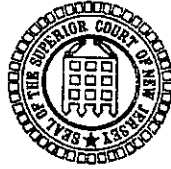


# Superior Court of New Jersey



CHAMBERS OF  
JUDGE VINCENT J. GRASSO  
ASSIGNMENT JUDGE

OCEAN COUNTY COURT HOUSE  
P.O. BOX 2191  
TOMS RIVER, NJ 08754-2191

October 31, 2008

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Re: Yehuda Shain v. Township of Lakewood  
Docket No. OCN-L-2919-05 PW

Dear Counsel:

The following shall set forth the court's decision. This matter comes before the court by way of a complaint in lieu of prerogative writs, in which plaintiff challenges the exchange of land between the municipality and certain private owners. Specifically, plaintiff alleges that the Lakewood Ordinances authorizing such exchanges are invalid because they do not comply with N.J.S.A. 40A:12-16.

On August 25, 2005, September 8, 2005, December 1, 2005, and June 22, 2006, the defendant's Township Committee adopted ordinances providing for the exchange of lands between the Township of Lakewood (hereinafter the "Township") and private entities. The plaintiff, Yehuda Shain, a taxpayer of the Township of Lakewood who brings this action as a taxpayer and on behalf of others similarly situated, alleges in his complaint that the actions of the Township, in adopting these ordinances, were arbitrary, capricious, and unreasonable. The plaintiff alleges that the ordinances fail to satisfy the

criteria for a land exchange pursuant to N.J.S.A. 40A:12-16, including, but not limited to, that the private lands must be needed for a “public use”; that their acquisition must be “more advantageous to” the municipality; and that the exchange must be “in the public interest.” The plaintiff further asserts that the ordinances were prepared, drafted, introduced, published, and adopted in a manner which was designed to hide and conceal their actual intent, in that they fail to identify and describe the properties to be exchanged and do not describe the “public use.” In addition, following the defendant’s concession at oral argument that only private schools were likely to buy the parcels involved, the plaintiff argued that the proposed transfers violate the Establishment Clause and, therefore, make the acquisition by exchange untenable.

The Township states that they designated certain blocks and lands as school parcel areas and affordable housing areas prior to the lawsuit. In Mayor Charles Cunliffe’s certification, he stated that these designations were made because the Township owned a majority of the properties in those portions of the Township. According to the Mayor, those lots that were owned by the Township were put out to public bid for purchase with the understanding that he same would be used for school purposes or affordable housing, depending upon the location of the property. Properties that were sold in the designated school parcels were sold with deed restrictions. As for the lots not owned by the Township, the Mayor claims that individual owners would approach the Township with a proposed land exchange to exchange land within a designated parcel with the Township for property located outside the area. The Mayor stated that the Township would consider an exchange to obtain land within the designated areas in order to allow the property to be put out to public auction.

The Ordinances remaining at issue are those adopted August 25, 2005, September 21, 2005, and December 1, 2005. In essence, these Ordinances state the assessed values of the properties to be exchanged, the requirements of N.J.S.A. 40A:12-16 regarding exchanges of land, the desire to undertake an exchange pursuant to N.J.S.A. 40A:12-16, and provide the following statement:

The township of Lakewood heretofore determines that the lands or rights or interest therein to be conveyed to the Township of Lakewood are at least of equal value to, and the acquisition of said property is more advantageous to the Township of Lakewood for public use than are the lands or rights or interests therein to be conveyed by the Township of Lakewood and that it is in the public interest of the Township of Lakewood that such exchange of lands or rights or interest therein be consummated.

At the hearing for the August 25, 2005 Ordinance, plaintiff read the Committee a letter from his attorney regarding his objections to the land exchange. In addition, plaintiff stated that the case of Witt v. Borough of Maywood, 328 N.J. Super. 432, 450 (Law Div. 1998), requires that there be a substantial equivalency between what the municipality is giving up and what it is receiving pursuant to N.J.S.A. 40A:12-16. He also cited Finn v. Borough of Norwood, 227 N.J. Super. 69 (App. Div. 1988). According to the plaintiff, the proposed Ordinance contained conclusory language without factual support and there was no appraisal. According to plaintiff's investigation, the Township lot to be traded was 2.3 times the land area of the lots to be acquired. In addition, plaintiff pointed out that the Township lot had 17 conforming lots with "substantial market value" while the lot to be obtained only had 3 conforming lots with "minimum value." He suggested that the Township consider selling the lots at public sale because it would be more advantageous to taxpayers. In response to plaintiff's reading of his

attorney's letter, the Mayor responded that the Committee was going to act based on the recommendation of their professionals and attorney.

Another resident, Larry Simons, appeared and objected to the August 25, 2005 Ordinance. Simons noted that the land the Township would acquire would equal 2.034 acres and the land that would be conveyed would equal 4.0405 acres. Simons also noted that all the land conveyed would be R-12 while the land received would be a mix of A-1, R-12, and HD-7. Simon questioned what the current market value, not the assessed value, of the Township owned parcels to be exchanged were, whether such appraisals were conducted, and if so when and by whom. The Mayor responded with the following: "No, I'm not prepared to give you answers tonight, but if you submit those to our attorney, we'll get you some answers."

According to the Mayor's certification submitted to the court, the August 25, 2005 Ordinance exchanged Township land that was valued at \$13,400.00 and received land valued at \$39,000.00. The Mayor stated that the Township received land valued in excess of the land exchanged and additionally, the land received would further the Township's goals in the development of public interest in that all the lots that were exchanged and received by the Township were either sites located within school parcels or were part of the affordable housing plan. Plaintiff's certification asserts that the Townships' parcels were worth at least one million dollars while the acquired lots were worth less than a quarter-million.

According to the Mayor, the September 8, 2005 Ordinance concerned property located in an area designated as "school parcel 5." The Ordinance concerned an exchange of Block 1007, Lot 3, which was owned by Brian Flannery and Y. Schwab for

Block 443, Lot 4, owned by the Township. A parcel presentation package dated February 1, 2005 was presented to the Mayor and Committee and was considered prior to the proposed exchange. The assessed value of the Flannery property was \$2,700.00 as unimproved property as indicated in the Township tax records. The Township owned property was assessed at \$17,300.00 according to Township tax records. At the hearing, plaintiff objected that this was not a fair trade. The municipal attorney responded with the following: "It's an issue that was looked at hard by the manager, myself, the engineer, the assessor, Mr. Keil...and you have a map, Mayor, that reflects all these exchanges ... and there are changes in the zoning that have taken place, the purposes of the ordinance for public use including schooling, and affordable housing, so I'm comfortable with the decision that was made to put this ordinance on for a vote."

According to the Mayor's certification, he and the Committee were aware that there was a willing buyer for the exchanged land since prior auctions were held and nine sites within school parcel number 5 had been bid upon when making the decision regarding the September 8, 2005 Ordinance. According to the Mayor, as of the time of his certification, four sites purchases had been closed and five were currently pending. The Mayor stated that the intent of the Committee was that the minimum bid of the property in school parcel 5 would be at least the assessed value of the Township property exchanged: \$17,300.

At the hearing for the December 1, 2005 Ordinance, plaintiff appeared and again inquired why the Township needed the piece of land they were acquiring. Chairman Lichtenstein responded with the following: "I believe that this is a parcel that is in one of the parcels that a school, that was sold at the auction for schools. And we are facilitating

this so that the Town can then, I mean that the school can then have the piece of land to sort of finish out their piece.” Plaintiff stated that he thought this should be in the Ordinance to explain the reason the Township needed the property because otherwise, in his opinion, the Ordinance would lack legality due to vagueness. Chairman Lichtenstein commented that the reason for second readings was so that individuals like Shain could ask questions and get answers. Plaintiff responded with the following: “But you have the public comments at the first reading, at least the Township Committee sits and goes it over, they can at least take up the comments of the public they have at the second reading. It’s basically too late for, to bring anything to their attention.”

In Shain’s certification, he objects to the Mayor’s explanations in his certification. According to Shain, it “fails to explain how the Township actually received any advantage, for school or affordable housing, by this land exchange. Specifically, the mayor does not explain why the parcels could not have been obtained on more favorable terms, by purchase or condemnation, if needed for a public purpose. Also, none of this information is contained in the ordinance, and none of this information was available to the public.”

## FINDINGS

The court’s role in reviewing determinations of governing bodies is clearly defined by case law. Municipal action will be overturned by a court if it is arbitrary, capricious or unreasonable. Charlie Brown of Chatham v. Board of Adjustment of Chatham, 202 N.J. Super. 312, 321 (App. Div. 1985); Drake v. Human Servs. Dept., 186 N.J. Super. 532, 536 (App. Div. 1982); In Re: Application of Holy Name Hospital, 301 N.J. Super. 282 (App. Div. 1997). Municipal actions enjoy a presumption of validity. A

challenge to the validity of a municipal ordinance or action must overcome the presumption of validity – a heavy burden. 550 Assocs. v. City of Newark, 132 N.J. 180, 185 (1993); First Peoples Bank v. Medford Township, 126 N.J. 413, 418 (1991). A determination predicated on unsupported findings is the essence of arbitrary and capricious action. In Re: Boardwalk Regency Corp. for Casino License, 180 N.J. Super. 324, 334 (App. Div. 1981), modified on other grounds, 90 N.J. 361 (1982). Legislative bodies are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience. Witt v. Borough of Maywood, 328 N.J. Super. 432, 443 (Law Div. 1998).

This case involves a challenge by the plaintiff to the municipality's action on exchange of lands pursuant to N.J.S.A. 40A:12-16, which provides as follows:

The governing body of any county, by resolution, or any municipality, by ordinances may exchange any lands or any rights or interests therein owned by the county or municipality, except lands used for public highways or places, for other lands or rights or interests therein desired for public use. The county or municipality may exact and receive a cash consideration in addition to such other lands or rights or interests therein when such exchange shall be authorized, and such governing body determines that the lands or rights or interests therein to be conveyed to such county or municipality or such lands or rights or interests therein and the cash consideration to be paid are at least of equal value to, and their acquisition is more advantageous to, the county or municipality for public use, than the lands or rights or interests therein to be conveyed by the county or municipality, and that it is in the public interest that such exchange of lands or rights or interests therein be consummated. Any prior dedication or determination for use for park purposes of such land or any part thereof, shall not preclude an exchange thereof or rights or interests therein under this section but where the lands or rights or interests therein to be exchanged by a municipality are

lands or rights or interests therein that have been dedicated and determined for use for park purposes, or are rights or interests in lands so dedicated or determined, the lands or rights or interests therein received in exchange therefor by the municipality shall be used for the same purposes. For purposes of this section, any land or rights or interests therein to be exchanged by the county or municipality shall be valued at not less than the amount for which it was acquired or in the case of an acquisition by gift or devise, in an amount of not less than the "full and fair value" of the land or rights or interests therein as determined by the assessor of the municipality in which it is located pursuant to R.S. 54:4-23 for the tax year in which the land was acquired by the county or the municipality. Any land or rights or interests therein which shall be conveyed to the county or municipality in exchange for any county or municipal land or rights or interests therein shall be valued at no more than the "full and fair value" determined for the land or rights or interests therein by the assessor of the municipality in which the land or rights or interests therein is located pursuant to R.S. 54:4-23 for the then current tax year. In any case in which the value of the county or municipal land or rights or interests therein to be exchanged exceeds the value of the land or rights or interests therein to be received by the county or municipality, the county or municipality shall exact additional cash consideration, as authorized herein, equal to the difference of the two values as determined pursuant to this section.

At issue in this case is whether the Ordinances remaining in dispute can satisfy the following, pursuant to N.J.S.A. 40A:12-16: the private lands must be needed for a "public use"; the acquisition must be "more advantageous to" the municipality than the lands to be conveyed; and the exchange must be "in the public interest." In addition, according to Finn v. Borough of Norwood, 227 N.J. Super. 69 (App. Div. 1988): "The value of the lands to be conveyed to the municipality and any cash consideration to be paid must, at least, be equal to the value of the lands to be conveyed by the municipality. Consequently, in reviewing [a] Borough's action, the trial court [is] required to make



findings regarding the relative values of the exchanged lands.” Finn, 227 N.J. Super. at 73.

In the case of Roe v. Kervick, 42 N.J. 191, 207 (1964) the following regarding the preceding sections of the New Jersey Constitution: “The strictures of *Article VIII*...were simply the retreat to a fundamental doctrine of government, *i.e.*, that public money should be raised and used only for public purposes.” According to the Roe court, the concept of public purpose is broad:

Generally speaking, it connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government. Moreover, it cannot be static in its implications. To be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society. Thus it is incapable of exact or perduring definition. In each instance where the test is to be applied the decision must be reached with reference to the object sought to be accomplished and to the degree and manner in which the object affects the public welfare.

Id. at 207; citing Hoglund v. City of Summit, *supra* (28 N.J., at p. 549); DeArmond v. Alaska State Development Corporation 376 P. 2d 717 (Alaska Sup. Ct. 1962); City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852, 855 (Ct. App. 1957); Opinion to the Governor, 76 R.I. 249, 69 A.2d 531 (Sup. Ct. 1949); Rhyne, Municipal Law, § 15-4, p. 341 (1957).

A Board’s resolution should contain sufficient findings, based upon the proofs submitted which permits a reviewing court to satisfy itself that the Board analyzed the proper criteria and gave reasons for the decision that was reached. The mere recitals of testimony do not satisfy the Board’s responsibility to make findings of fact. Loscalzo v. Pini, 228 N. J. Super. 291, 305 (App. Div. 1988), certif. den. 118 N. J. 216 (1989); Medici v. BPR Co., 107 N. J. 1, 23 (1987).

In the case of Witt, the court found that an exchange of easements under N.J.S.A. 40A:12-16 resulted in a substantial equivalency between what the municipality was giving up and what it was receiving. 328 N.J. Super. 432. In Witt, Commerce Bank sought to engage easements to facilitate an efficient use of Commerce's land, and in return, Commerce would improve and expand the municipal parking lot so that it could be effectively used for local residents and shoppers. Id. at 437. The Ordinance allowing the exchange, provided that the municipality would receive an access and parking easement across the lands of Commerce in exchange for giving up an easement for access across its land. As part of the consideration, the municipality received 16 dedicated and improved parking spaces, the non-exclusive use of other parking spaces during non-banking hours, intersection improvements, drainage improvements, and road-widening easements. Id. at 450. The court found that the municipality would gain benefits from the entire development process. "[The municipality] can not be held to the bean-counting analysis of plaintiffs if it is to effectively and efficiently conduct its governmental function. Overall, in the grand mix of benefits and burdens there is substantial equivalency in what Maywood will give up and what it receive[s]." Id. at 452-53.

The Ordinances at issue fail to provide such as detailed an explanation as in the ordinance in Witt and also fail to provide findings of a public purpose as explained in Roe. Although the Ordinances provide assessed values of the properties to be exchanged, given that the assessed values are not equal to their counterparts in the exchanges, it is difficult to discern from the Ordinances why the exchanges are equal other than a generic statement that the Township has determined that "the lands or rights or interest therein to be conveyed to the Township of Lakewood are at least of equal value to." It is

additionally difficult to discern from the Ordinances whether (1) the private lands are needed for a “public use”; (2) the acquisitions are “more advantageous to” the municipality than the lands to be conveyed; and (3) the exchanges are “in the public interest.” Again, the only indicator of such is a generic statement purporting that “the acquisition of said property is more advantageous to the Township of Lakewood for public use than are the lands or rights or interests therein to be conveyed by the Township of Lakewood and that it is in the public interest of the Township of Lakewood that such exchange of lands or rights or interest therein be consummated.” The transcripts of the hearings for the Ordinances do not provide any further guidance as to what these findings were based upon.

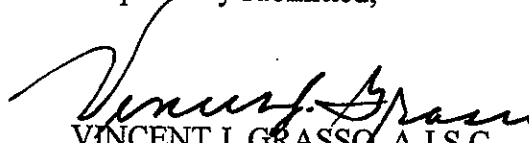
For these reasons, the court finds that the failure of the municipality to establish and articulate its findings to satisfy the criteria of N.J.S.A. 40A:12-16 was arbitrary and unreasonable rendering the subject ordinances void and of no effect. Fairness to all parties dictates that the matters be remanded to the Township Committee for action and findings consistent with the within opinion. In the event that the municipality undertakes an exchange of lands pursuant to N.J.S.A. 40A:12-16, the public hearing and ordinance introduced should at a minimum, in order to satisfy the statutory requirements, address the following:

1. Establish the value of the land to be conveyed by the municipality in accordance with the statute;
2. Establish the value of the land to be conveyed to the municipality in accordance with the statute;

3. Establish and determine a substantial equivalency between what the municipality is giving up and what it is receiving;
4. The reasons given by the municipality that the acquisition of the property by the municipality is more advantageous to the municipality for public use than the lands it conveys;
5. Identify the public use upon which it premised its decision. It is not enough that the ordinance merely restate the statutory language or set forth conclusory language.

The importance of a complete record that reflects the deliberative process of the governing body and its reasons for a decision to exchange property cannot be understated. It will insure transparency of municipal actions, provide a forum for interested taxpayers and inform the public. Moreover, if there is a legal challenge to the municipal action, it assures a meaningful and complete record for judicial review. The court makes no factual finding as to the value, advantage, or public use intended with respect to the subject properties. Judgment is entered in favor of the plaintiff on Count 1, with each party to bear its own cost and fees. The Second Count of the complaint is dismissed with a finding of insufficient proof without fees or costs to either party. Mr. Martino is to prepare a form of order that comports with the court's ruling. The court does not retain jurisdiction.

Respectfully submitted,

  
VINCENT J. GRASSO, A.J.S.C.

VJG/r

