

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS**

NATIONAL WINTER ACTIVITY :
CENTER, :
:
Plaintiff, :
:
v. :
DIRECTOR, DIVISION OF :
TAXATION, :
:
Defendant. :
:

TAX COURT OF NEW JERSEY
DOCKET NO.: 008480-2017

Approved for Publication In the New Jersey Tax Court Reports
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Decided: September 25, 2020

Cara A. Parmigiani for plaintiff
(Law Office of Cara A. Parmigiani LLC).

Joseph A. Palumbo for defendant
(Director, Division of Taxation).

Joshua A. Zielinski for movant
(O'Toole Scrivo, LLC).

BIANCO, J.T.C.

This shall serve as the court's formal opinion concerning a motion to intervene as a necessary party brought by the Township of Vernon ("Vernon") under R. 4:33-1, and a cross-motion to transfer funds held in escrow from Vernon to the State's control. The matter is before this court as part of an appeal of a Non-Residential Development Fee ("NRDF") assessed by Vernon against plaintiff, National Winter Activity Center ("NWAC") for improvements made to NWAC's property located at 44 Breakneck Road, Vernon Township, New Jersey (Block 192.02, Lots 25 and 19). Vernon denied NWAC's application for an exemption from payment of the NRDF, and NWAC appealed Vernon's decision to the Director of the Division of Taxation

(“Director”) who also denied the exemption. NWAC then appealed the Director’s decision to this court, naming the Director as the sole defendant. Because Vernon has a legitimate interest in the subject of the underlying action, and Vernon’s interest is not adequately represented by the Director, its motion to intervene is granted. Furthermore, as Vernon’s interest in this litigation is not limited to its status as escrow holder of the disputed funds, NWAC’s cross-motion to transfer the funds to the State’s control is denied. The court’s reasoning is set forth below.

Procedural History/Facts

NWAC is an I.R.C. 501(c)(3) non-profit organization and is organized as a non-profit corporation with a stated charitable purpose to “improve the lives, health and fitness of youth by providing access to continuous, progressive instruction and meals in an outdoor environment for winter activities.” About NWAC, A Facility Focused on Improving Lives through Winter Sports, CFNJ, <https://cfnj.org/warmjacket/about-nwac/> (last visited Sept. 23, 2020). On December 13, 2016, NWAC applied to Vernon for an exemption from an NRDF for recent improvements made at NWAC’s property. On the same day, Vernon’s Tax Assessor denied the application and determined that NWAC owed an NRDF of \$33,000 based on the assessed value of these improvements. NWAC paid Vernon \$16,500 under protest, representing half of the total fee, in return for a conditional certificate of occupancy. Vernon continues to hold the funds in escrow pending the outcome of this litigation.

On December 19, 2017, NWAC requested from Vernon an explanation of the assessed value and a reconsideration of the denial of its exemption application as a recreational facility that is organized as a non-profit corporation. In correspondence dated February 22, 2017, Vernon re-affirmed that it would not grant NWAC relief from the NRDF.

On March 15, 2017, NWAC challenged Vernon's decision via a formal protest filed with the Director. This application was denied by the Director in a letter dated May 3, 2017. On June 9, 2017, NWAC timely challenged the Director's decision by filing the instant case with the Tax Court seeking a determination that NWAC is entitled to an exemption from the NRDF, and that the \$16,500 which it paid under protest be refunded. NWAC did not name Vernon as a defendant, and Vernon was not aware of NWAC's complaint.

On June 23, 2020, the court held a conference call with the parties and instructed the Director to advise Vernon of the instant litigation and invite Vernon to file a motion to intervene by August 24, 2020. The Director's letter conveying the court's instruction was sent to Vernon that same day. On, July 15, 2020, Vernon filed the instant motion along with an answer to NWAC's complaint. In its motion, Vernon argued that it should be permitted to intervene as a necessary party because it has an interest in protecting the NRDF, and that its application should be considered as timely because NWAC failed to notify Vernon of its appeal.

NWAC filed timely opposition papers on July 24, 2020, along with a cross-motion to transfer the funds held in trust by Vernon to the State. NWAC argued that Vernon's position is identical to the Director's, and, therefore, its interests were adequately represented by the Director. NWAC further argued that Vernon's application was untimely because it was filed three years after the case was initiated, and that Vernon's intervention would cause undue delay. Finally, NWAC argued that the State should hold the funds in escrow because the fees were collected to further the Fair Housing Act which is administered by the State.

Oral argument was held on August 14, 2020. During argument, NWAC claimed, and Vernon did not deny, that Vernon had constructive notice of the instant litigation despite not being

named as a defendant by NWAC. Vernon and the Director maintained that Vernon's interest in the instant litigation went beyond that of escrow holder of the disputed NRDF.

Applicable Law

The issue here is whether Vernon should be permitted to intervene as a necessary party to this case. Vernon seeks to intervene as of right under R. 4:33-1 which states:

Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[Id.]

Thus, an applicant seeking intervention as of right in a matter must:

(1) claim an interest relating to the property or transaction which is the subject of the transaction, (2) show [that the movant] is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, (3) demonstrate that the [movant's] interest is not adequately represented by existing parties, and (4) make a timely application to intervene.

[Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998) (internal citations and quotation marks omitted) .]

Courts should liberally grant motions to intervene as of right, and "[t]he test is 'whether the granting of the motion will unduly delay or prejudice the rights of the original parties.'" Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr., Inc., 239 N.J. Super. 276, 280 (App. Div. 1990).

NRDFs are imposed and collected as part of the Fair Housing Act, N.J.S.A. 52:27D-301 to 329.9. Under the statutory scheme, development fees may be collected by a municipality or the State. N.J.S.A. 52:27D-329.2(e). See also N.J.S.A. 40:55D-8.1 to 8.7. An authorized municipality may impose an NRDF on developers and must place collected fees in a municipal

trust fund solely dedicated to fulfilling the purposes set forth in the Fair Housing Act. N.J.S.A. 52:27D-329.2(a)-(b). The municipality may not use these funds until it receives State approval. N.J.S.A. 52:27D-329.2(c). Up to 20% of the funds may be used to cover administrative costs for implementing the plan. N.J.S.A. 52:27D-329.2(c)(5). If the municipality fails to comply with the State's regulations concerning maintenance of the municipal trust fund, the monies may be forfeited in their entirety and transferred into the "New Jersey Affordable Housing Trust Fund" maintained by the State. N.J.S.A. 52:27D-329.2(a).

A taxpayer may appeal an NRDF *to the Director*. N.J.S.A. 40:55D-8.6(b). The Director's final determination may then be appealed *to the Tax Court*, which reviews such decisions *de novo*. Ibid.; N.J.S.A. 2B:13-3. However, N.J.S.A. 40:55D-8.6(b) contains no provision to include or even notify the local municipality of a pending Tax Court appeal of the Director's final determination in NRDF matters. Regardless, in some instances the local municipality was included as a defendant in the litigation.¹ This practice, however, has not been expressly authorized by statute or case law. In the present matter and other instances, the local municipality was not included as a defendant in the litigation.²

Analysis

I. Motion to intervene

a. Interest in the Current Litigation

Here, Vernon has a legitimate interest in the subject of the present litigation, as it is authorized to use the funds in its municipality to further the purposes of the Fair Housing Act.

¹ In Glenpointe Assocs. IV, LLC v. Twp. of Teaneck, 2019 N.J. Tax Unpub. LEXIS 25, for example, the municipality was included as a named party at the time its NRDF was appealed to the Tax Court.

² As of the date of this opinion, there are at least two additional pending matters before the Tax Court where the local municipality was not included as a defendant.

Vernon has not provided its municipal plan to use the funds it has collected, but its status as a municipality that is authorized to impose NRDFs demonstrates that it is in basic compliance with the Fair Housing Act requirements. See N.J.S.A. 52:27D-329.2(a),(e) (providing that a municipality must obtain authorization before being allowed to assess NRDFs). Though Vernon will ultimately need State approval before disbursing the funds, Vernon has a legitimate interest in securing the NRDF in this case to finance its municipal plan. Furthermore, the court's ruling on the ultimate issue in this case (whether the NRDF was properly assessed by Vernon) will be binding on Vernon by virtue of the doctrine of collateral estoppel. Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005). Accordingly, if Vernon is denied participation now, it will be impeded from protecting its interest in the future.

b. Adequacy of the Director's Representation

The court further finds that Vernon's interest in the pending litigation is not adequately represented by the Director. The underlying NRDF in this case was imposed by Vernon in conjunction with its scheme to collect funds for its municipal fair share plan. If Vernon satisfies its other obligations under the Fair Housing Act, it will be the ultimate user of the funds, not the State.

Additionally, much of the evidence to support the NRDF's justification (i.e., property records, calculations used by the assessor to arrive at the assessed value, assessed values of similarly situated properties within the municipality) is in Vernon's control, and Vernon, not the Director, is in the best position to raise such arguments. Also, while in the instant litigation the Director affirmed Vernon's decision, in cases where the Director rules against a municipality the Director would not be able to represent that municipality on appeal. For these reasons, the court

finds that the Director and Vernon do not share the same incentives to defend Vernon's collection of the NRDF and, therefore, Vernon's interest is not adequately represented by the Director.³

c. Timeliness

The court further finds that Vernon's application is timely. Vernon did not have actual notice of the pending litigation until June 23, 2020. Whether or not Vernon had constructive notice of the lawsuit prior to this date is of no consequence here.⁴ Constructive notice is not germane to the question of timeliness presented in applications to intervene under R. 4:33-1. After being notified, Vernon filed the instant motion on July 15, 2020, well before the court's August 24, 2020 deadline. A trial date has not been assigned yet, and Vernon's addition will not bring a new cause

³ In its responding papers to NWAC's motion, the Director argued that the only proper parties in this case are NWAC and Vernon, and that the Director is more akin to a County Board of Taxation acting in a quasi-judicial capacity to defend its decision from being deemed arbitrary, capricious, or unreasonable. Under the statutory scheme of N.J.S.A. 40:55D-8.6(b), appeals of the Director's final determination on NRDF appeals are treated like any other appeal of a final determination of the Director. In such appeals, the Director is the named defendant. It is clear to this court that Vernon's interest, and those of any similarly situated municipality, is paramount in NRDF appeals to the Tax Court. Those interests are not adequately represented by the Director's participation in the appeal. The court defers to the legislature to consider whether the Director's involvement in these NRDF appeals is appropriate and/or necessary, and whether the local municipality, at a minimum, should be named as a defendant in NRDF appeals to the Tax Court.

⁴ While the concept of constructive notice is not foreign to tax matters, it has never been fully addressed by the Tax Court. In fact, only six published tax opinions even mention the concept. See City of East Orange v. Twp. of Livingston, 27 N.J. Tax 161 (Tax 2013); Rappeport v. Dir., Div. of Taxation, 22 N.J. Tax 422 (Tax 2005); Green v. East Orange, 21 N.J. Tax 324 (Tax 2004); Evesham Twp. v. Nye, 3 N.J. Tax 183 (Tax 1981); C.J. Kowasaki, Inc. v. State of New Jersey, Div. of Taxation, 13 N.J. Tax 160 (Tax 1993); and Oberhand v. Dir., Div. of Taxation, 22 N.J. Tax 55 (Tax 2005), rev'd, 388 N.J. Super. 239 (App. Div. 2006), aff'd in part, rev'd in part, and remanded, 193 N.J. 558 (2008). References made in the cited cases are not instructive here. Generally, constructive notice is "[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of . . . notice presumed by law to have been acquired by a person and thus imputed to that person." Black's Law Dictionary 1227 (10th ed. 2014). Under the most liberal of interpretations, this court would be constrained to find that Vernon had constructive notice of the present pending NRDF appeal, particularly when, in such appeals, there has been no consistent practice of naming the municipality as the defendant in the first instance.

of action nor “unduly delay or prejudice the adjudication of the rights of the original parties.” Atlantic Employers, 239 N.J. Super. at 280. Furthermore, the court maintains discretion to control timelines for discovery. R. 4:24-1 (setting timelines for discovery for both original and added parties); R. 1:1-2(a) (allowing for the relaxation of court rules to avoid injustice). Moreover, given the court’s findings that Vernon has a legitimate interest in this litigation which is not adequately represented by the Director, any inconvenience caused by Vernon’s entry at this stage is outweighed by the necessity of its joinder to achieve a fully litigated outcome. Therefore, the court is satisfied that Vernon’s motion is timely.

d. Conclusion

The court finds that Vernon has satisfied the requirements for intervention under R. 4:33-1 because Vernon has a demonstrated interest in enforcing the NRDF, would forfeit its right to protect that interest if it failed to intervene, is not adequately represented by the Director, and has made a timely application. Furthermore, the court finds that when a municipality is authorized to impose fees under N.J.S.A. 52:27D-329.2, any appeal to the Director or Tax Court of the municipality’s decision must include the municipality as a named party.

II. Cross-Motion to Transfer Funds

NWAC’s motion to transfer the fees held in escrow by Vernon to the State is denied. NWAC argues that Vernon’s only interest in this litigation is as escrow holder of the disputed NRDF, so making the State the escrow holder eliminates any basis for Vernon to join now. This is an oversimplification of the matter. Vernon’s interest in this litigation is to secure the assessed NRDF to support its municipal affordable housing plan. Though the State must issue its final approval before Vernon can use the collected funds, Vernon has obtained authorization to assess and maintain such funds under N.J.S.A. 52:27D-329.2(a),(b). Provided that Vernon remains

compliant with State rules, it will be the ultimate user of the funds. Therefore, regardless of who currently holds the funds in escrow pending the outcome of this litigation, Vernon still has an interest in the litigation. Accordingly, NWAC's cross-motion is denied.

Conclusion

Vernon's motion to intervene is granted, and NWAC's motion to transfer funds to the State's control is denied. Vernon has satisfied the criteria to intervene as a necessary party under R. 4:33-1. Though this matter was initiated in 2017, NWAC has not identified how it would be prejudiced by Vernon's intervention at this stage, as a trial date has yet to be scheduled and the court has the authority to control discovery. Finally, Vernon has the authority under N.J.S.A. 52:27D-392.2(e) to impose fees and maintain a fund to finance its fair share plan. Though regulated by the State, these monies would ultimately be used by Vernon, so its interest in this litigation is not limited to its status as escrow holder. The court's order consistent with this opinion shall be uploaded to eCourts.