SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2571-15T3
A-3238-15T3

JOHN J. SUMAS,

Plaintiff-Appellant,

v.

HANOVER 3201 REALTY, L.L.C.,

Defendant-Respondent.

MARIA ESPOSITO,

Plaintiff-Appellant,

v.

HANOVER 3201 REALTY, L.L.C.,
TOWNSHIP OF HANOVER, and
THE PLANNING BOARD OF THE
TOWNSHIP OF HANOVER,

Defendants-Respondents.

Telephonically argued March 20, 2017 –
Decided April 12, 2017

Before Judges Reisner, Koblitz and Rothstadt.

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County,

Docket No. C-0105-15 and Law Division, Morris County, Docket No. L-1320-15.

Richard F. Ricci argued the cause for appellant John J. Sumas (Lowenstein Sandler L.L.P., attorneys; Christopher S. Porrino, of counsel; Mr. Ricci and Joseph A. Fischetti, on the briefs).

Kevin J. Coakley argued the cause for respondent Hanover 3201 Realty, L.L.C. in A-2571-15 (Connell Foley, L.L.P., attorneys; Mr. Coakley, of counsel; Nicole B. Dory and Nicholas W. Urciuoli, on the brief).

Joseph A. Fischetti argued the cause for appellant Maria Esposito (Lowenstein Sandler L.L.P., attorneys; Richard F. Ricci and Peter Slocum, and Mr. Fischetti, on the briefs).

Richard L. Rudin argued the cause for respondents Hanover 3201 Realty, L.L.C. and Township of Hanover in A-3238-15 (Weiner Lesniak, L.L.P. and Dorsey & Semrau, attorneys; Mr. Rudin and Fred Semrau, on the brief).

Michael D. Sullivan and Dawn Sullivan argued the cause for respondent The Planning Board of the Township of Hanover (Stickel, Koenig, Sullivan & Drill, L.L.C., attorneys; Mr. Sullivan, on the brief).

PER CURIAM

These two appeals are part of a long-running effort by Village Super Market, Inc. (Village), which operates a ShopRite store in Hanover Township, to prevent local competition.[1] We need not

[1] The appeals were calendared back-to-back and we have consolidated them for purposes of this opinion.

recite the litany of Village's prior unsuccessful litigation against Hanover 3201 Realty, L.L.C. (Hanover or the applicant), which is attempting to open a Wegman's supermarket in Hanover Township. That history, and the project itself, was detailed in our prior opinion in a related appeal. In re Issuance of Access St. Intersection Permit No. S-10-N-0002-2013, A-4339-14 (App. Div. Aug. 1, 2016). In the cases now before us, John Sumas, Village's chief operating officer, and Maria Esposito, a Village employee, each filed litigation aimed at furthering Village's opposition to the siting of the Wegman's store.

Having reviewed the record in light of the applicable legal standards, we affirm the orders on appeal in both cases. Both cases were correctly decided. Moreover, except as briefly addressed below, plaintiffs' appellate arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

I

In A-3238-15, Esposito appeals from a March 8, 2016 order, dismissing her complaint seeking declaratory and injunctive relief against the Hanover Township Planning Board (Board) and Hanover. Central to her complaint was her claim that the Board conditioned its approval of Hanover's site plan application on the construction of certain specific left turn configurations on an adjacent

roadway. The Board's resolution required the applicant to obtain approval from the New Jersey Department of Transportation (DOT). After a review process in which Village participated as an objector, DOT approved the creation of a jug handle turn instead of a series of left turn lanes.[2] After DOT issued its approval, the Board's engineer reported to the Board that the jug handle configuration was a better traffic design than the left turn lanes.

However, Esposito asserted that because DOT did not accept the precise turn configurations set forth in Hanover's land use application, Hanover had to return to the Board and apply for an amended approval. In opposing the complaint, and on this appeal, both the Board and Hanover asserted that construction of the particular left turn configuration set forth in the site plan application was not a condition of the Board's approval. Based on our review of the record, we agree with that contention. Additionally, as the trial judge noted in his written opinion, after DOT rendered its decision, the Board signed off on Hanover's developer's agreement with the Township, thus signaling its

[2] Esposito, appearing as Village's stand-in in the DOT matter, filed an appeal from DOT's decision, however, we affirmed. See Access St. Intersection Permit, supra, slip op. at 27.

determination that the jug handle turn was acceptable to the Board.[3] Accordingly, we affirm the March 8, 2016 order on appeal.

II

In A-2571-15, Sumas appeals from: a September 8, 2015 order, denying plaintiff's application for a preliminary injunction and related relief with respect to certain permits issued to Hanover by the New Jersey Department of Environmental Protection (DEP), and ordering the Morris County Soil Conservation District (MCSCD) to investigate plaintiff's allegations about Hanover's discharge of construction sediment; a November 13, 2015 order denying plaintiff's application to file an amended complaint; and a January 26, 2016 order denying plaintiff's motion for reconsideration.

Briefly, after an extended review process in which Village participated as an objector, the DEP issued Flood Hazard Area and Freshwater Wetlands permits to Hanover, which included permission to fill in two tenths of an acre of wetlands. Village did not appeal from the DEP's permit decisions. Instead, invoking the Environmental Rights Act (ERA), N.J.S.A. 2A:35A-1 to -14, Sumas

[3] Paragraph 6 of the Board engineer's review report provided that the traffic improvements must be "finalized and approved" before the Board would sign off on the developer's agreement. The Board incorporated paragraph 6 as a condition in its resolution. Notably, however, the Board resolution did not incorporate paragraph 3 of the engineer's report, which referenced the proposed traffic improvements and noted that they had been submitted to DOT.

filed a lawsuit in General Equity, which Judge Stephan C. Hansbury dismissed as an impermissible collateral attack on the DEP permits. We agree with his decision, largely for the reasons he stated. We add these comments.

A party dissatisfied with the decision of a State agency must file an appeal with the Appellate Division, rather than mounting a collateral challenge in a trial court. See Beaver v. Magellan Health Servs., Inc., 433 N.J. Super. 430, 441-42 (App. Div. 2013), certif. denied, 217 N.J. 293 (2014). In this case, Village should have filed an appeal with this court, within forty-five days after the permits were issued. See R. 2:2-3(a)(2); R. 2:4-1(b). The General Equity lawsuit was "a thinly disguised effort" to fit its claims within the jurisdiction of the trial court. Beaver, supra, 433 N.J. Super. at 442.[4] The challenge was filed far out of time and in the wrong forum, and was properly dismissed. See Kohlbrenner Recycling Enters., Inc. v. Burlington Cty. Bd. of Chosen Freeholders, 228 N.J. Super. 624, 629 (Law Div. 1987); Kohlbrenner Recycling Enters., Inc. v. Burlington Cty. Bd. of Chosen Freeholders, 248 N.J. Super. 531, 539 (App. Div.), certif. denied, 127 N.J. 551 (1991).

[4] None of the cases plaintiff cites stand for the proposition that the ERA can be used to mount a collateral attack on a DEP permit decision.

We find no merit in Village's argument, that it could pursue a trial court challenge because the DEP permits were "utterly void." The concept, that an utterly void agency action may be collaterally attacked at any time, simply does not apply here. The issue most often arises in cases involving land use applications and other municipal permitting actions. As thoroughly discussed in Najduch v. Township of Independence Planning Board, 411 N.J. Super. 268, 274-75 (App. Div. 2009), if a land use board approves an application that is beyond its jurisdiction to entertain, the board's action is "utterly void." Likewise, if a municipal officer issues a building permit "in direct violation" of the local zoning ordinance, the permit can be collaterally challenged. Sitkowski v. Lavalette Zoning Bd. of Adjust., 238 N.J. Super. 255, 262 (App. Div. 1990). In this case, DEP clearly had statutory authority to issue wetlands and flood hazard area permits. Any alleged deficiencies in the permitting process should have been timely raised on a direct appeal to this court, or in a motion for reconsideration filed with the DEP.

We also find no error in Judge Hansbury's decision to direct the MCSCD - the State agency with jurisdiction over soil control issues at construction sites - to investigate plaintiff's Environmental Rights Act claim, alleging that Hanover was improperly discharging construction sediment into wetlands on

Hanover's property. See N.J.S.A. 4:24-22; N.J.S.A. 4:24-47 (addressing the powers of a soil conservation district). We have previously recognized that in an ERA case: "If necessary a court may utilize the expertise of interested administrative agencies to assist it in reaching a just result." Howell v. Waste Disposal, Inc., 207 N.J. Super. 80, 94 (App. Div. 1986).

As Judge Hansbury pointedly noted in denying plaintiff's request to accompany the MCSCD inspectors, this lawsuit was plainly motivated by anti-competitive animus rather than concern for the environment, and a completely independent inspection was warranted. Moreover, the ERA authorizes trial courts to weed out patently frivolous or harassing lawsuits. N.J.S.A. 2A:35A-4(c). See Howell, supra, 207 N.J. Super. at 93.

On October 30, 2015, the MCSCD reported back to Judge Hansbury that it had inspected the property three times and found evidence of only one minor discharge, caused by overtopping of a silt fence during a rainstorm - a de minimis incident which was to be expected at an active construction site. The agency also reported that defendant had taken prompt action to prevent any future discharge by installing perimeter barriers and a stormwater basin. The MCSCD further stated that defendant was in the process of constructing a retaining wall "along the entire perimeter of the wetland" which "will act as a curb to direct construction runoff

away from this wetland." In the circumstances of this case, we find no error in the judge's decision to dismiss the lawsuit.[5]

To the extent not specifically addressed herein, plaintiff's appellate arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm the orders on appeal.

Affirmed.

[5] At oral argument, Hanover's attorney advised us that the retaining wall has been completed, and asserted that a claim for an injunction against the discharge of untreated sediment is now moot. Plaintiff's attorney did not dispute that the wall had been completed, but argued that fines or penalties might still be assessed if an unlawful discharge had occurred in the past. We choose not to address the mootness issue because it was not adequately briefed.