), and their respective planning boards,¹ engaged in patterns of exclusionary zoning that failed to address their Mount Laurel² affordable housing obligations. Because the land

¹ In this opinion, the planning boards are encompassed in the reference to the municipalities.

² Southern Burlington County NAACP v. Mount Laurel Township, 67 N.J. 151 (Mount Laurel I), cert. denied and appeal dismissed, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975); Southern (continued)

upon which Tomu proposed to build a development, including affordable housing, lay wholly within the statutorily created Meadowlands District, the New Jersey Meadowlands Commission (Meadowlands Commission) was joined as a party. See N.J.S.A. 13:17-11. The municipalities and Meadowlands Commission appeal from the orders declaring Tomu was entitled to a builder's remedy, allowing it to develop the site with an affordable housing component. The court's orders were based on its findings that the municipalities "failed to comply with their express obligations to provide realistic opportunities for affordable housing within their borders," the Meadowlands Commission "implicitly fostered the long-standing municipal failures through its benign neglect of the housing needs of the poor[,] and that none of the defendants "demonstrated that the site is environmentally constrained, that construction of a high-density mixed-use project would represent bad planning," or that Tomu prosecuted the "action in bad faith." The municipalities also appeal from the order appointing a private person as a "Mount Laurel Implementation Monitor" to make all land use decisions for the two municipalities, including appearing before the Meadowlands Commission on their behalf. We

(continued)

Burlington County NAACP v. Mount Laurel Township (Mt. Laurel II), 92 N.J. 158 (1983).

affirm substantially for the cogent and comprehensive reasons articulated by Judge Jonathan Harris in his December 3, 2004 oral decision, November 10, 2005 written opinion, and May 19, 2006 oral decision and written opinion.

The subject property is an irregularly shaped plot of approximately 26.9 acres, with 4.9 acres in Carlstadt (block 136, lots 14 and 15) and 22 acres in East Rutherford (block 107.03, lots 2, 5, and 7³). In Carlstadt only about 3.584 acres are developable uplands and in East Rutherford, 5.286 acres are developable uplands. The site is located at the terminus of Paterson Plank Road, on the banks of the Hackensack River and is separated from the Xanadu Development by the New Jersey Turnpike.

Tomu purchased the property from Riverview Associates in 1995. In 1989, contingent approvals were granted to permit construction of 350 residential units, of which 70 were required to be devoted to affordable housing, a 100-suite hotel, a 1,200-seat banquet facility, two restaurants, a fitness center, a multi-level parking facility, and a 240-slip marina. The conditionally approved plan included residential uses only in East Rutherford, with no housing in Carlstadt. The approvals

³ Formerly designated as block 107A, lots 59A, B, C, D and L and 60B, and block 108A, lots 27C, 32C and 33C.

lapsed in 1999, and Tomu appealed administratively.⁴ The land upon which Tomu proposed to build the development, straddling the boundary between Carlstadt and East Rutherford, was located within the Commercial District and Waterfront Recreational zone of the Meadowlands District. A certain measure of residential use was permitted on all of Tomu's uplands until the 2004 amendment to the Meadowlands District's Master Plan, after commencement of the present action. The Amendment changed the zoning of the site from Waterfront Development to Waterfront Recreation, which did not allow for housing.

In August 2003, Tomu filed exclusionary zoning complaints against the municipalities and thereafter the Meadowlands Commission, seeking a builder's remedy for permission to construct 988 residential units, divided equally between the two municipalities. The development proposal was thereafter redefined to consist of 420 housing units (360 market rate units and 60 affordable rental units) in East Rutherford, and an

⁴ See Riverview Associates v. New Jersey Meadowlands Commission, OAL HMD 1118-00, initial decision (May 1, 2006), <http://lawlibrary.rutgers.edu/oal/search.html>> (holding that Meadowlands Commission's sudden denial of the extension in December 1999 was fundamentally unfair and the extension should be granted); Riverview Associates v. New Jersey Meadowlands Commission, OAL HMD 1118-00, final decision (July 25, 2007), <http://lawlibrary.rutgers.edu/oal/search.html>> (rejecting the ALJ's decision and affirming the Commission's denial); Riverview Associates v. New Jersey Meadowlands Commission, A-151-07T3 (appeal pending).

additional 420 housing units (340 market rate units and 80 affordable rental units) in Carlstadt, located in two mid-rise buildings, plus approximately 38,000 square feet of "ancillary development" of limited commercial, recreation, and environmental facilities.

On October 14, 2004, the Meadowlands Commission filed a motion for summary judgment seeking to dismiss Tomu's builder's remedy. It contended that Tomu had ample opportunity to construct the seventy affordable housing units on the site but failed to do so and that the newly adopted Master Plan and regulations appropriately concluded the site was not deemed suitable for residential uses. The Meadowlands Commission also argued it should be dismissed from the action, primarily based on the claim that Tomu failed to exhaust administrative remedies against it. The municipalities filed cross-motions for partial summary judgment seeking to determine their Mount Laurel construction obligations as zero and to set their rehabilitation obligations, and to dismiss Tomu's builders remedy claim. Tomu also filed a motion for partial summary judgment, seeking a declaration that the municipalities' land use ordinances failed to comply with their Mount Laurel obligations to provide a reasonable opportunity for low and moderate income housing within their borders. Tomu additionally sought the appointment

of a Special Master to assist the court and parties in fashioning constitutional compliance.

Following argument on December 3, 2004, and memorialized in orders on that date, the court granted Tomu's motion, declaring Carlstadt's and East Rutherford's land use ordinances were unconstitutional for failing to provide a realistic opportunity for the provision of their fair shares of low and moderate income housing. It further ordered that an attorney, Robert T. Regan, be appointed as the Special Master to assist the municipalities in complying with their Mount Laurel obligations. The court also denied the Meadowlands Commission's and municipalities' cross-motions. The municipalities filed appeals from these orders, which pursuant to Tomu's motion, we dismissed as interlocutory on March 16, 2006 (A-2373-05T5).

On February 1, 2005, Tomu filed a motion with supporting certifications seeking entry of a "scarce resources" order, asserting the land and infrastructure needed for affordable housing was scarce in the municipalities. Carlstadt filed several certifications in opposition to the motion. Following oral argument, the court requested a Special Master's report on the issue, which was completed on April 13, 2005. Carlstadt and the Meadowlands Commission each moved for an order rejecting some of the Master's recommendations. On May 13, 2005 the court

entered an order declaring that land, public potable water supply, and sewerage capacity constituted scarce resources in Carlstadt and East Rutherford, including the parts of those municipalities that lay in the Meadowlands District under the jurisdiction of the Meadowlands Commission. The court restrained the municipalities from approving any new use of or access to those scarce resources without court approval, unless the uses fell within certain exceptions.

On June 13, 2005, the Special Master issued his report and recommendations to the court regarding the builder's remedy issue. The Meadowlands Commission moved for reconsideration of the court's denial of summary judgment, or, alternatively, for holding the litigation in inactive status until completion of pending administrative actions, which the court denied.

Judge Harris conducted a nine-day bench trial on the consolidated complaints from August 8 through November 3, 2005. In addition, he viewed the property in the presence of the attorneys under the procedures of Morris County Land Improvement Co. v. Township of Parsippany - Troy Hills, 40 N.J. 539, 548-49 (1963). On November 10, 2005, the court issued a thirty-page opinion, concluding that Tomu had proved its entitlement to a builder's remedy and that its lands in East Rutherford and Carlstadt may be developed with the proposed mixed-use project

because the municipalities failed to meet their obligations to provide realistic opportunities for affordable housing within their borders and the Meadowlands Commission "implicitly fostered" those municipal failures through its "benign neglect of the housing needs of the poor." The court further held the land use regulations of the municipalities remained invalid and unconstitutional insofar as they continued past exclusionary practices, and directed the municipalities to immediately prepare comprehensive compliance plans and appropriate zoning and planning legislation to meet their affordable housing obligations. An order was entered on November 28, 2005.

On February 28, 2006 and April 10, 2006, Carlstadt and East Rutherford, respectively, filed their affordable housing compliance plan documents and sought approval of the plans and judgments of repose that would protect them from builder's remedy litigation. The Special Master thereafter filed a report analyzing the Carlstadt and East Rutherford compliance plans. On April 26, 2006, the court heard argument on the motions.

The court rendered its decision on the record on May 19, 2006, followed by a written opinion later that day, concluding the municipalities continued to be recalcitrant in implementing their Mount Laurel obligations and consequently creating, as an independent judicial officer, a "Mount Laurel Implementation

Monitor" to oversee all land use authority in the two municipalities. The monitor's duties included preparing an affordable housing plan for each municipality and acting in place of the municipality in connection with development applications in the jurisdiction of the Meadowlands Commission. The court designated Regan, the Special Master, as the Implementation Monitor. The decision was memorialized in a final judgment of June 1, 2006. The trial court denied a stay. In late June 2006, Carlstadt, East Rutherford and the Meadowlands Commission filed appeals. On September 25, 2006, we granted Carlstadt's motion for a stay pending appeal (A-5512-05T1), which the parties agreed would also apply to East Rutherford.

On appeal, the three appellants argue the court erred in awarding Tomu a builder's remedy because: (a) the Meadowlands Commission did not zone the site for residential use; (b) the property was not suitable for affordable housing; and (c) Tomu improperly used the builder's remedy as a threat and failed to conduct good faith and pre-litigation negotiations. The municipalities additionally argue the court erred in: (1) ruling the municipalities failed to meet their Mount Laurel affordable housing obligations and develop appropriate affordable housing compliance plans; (2) imposing the punitive ruling of appointing

a private person as an "Mount Laurel Implementation Monitor" which removed authority from the municipalities' planning and zoning authority and did not benefit the municipalities; and (3) imposing an unconstitutional prior restraint on public officials' protected speech, and interfering with their duties owed to the public and with their constitutional rights to petition other branches of government for redress on public policy matters by appointing a "Mount Laurel Implementation Monitor." We are not persuaded by appellants' arguments and affirm.

In January 1969 the Legislature enacted the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-60 to -76. Meadowlands Reg'l Dev. Agency v. State, 112 N.J. Super. 89, 124 (Ch. Div. 1970), aff'd, 63 N.J. 35, appeal dismissed, 414 U.S. 991, 94 S. Ct. 343, 38 L. Ed. 2d 230 (1973). The Act created the Hackensack Meadowlands Commission, now called the Meadowlands Commission, to oversee the orderly development of the Hackensack Meadowlands and to "provide a means to reclaim, plan, develop and redevelop 21,000 acres of public and private land in the Meadowlands District[], consisting of saltwater swamps, meadows and marshes, and related uplands." Town of Secaucus v. Hackensack Meadowlands Dev. Comm'n, 267 N.J. Super. 361, 367 (App. Div. 1993), certif.

denied, 139 N.J. 187 (1994). In establishing the Meadowlands District, the Legislature recognized that "this land acreage is a land resource of incalculable opportunity for new jobs, homes and recreational sites, which may be lost to the State through piecemeal reclamation and unplanned development" and that an "orderly, comprehensive development of these areas, due to their strategic location in the heart of a vast metropolitan area with urgent needs for more space for industrial, commercial, residential, and public recreational and other uses, can no longer be deferred[.]" N.J.S.A. 13:17-1. The District's boundaries, set out at N.J.S.A. 13:17-4, encompass parts of fourteen municipalities, including Carlstadt and East Rutherford.

In In Re Adoption of N.J.A.C. 19:3, 19:4, 19:5 & 19:6, 393 N.J. Super. 173 (App. Div. 2007), certif. denied, 194 N.J. 267-68 (2008), we held that under the New Jersey Constitution, as interpreted by the Mount Laurel cases, the Meadowlands Commission has an affirmative zoning and planning role to play in providing for affordable housing located in the Meadowlands in consultation with the Council on Affordable Housing (COAH). This decision, which post-dated Judge Harris' rulings, undercuts appellants' argument that Tomu could not obtain a builder's remedy because its property was in the Meadowlands District as

the trial court was without jurisdiction to make such award because the municipalities did not have zoning authority for that property and the trial court was without authority to require the Meadowlands Commission, a State agency, to change its zoning to allow affordable housing on the site.

The core inquiry in Mount Laurel cases is whether a municipality has met its constitutional obligation by "affirmatively affording a realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing." Mount Laurel II, supra, 92 N.J. at 205. The Supreme Court firmly established that in most instances where a developer succeeds in Mount Laurel litigation and proposes a project that would provide a substantial amount of lower income housing, the court should grant a builder's remedy. Id. at 278-81. "A developer is entitled to a builder's remedy if: (1) it succeeds in Mount Laurel litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project would represent bad planning." Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 525 (App. Div. 2001), remanded on other grounds, 174 N.J. 359 (2002).

Judge Harris reviewed voluminous reports and certifications in connection with the motions and trial. He also viewed the site and during the nine-day trial heard extensive testimony from Tomu's planner, Joseph Burgess; the municipalities' planner, Jill Hartmann; and Special Master Regan, regarding the second and third round Fair Share Housing obligations of the municipalities,⁵ and all aspects of site suitability and feasibility of the municipalities' proposed plans. Judge Harris made express credibility determinations. For example, he discredited Hartmann's opinion that Carlstadt had a zero realistic development potential, and explained in detail the reasons why he disagreed with the Master's conclusion that East Rutherford made a good faith effort to submit a compliant housing element.⁶ The court made extensive findings, holding

⁵ COAH revised its third round substantive rules in response to the decision in In Re Adoption of N.J.A.C. 5:94 & 5:95, by New Jersey Council on Affordable Housing, 390 N.J. Super. 1 (App. Div.), certif. denied, 192 N.J. 72 (2007). N.J.A.C. 5:96, 5:97 (effective June 2, 2008), appeals pending, IMO The Revised Third Round Regulations Promulgated by the NJ Council on Affordable Housing, N.J.A.C. 5:96 and 5:97, A-5382-07T3, A-5404-07T3, A-5423-07T3, A-5424-07T3, A-5429-07T3, A-5436-07T3, A-5451-07T3, A-5455-07T3, A-5458-07T3, A-5460-07T3, A-5461-07T3, A-5590-07T3, A-5752-07T3, A-5756-07T3, A-5757-07T3, A-5758-07T3, A-5759-07T3, A-5760-07T3, A-5761-07T3, A-5763-07T3, A-5765-07T3, A-5767-07T3, A-5871-07T3, and A-5920-07T3.

⁶ Regan reported that Carlstadt did not make a good faith effort to comply, particularly noting its continued opposition to residential use in the Meadowlands District.

that Tomu met all three prongs of a successful builder's remedy case, proving: (1) the municipalities' zoning regulations invalidly failed to address affordable housing needs; (2) Tomu offered to make "substantial contributions" to the municipalities' "non-existent stock of family-type low and moderate income housing units"; and (3) the site could be developed as Tomu proposed without upsetting legitimate planning or environmental concerns.

We are satisfied there was ample evidence in the record for the judge's factual and legal findings supporting his rejection of the municipalities' municipal compliance plans and his award to Tomu of a builder's remedy. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474 (1974). As Judge Harris recognized, the matter was hybrid in that the municipalities possessed a Mount Laurel obligation as to which a builder's remedy was appropriate. East Rutherford and Carlstadt showed no inclination to voluntarily meet their affordable housing obligations, the Tomu site appeared to be one of the few remaining developable housing sites in the two municipalities, and it was imperative for the Meadowlands Commission to take a proactive role in the Mount Laurel process. We discern no procedural impediment in the manner in which Judge Harris conducted the litigation, including involving the Meadowlands

Commission in enforcing the remedy, particularly in view of the trial court's concern that the Meadowlands Commission had recently approved a 614-unit residential project on District lands in East Rutherford along Route 3, without any Mount Laurel component.

Nor do we find persuasive appellants' alternative argument that the builder's remedy should be denied because Tomu's representatives used the litigation as a threat in meeting with municipal officials and because Tomu failed to conduct good faith negotiations in advance of litigation. We perceive no reason to elaborate upon Judge Harris' November 10, 2005 comments on this issue. R. 2:11-3(e)(1)(A), (E).

We are also satisfied there is ample basis in the record and in the spirit and law of Mount Laurel to support Judge Harris' novel step of appointing a neutral "Mount Laurel Implementation Monitor" to formulate the land use development decisions for the two municipalities, including preparing a fair share plan and appearing before the Meadowlands Commission on Tomu's zoning applications for this parcel. The trial court's reasoning for appointing a monitor explains its understanding of the Meadowlands Commission's role in this process:

Among the remedies available to the judiciary if a municipality fails or refuses to comply with a court-ordered Mount Laurel rezoning effort is to enjoin all further

development within the municipal borders. Another is to suspend all legislative barriers that prohibit multi-family uses while at the same time ensuring that any such development includes affordable housing. It is no answer that the court should give East Rutherford and Carlstadt one more chance to comply; that they misunderstood the court's direction; and now they will get it right. The reason for the absence of this last bite of the apple remedy is two-fold. First the Supreme Court in Mount Laurel II would not countenance such a transparent delay tactic. Second, any further lag would only increase the detriment to plaintiff and the third party beneficiaries of plaintiff's builder's remedy by delaying the entry of a final, appealable judgment, again putting off into the future the ultimate disposition of this litigation. I must act now to end this litigation in a way that protects and preserves the interests of all concerned. One remedy that I have considered and rejected is the use of contempt proceedings against individual governmental actors or the municipal corporations themselves. Although monetary sanctions might well incite the defendant municipalities into action, and I truly understand the power of the wallet, I intend to avoid the replication of local government errors that were committed in the past. Another reason I have eschewed the traditional contempt mode of ensuring compliance is to avoid the martyrdom syndrome that some public officials exploit. Rather than involve those governmental actors who have failed the public in the past, I have elected to simply remove them from the process and substitute a court-appointed monitor to oversee land development activities in East Rutherford and Carlstadt for the foreseeable future.

. . . .

The missing link in all the municipalities' compliance efforts has been the land in the jurisdiction of the New Jersey Meadowlands Commission. Contrary to plaintiff's view that East Rutherford and Carlstadt are required to lobby *affirmatively* for housing within their borders but beyond their control, I think that the municipalities should not be required to advocate purposefully positions that their elected officials deem contrary to the local public interest. This is especially so if it turns out that the New Jersey Meadowlands Commission is itself someday authoritatively obligated to ensure compliance with the Mount Laurel doctrine. However, recalcitrant municipalities, such as the defendants here, should not be allowed to inflict damage to affordable housing opportunities by either their active discouragement of such housing opportunities or by silence . . . a Mount Laurel Implementation Monitor shall be appointed to speak on behalf of each municipality on matters affecting affordable housing in the New Jersey Meadowlands District in order to ensure that the inertia engendered by each municipality will no longer impede appropriate affordable housing opportunities on lands in these municipalities under the control of the New Jersey Meadowlands Commission.

The appointment of the Implementation Monitor, with defined powers, is an inspired and appropriate exercise of the court's judicial powers, consistent with the Mount Laurel decisions, to assume oversight responsibility for the constitutional right to have zoning throughout New Jersey appropriately accommodate affordable housing where, as here, the municipalities neglected

such constitutional obligations. Judge Harris' ruling was creative and insightful. It was definitely not punitive. Rather than hold the municipal officials in contempt, which would have been a knee-jerk reaction, the judge wisely looked for a remedy that would move the case forward. The ruling was intended to avoid collaboration between the municipalities and Meadowlands Commission that would continue the pattern of non-compliance. It was also intended to allow the Special Master to continue to implement the Mount Laurel doctrine continuously ignored by the municipalities by seeking rezoning of the Tomu site and promoting other changes necessary to permit realistic opportunities for affordable housing in the municipalities. Noting there were limits on available land in the municipalities and the municipalities' recalcitrance in fulfilling their obligations, as well as the prior lost opportunities for affordable housing on District lands which should not be repeated, Judge Harris appropriately concluded it was imperative for a neutral person to seek to advance Mount Laurel goals on behalf of the municipalities before the Meadowlands Commission.

We perceive of no constitutional infirmity in this appointment. The issue involves who may speak to the Meadowlands Commission regarding land use matters of State constitutional significance, not the denial of governmental

officials' rights to hold a particular office or an unconstitutional prior restraint on their rights to speak to the Meadowlands Commission on behalf of the municipalities' residents. The court's order does not prevent individual residents of Carlstadt and East Rutherford from appearing before the Meadowlands Commission to express their views during the public portions of the meetings.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION