

DOCKET NO. CV 03-0480170 S : SUPERIOR COURT
 NEW ENGLAND ESTATES, L.L.C. : JUDICIAL DISTRICT OF NEW HAVEN
 V. : AT NEW HAVEN
 TOWN OF BRANFORD, et al : DECEMBER 15, 2003

MEMORANDUM OF DECISION

STATEMENT OF THE CASE

The plaintiff has brought this action against the Town of Branford and its Board of Selectmen, viz. Messrs. Anthony DaRos, Francis Walsh, and Robert Denhardt. Town Clerk Georgette Laske is apparently a party because of her statutory role should the proposed condemnation proceed.

The plaintiff claims to have an option to purchase a 77 acre parcel of vacant land in Branford which it seeks to develop for housing. As of the dates of the events which gave rise to this suit, the plaintiff had not exercised that option and no record of an option agreement had been recorded on the land records.

In its five count complaint, the plaintiff alleges that:

1. All the defendants engaged in acts which constitute a bad faith decision to condemn the 77 acres;

Counsel/Pro Se Parties notified 12/15/03
 By JDNO Copy of Memo Other

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2. These acts were due process violations and thus civil rights violations;
3. The defendants thereby committed violations of the state and federal Fair Housing Act;
4. The defendant DaRos acted "intentionally, knowingly, recklessly, wantonly, callously or maliciously";
5. The Town of Branford should indemnify the plaintiff for the misdeeds of the individual defendants.

The property owners, Thomas Santa Barbara Jr. and Frank Perrotti, Jr., were made defendants upon agreement of all parties and the owners.

They have "endorsed" the claims of the plaintiff but have not stated a cause of action nor filed prayers for relief.

In the proceeding before this court, the plaintiff seeks a temporary injunction prohibiting the town from proceeding with the condemnation of the 77 acre parcel. The defendants have denied the plaintiff's allegations and seek to show the actions complained of were proper. They urge that the application be denied.

DISCUSSION

In order to obtain injunctive relief, the applicant must satisfy all four prongs of this test, i.e., it must establish:

1. that it has no adequate legal remedy;

2. that it will suffer irreparable injury or harm;
3. that it will probably succeed on the merits; and
4. a balancing of the equities favors the applicant.

(Citations omitted).

I

Case law in Connecticut does not support the plaintiff's argument that it has no adequate legal remedy. The plaintiff is the optionee of the parcel in question and in the same position as the holder of the unexercised option to purchase in Ravenswood Development Corp. v. Town of Newington, No. CV-98-0581791, 1998 WL 918801 (Conn. Super. 998).

There the court recounted the optionee's damage claims and concluded that "...any damages suffered by plaintiff are mostly reducible to monetary compensation readily recoverable at law" (Page 3). That would seem to be the case here.

II

The plaintiff's claim that it will suffer irreparable harm unless this application is granted fails to address what the court sees as an obvious fallacy.

In its July 18, 2003, Memorandum in Support of the Application, the plaintiff states:

"The imminent, irreparable harm to the plaintiffs is set forth in the Verified Complaint. In very brief summary, the plaintiffs (1) have demonstrated that eminent domain is imminent; (2) have alleged a prima facie case of numerous constitutional, statutory, and

common law violations in the process to date and if eminent domain proceeds; (3) have alleged that those rights will be lost without an adjudication if the Town divests the plaintiff of its contractual rights; and (4) have alleged that the Town does not need to proceed expeditiously." (Page 7).

Actually, what the plaintiff is claiming is that by virtue of the defendants' misdeeds, it will be deprived of a business opportunity.

To demonstrate, while it deplores the alleged state and federal Fair Housing Act violations, the first mention of affordable housing came from Shirley Rasmussen, the Town Planner at a meeting in January of 2003.

The plaintiff then offered to provide 17 units of affordable housing out of a total of 268, to be built, stating "it was an economic loss for them to develop affordable housing. (Tr. 9/18/03, page 50). When the plaintiff's attorney appeared at the Town Planner's office in April 2003, the development proposal called for 372 units with 30% of them reserved for affordable housing. The application submitted in May 2003 called for 354 units and the same 30% for affordable housing. This was withdrawn and resubmitted after the town moved to condemn the parcel.

Thus, while an excess of 17 affordable units out of 268 total units was an economic loss, 111 out 372 and 106 out of 354 was not. It is interesting that the plaintiff's proposed units grew in number as time passed, discussions ensued, and meetings were held.

The court concludes that the sole harm that the condemnation could cause the plaintiff is financial loss, recoverable in the case in chief.

III

In order to obtain a temporary injunction, this plaintiff must also show that it will succeed in a trial on the merits. The court does not find that to be a likely result and if it were to decide the "bad faith" claim on the evidence heard over 5 days, a judgment would enter for the defendants.

The plaintiff opened its presentation with the stated purpose of showing that a conspiracy was formulated by the individual defendants with Mr. DaRos as the ringleader. As the defendants and other witnesses testified, it became obvious to the court that the plaintiff had no evidence to support its theory.

The court has searched the transcripts and can ~~find no evidence of "bad faith"~~ on the part of any of the defendants. It should be noted that the plaintiff attempts to make much of the fact that the environmental issues in this case were not mentioned until the plaintiff had "gone public." It is true that early concerns over this proposed development centered on traffic, density and school population. These are common concerns, but the plaintiff has not presented a case suggesting that the affordable housing issue was behind the opposition and motivated the condemnation process.

It is also to be expected that when such a proposal as that of the plaintiff's is publicized, it will attract more attention, invite more comment and alert any opponents.

The plaintiff's view seems to be that discussion of later arising issues is improper and supports the conspiracy theory. As several witnesses testified, they had long held concerns about this area because of the adjacent landfill and they responded to the proposed development.

The plaintiff argues that any pollution in the area is below state standards and does not present a present health risk. However, Mr. DaRos expressed his concern for potential problems such as the landfill leachate migrating further. He also explained he was aware of serious problems facing other Connecticut towns as a result of landfill runoffs and related conditions. And, he was mindful of the fact that several years ago Branford had to expand millions of dollars because nearby properties had been contaminated by leachate from the landfill.

The court heard testimony from RTM members who favored the condemnation action. Dale F. Baughman related his concerns over the potential for spreading of the leachate and resulting litigation. Kathleen Fox related that her constituents had expressed their fears to her. She felt the risks should be avoided. Kurt Schwanfelder knew the history of this site and the adjacent landfill. He described what he referred to as the "long standing (environmental) abuse" of the subject property. Dennis Flanigan's main concern was the

potential for contamination though his constituents were concerned over traffic, schools and density.

From none of these officials did the plaintiff elicit even a suggestion of a plot to sabotage this project as it alleged.

The court gave the plaintiff great leeway in its offers of evidence it claimed pointed to the alleged "conspiracy." In the transcript of September 18, 2003, a zone change is questioned through Ms. Rasmussen. Despite liberal rulings by the Court, the attempted "linkups" fizzled. (Pages 58-72).

Support for the general concern over contamination came from other sources, all strongly indicating that this was not as trivial an issue as the plaintiff urges the court to believe.

Margaret Hall, the town's solid waste manager, expressed the fear that it could cost thousands to control the leachate plume from the landfill. Obviously, this was not a certainty, but the potential for damage to housing on this 77 acres was real.

The testimony of Craig Lapinski is significant as he was Branford's environmental engineering consultant, employed by the firm of Fuss and O'Neill. That firm has been monitoring the landfill for several years. He stated that risks were involved in grading and digging utility trenches and foundations as that activity could serve as an avenue for methane gas emanating from the landfill. This disturbing of the present condition could create a

conduit for the methane. "Along the northern boundary, methane was detected at seven locations at concentrations less than 4%. As indicated above, these concentration are below the lower explosive limit for methane. As the waste ages, its ability to generate methane will diminish. However, capping the top of the landfill with clay (planned within the next two years) and closing the active bulky waste area will reduce the ability of the landfill to vent upwards and could allow the gas to move further away from the landfill laterally. Because of these two competing actions, the extent of decomposition gas migration is difficult to predict for the future." (Exhibit 29, page 4). IES, the plaintiff's consultant, met with Mr. Lapinski on the site and agreed with him that methane migration was a valid concern. Plaintiff's counsel was also present. Finally, Mr. Lapinski said that the data presently available was not complete and more study was needed of the property to the north. This work had not been done to the time of the hearing so that neither the plaintiff nor the town have a complete evaluation of the problem. (IES report, Exhibit 30).

The court has considered the testimony and opinion of Carter Glezen, an expert in the field called by the plaintiff. It was his opinion that the parcel in question was suitable for residential use. (Tr. Sept. 11, 03, page 95). He did concede that IES did no testing for methane but minimized this risk based on the 16 years of monitoring reports. (Tr. Pages 102-106).

The court is not impressed by that explanation in the face of the conflicting opinions noted above. But choosing one opinion over the other is not necessary here, rather these conflicts support the conclusion that the defendants' concerns were not imaginary, unreasonable and without foundation. In effect, they support the town's view that this project held substantial risks for the town and were the basis or the decision to condemn.

The allegations against Mr. DaRos are serious and all inclusive, yet the evidence offered to support them in the injunction hearing was non-existent. While reasonable minds may differ as to how, when and why certain decisions were made by Mr. DaRos, the court finds nothing to support the allegations that even assuming actions taken were improper, he acted "intentionally, knowingly, recklessly, wantonly, callously or maliciously" at any time. In fact, the court was impressed by Mr. DaRos handling of this matter and demeanor on the stand. He appears to have had genuine concerns about Branford's interests and still displayed a desire to be fair to the property owners and the plaintiff.

An example of this is found in the attempts to settle the case resulting from the plaintiff's application being denied by the Planning and Zoning Commission. Mr. DaRos' statement to Mr. Santa Barbara, offering "to make him whole," hardly indicates behavior consistent with the allegations in the fourth count. The town planner, Shirley Rasmussen met with plaintiff's counsel and discussed the plaintiff's proposal, particularly the affordable housing aspect.

Another claim made by the plaintiff is that the town and Mr. DaRos did not attempt to negotiate a voluntary purchase and sale. Mr. Santa Barbara testified about meeting with M. DaRos on June 26, 2003 and stated that Mr. DaRos told him he suspected the 77 acres were contaminated from the landfill. He recalls DaRos saying the parcel was worth 1.3 million but didn't recall him offering "to make him whole." This meeting concluded without an agreement. Mr. DaRos recalled telling Mr. Santa Barbara he had appraisals of the property for \$770,000 and 1.2 million, and Mr. Santa Barbara's parting remark was "... we're not even close." (Tr. 9/18/03, page 102).

The plaintiff argues it was left out of this meeting and Mr. DaRos never contacted the plaintiff or its representatives. The plaintiff's option was not recorded and had not been exercised, nor had the owners invited them to participate in the June 26 meeting.

The town was only obligated to negotiate with the owner of the property and the court concludes that this was accomplished. When Mr. Santa Barbara closed the June 26 meeting as he did, supra, it could reasonably be interpreted as a rejection of the town's proposal and that further discussions would be fruitless.

IV

The final prong of the test required to obtain a temporary injunction is that a balancing of the equities favors the applicant.

In the court's view, there is no equitable factor weighing in favor of the plaintiff. It has failed to demonstrate that the defendants acted in bad faith, - the existence of which behavior could be a vital factor in weighing the equities. This applies as well to the serious but unproven allegations against Mr. DaRos.

The failure of the plaintiff to demonstrate that affordable housing, elderly housing or even routine development was the focus of a conspiracy effectively negates the strongest claim made - that the defendants violated fair housing acts.

Thus, the sole claim to be weighed against the town's equitable claims is that the plaintiff stands to lose a business opportunity.

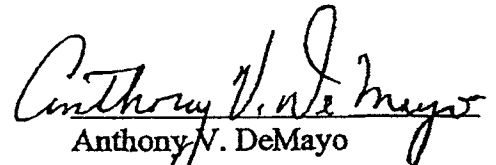
On the other hand, the potential for serious contamination involves the health of residents in the area. There is the potential for litigation if purchasers of homes become victims of pollution. In summary, this project has the potential to cause serious physical and financial distress to the present and future residents and taxpayers of the town of Branford.

The opportunity to satisfy the growing need for a variety of recreational facilities is also a substantial factor.

The court concludes that a balancing of the equities dictates a finding in favor of the town.

CONCLUSION

The plaintiff having failed to sustain the burden required of an applicant for a temporary injunction, its application is denied.


Anthony V. DeMayo
Judge Trial Referee