FILED, Clerk of the Supreme Court, 09 Aug 2024, **089641**

DONALD WHITEMAN, PATRICIA A. DOLOBACS, JUDITH A. ERDMAN AND 282 OTHER PETITION SIGNERS OF SOUTH SEASIDE PARK HOMEOWNERS & VOTERS ASSOCIATION,

Plaintiffs,

vs.

TOWNSHIP COUNCIL OF BERKELEY TOWNSHIP; TOWNSHIP OF BERKELEY, JOHN DOES 1-10, ABC CORPS. 1-10,

Defendants.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089641

App. Div. Docket No.: A-003786-21

SAT BELOW:

Hon. Thomas E. Sumners, Jr., P.J.A.D.
Hon. Lisa Rose, J.A.D.
Hon. Lisa Perez Friscia, J.A.D.

ON APPEAL FROM:
Superior Court of New Jersey
Law Division, Ocean County

Docket No.: OCN-L-2667-20

CIVIL ACTION

SAT BELOW:

Hon. Marlene Lynch-Ford, A.J.S.C.

REPLY BRIEF OF DEFENDANTS/PETITIONERS TOWNSHIP OF BERKELEY AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY

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POINT I

THE FAILURE OF THE COURT BELOW TO ADDRESS THE IMPACT ON SCHOOL TAXES RESULTING FROM THE DEANNEXATION OF 10.65% OF THE TOWNSHIP'S TAX BASE IS DIRECTLY CONTRARY TO THE HOLDINGS OF TWO OTHER APPELLATE PANELS.

The decision below is in direct conflict with Seaview Harbor Realignment Committee, LLC v. Township Committee of Egg Harbor Township, 470 N.J.Super. 71, (App. Div. 2021) and Avalon Manor Improvement Asson., Inc. v. Twp. of Middle, 370 N.J. Super. 73 (App. Div. 2004). Unlike each of those two cases, the Court here completely failed to address the impact that the loss of 10.65% of the Township's tax base would have on the school tax bill for the remaining residents of Berkeley Township. Nowhere in the court's opinion is it even mentioned. This glaring omission was then compounded by the court addressing only the loss of municipal tax revenue, (Pa011-013, Pa032) as a basis for determining the Townships' remaining residents would not suffer a significant injury.

School taxes are one of the critical factors for a municipality to consider in determining if deannexation would cause a significant injury to the well-being of the municipality. By way of example, in Seaview Harbor, the Court recognized the full impact of the loss of the Township's tax base. This loss not

only impacts the municipal tax rate (the smallest portion of the tax bill), but the school tax rate, as well. The Seaview Harbor Court determined it was not arbitrary or unreasonable for the governing body to conclude that petitioners had failed to meet their burden, since deannexation would lead to an immediate tax increase to the remaining residents of $122.78, (an approximate $95 increase in school taxes and a $27 increase in municipal taxes. Seaview Harbor Realignment Committee, LLC, *supra*, at 99-100. The Court in Avalon Manor utilized the same analysis.

Plaintiffs continue to downplay the school tax impact in this case, and apparently convinced the Court below that they are of such little consequence they need not be addressed. They continue to obfuscate the impact by trying to conflate the Central Regional School District with Berkeley Township as if they are one and the same, they of course are not. According to the plaintiffs' own expert, the plaintiffs will obtain a tax reduction windfall of approximately 40% (Da477), at the expense of the remaining Berkeley Township residents. The question is not whether the handful of students from the barrier island will continue to attend the Central Regional School District, they will, the question is what will the school tax increase be to the remaining residents from the loss of 10.65% of the tax base. This point is not even in dispute. The plaintiffs' own expert concluded the school tax increase for the remaining residents if

deannexation occurs would be an annual increase of at least $121 (Pa0241). Plaintiffs try to devalue this significant tax increase as "inconsequential," and only $0.34 per day. (Pb, page 14). Simple mathematics confirms this equates to a school tax increase *alone* of $124.10 per year. While the Township vigorously disputes the loss of municipal tax revenue could be offset by a reduction of municipal costs, laying off police or selling Township equipment will have absolutely no effect on the devastating school tax increase facing the residents of Berkeley Township if this case stands. Nevertheless, the Appellate Division didn't even address it.

In Seaview Harbor the panel concluded that petitioners failed to meet their burden due to an immediate tax increase of $122.78 ($95 from school taxes) on the residents of Egg Harbor Township, while the court here decided that a school tax increase of $124.10 on the residents of Berkeley Township does not. These two decisions could not be in more conflict. The lower Courts' attempts to distinguish this case from Seaview Harbor are misplaced and clearly based on its mistake in failing to adequately address the impact of school taxes. The Court has focused only on the municipal tax rate and potential savings which "may" accrue to the municipal budget, while ignoring the overwhelming school tax increase which would have no offset whatsoever.

It is important to recognize that school taxes were a major discussion over the course of 38 Planning Board hearings on the issue. The Plaintiffs presented witnesses on the subject, Township officials testified, cross examination was extensive and at the conclusion of such testimony, there was essentially an agreement that the school tax impact of deannexation on the remaining residents of Berkeley would be an annual school tax increase of between $121-124. Even now plaintiffs do not dispute this fact, they simply try to "soften" it, by calculating it as a *per diem* cost of $0.34 instead of on an annual basis. Likewise, Plaintiffs' attempt to mislead the Court, as they did at trial, by referring to only a portion of the resolution adopted by the Planning Board when it made its recommendation to the governing body. The Planning Board's resolution (Pa 464) focused mainly on the disputed facts which the board addressed, not the ones which were not in dispute. However, the Board's resolution also specifically incorporated into their recommendation, the entire 399-page report of the Board's Expert Planner Mr. Wiser, which was attached as Exhibit A to the resolution itself. (Da465). In that report Mr. Wiser addressed the undisputed school tax increase which would result from deannexation. (Da373-374,380). Once again, this fact was never in dispute, Plaintiffs' financial expert, Mr. Moore agreed. At trial, Plaintiffs attempted to argue, as it does here, that the Court should ignore the impact of the school tax increase, not because it wasn't true

but because it was not specifically laid out in the Board's resolution, but was instead incorporated by reference. The Township quickly pointed this out at trial and there was no other dispute regarding same. (2T17:15-25, 2T 18-1).

POINT II

THERE ARE FEW QUESTIONS OF MORE CRITICAL PUBLIC IMPORTANCE TO MUNICIPALITIES THAN LOCAL PROPERTY TAXES.

Berkeley Township's Petition for Certification presents a question of critical public importance which has not been previously addressed by this Court. In 1982 the legislature not only shifted the burden of proof but also applied the arbitrary standard to a municipal decision to deny deannexation. Seaview Harbor Realignment Committee, LLC, *supra*, at 95 (2021). The legislative intent was to impose a heavier burden on petitioners, to discourage attempts to do so and to advance the "…more significant policy" to preserve municipal boundaries and the maintenance of their integrity from short-term or even frivolous considerations of "tax shopping or avoidance of assessments". See Seaview Harbor Realignment Committee, LLC, *supra,* at 95 (citing D'Anastasio, *supra,* at 260.)

This Court has never examined this statute. It has never interpreted the burden of proof a petitioner for deannexation must meet, nor the factors a municipality must consider or weigh to determine if the petitioner has met their burden under N.J.S.A. 40A:7-12.1. It has never decided what a significant injury to the well-being of a

municipality means or what process and procedures a municipality should utilize in order to faithfully discharge their responsibilities under the statute. This Court has never opined on how the legislative intent behind the statute informs the determinations which must be made or the type of role a municipality, a local planning board or it's officials should play. In view of the ever-increasing efforts by wealthier residents, who shoulder a larger portion of the property tax bill due to their higher property values, to utilize deannexation as a vehicle to obtain property tax relief at the expense of their fellow residents, a question of general public importance has been presented to this Court which must be answered.

In the first twenty years of its existence, only one deannexation case was decided by a court and that case affirmed the decision of the "receiving municipality" to decline to accept a roadway from its adjoining neighbor. Russell v. Stafford Twp., 261 N.J. Super. 43, 48 (Law Div. 1992.) In the entire forty-two years since its adoption, only one other case has ever overturned a municipality's denial of a deannexation petition; Bay Beach Way Realignment Committee, L.L.C. v. Township Council of Township of Toms River, No. OCN-L-2198-07PW, 2008 WL 8854635 (Law Div. July 22, 2008), aff'd. No-A-5733-07T1, 2009 WL 1954504 (App. Div. July 9, 2009).

In Bay Beach Way, one street, representing only 3/8ths of one percent (0.00375) of the Township's tax base, as opposed to the 10.65% Berkeley stands to

lose here, was permitted by the court to be deannexed from Toms River, since the municipality would not suffer an injury from such a statistically insignificant loss of tax ratables. With the legislative intent of the 1982 statute at the forefront, every other court has ruled that it is not arbitrary for a municipality to refuse to consent if it will result, for example, in the loss of 2.4% of the municipal tax base in Seaview Harbor, *supra*, or 2.5%-2.6% in Avalon Manor Improvement Asson., Inc. v. Twp. of Middle, 370 N.J. Super. 73 (App. Div. 2004). Unless reversed, the decision below changes this. It is not hyperbole to predict the floodgates will open.

POINT III

THE TRIAL COURTS INADEQUATE REVIEW OF THE RECORD LED IT TO INCORRECTLY CONCLUDE A DUE PROCESS VIOLATION OCCURRED.

It is undisputed that the trial court made an enormous factual error that Mr. Wiser, the author of the 399-page report relied upon by the Board, was somehow shielded by the Board from testifying. This, according to the trial judge, denied the plaintiffs their right of cross examination. Da450. Of course this was absolutely incorrect. This factual finding unquestionably framed the trial court's entire decision that the Planning Board had acted improperly. Mr. Wiser was subject to extensive cross-examination on his report, his discussions with any Township employes, his opinions and his conclusions. The trial court had the transcripts where he was subject to such cross-examination but either

did not read them or simply forgot this fact. Since Plaintiffs and the trial court focused so much of their arguments on Mr. Wiser himself, it is inconceivable to the Township how this glaring error was not reversed and at least remanded by the Appellate Division. This error, and the failure to remand is only exacerbated by the court affirming the Township's objection at trial regarding an alleged sign on the property of a Board member and then, inexplicably using it as an example of bias in her decision.

The Township vigorously disputes the remaining allegations of bias and relies on its Appellate brief and initial brief before this Court with respect to same. However, there can be no question that these two examples highlight the failure of the trial court to adequately review the record.

The Township again submits that there is a catch-22 facing a municipality in petitions such as this. Recognizing this conundrum, the Plaintiffs apparently for the first time, now argue, that the Township itself should have coordinated and presented witnesses, testimony or evidence to the Board. (Pb, page 10). According to the statute it is the Township governing body which makes the ultimate decision on whether petitioners have met their burden of proof. So how would it be appropriate for the Township to present expert or factual witnesses challenging factual statements, arguments or opinions of petitioners seeking to deannex? The same argument would be made, as was made here, the Township

was biased or prejudged the issue because they obtained and presented witnesses who disputed those of the petitioners. Plaintiffs seek a quasi judicial adversarial hearing, but simultaneously argue there can be no adversary. It is for reasons such as this that this Court must step in and clarify the process and procedure to be applied under N.J.S.A. 40A:12-7.

POINT IV

THE COURT BELOW ERRED WHEN IT STATED THAT THE TOWNSHIPS BEACH, AUTOMATICALLY BECOMES PART OF ANOTHER MUNICIPALITY IF DEANNEXATION WERE TO OCCUR.

The question of ownership of the Townships oceanfront beach was never addressed at trial, was not decided by the trial court and was not litigated in the Appellate Division below. Nevertheless, the opinion avers that the beachfront lot, which is owned in fee by all residents of Berkeley Township, apparently belongs only to those residents seeking to deannex. There can be no question that public streets and right of ways go with petitioners who successfully achieve annexation by another municipality. A municipality does not own the land under a right-of-way, it belongs to the adjoining owner in fee. The municipality essentially administers this public right of way for the general public. If a right of way is vacated by a municipality, the underlying fee reverts to the adjacent property owners. Salter v. Jonas, 39 N.J.L. 469 (E&A 1877); Wolff v Veterans of Foreign Wars, 5 N.J. 143 (1950).

To the contrary, the Township's ocean front beach is owned in fee and belongs to every resident of Berkeley Township. It is not the private domain of petitioners. The trial court never made any such finding and the conclusion of the panel below is clearly in error.

CONCLUSION

For the foregoing reasons, the Township of Berkeley respectfully requests that this Honorable Court grant its Petition for Certification.

Respectfully submitted,

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