FILED
JAN 28 2016
PAUL X. ESCANDON, J.S.C.

PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – SPECIAL CIVIL PART
MONMOUTH VICINAGE

ROBERT KASH et al	:	
Plaintiff(s)	:	
	:	DOCKET NO. L-2814-15
v.	:	ORDER
	:	
THE MAYOR AND COUNCIL OF	:	
THE BOROUGH OF FREEHOLD,	:	
EXQUISITE CATERERS, LLC and	:	
17-19 SOUTH STREET, LLC	:	
Defendant(s).		

IT IS ORDERED on this 28 day of January, 2016 as follows:

This matter originated before the Mayor and Council of the Borough of Freehold, sitting as the Redevelopment Entity under the Freehold Center Core Redevelopment Plan (hereafter "FCCRP") on the application of Exquisite Caterers to construct a banquet hall with off-site parking amenities. The issue before the Redevelopment Entity was whether an off-site parking scheme, to be utilized in conjunction with a valet service, was in compliance with the FCCRP or whether an amendment to the plan would be necessary. After the presentation of the evidence was completed, the Redevelopment Entity determined that the parking scheme offered by Applicant was in compliance with the FCCRP and therefore did not require an amendment to the FCCRP. The matter proceeded before this Court by ways of a Complaint in Lieu of Prerogative Writ filed on July 27, 2015.

Having considered the moving papers, and the arguments of the parties, this Court makes the following findings of fact and conclusions of law:

1. This Court has not found the decision of the Redevelopment Entity to be arbitrary and capricious, unreasonable, or against the great weight of the evidence. It is well settled that the Entity's decision is entitled to the presumption of validity. Furthermore, "when two actions are open to a municipal body, municipal action is not arbitrary and capricious if exercised honestly and upon due consideration, even if an erroneous conclusion is reached... A determination predicated on unsupported findings is the essence of arbitrary and capricious action." Bryant v. City of Atlantic City, 309 N.J. Super 596, 610 (App. Div. 1998).

   In the context of the instant application, Applicant Exquisite Caterers presented testimony from four (4) witnesses over the course of three (3) hearings as to why the proposed valet plan fit the Freehold Center Core Redevelopment Plan. The testimony indicated that Exquisite has an exclusive lease over Stavola Lot and will be able to support all required parking, and that the use of the lot is reasonably accessible to support nearby catering business. It was based on this evidence presented, that the governing body memorialized its resolution of approval.

   Sufficient evidence existed to support the Board's decision that the off-site parking scheme did not violate the FCCRP; therefore, the Court finds that the decision rendered was not arbitrary, capricious, or unreasonable, nor was it against the great weight of the evidence.

2. This Court likewise concludes that the participation of Mayor Higgins in the instant application before the Redevelopment Entity did not constitute a conflict of interest sufficient to warrant Mayor Higgins to recuse himself.

   Pursuant to the 2008 holding of the Appellate Division in Mountain Hill, L.L.C. v. Township Comm. of Tp. Middletown, 403 N.J. Super. 146 (App. Div. 2008), "courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials." Mountain Hill, L.L.C. v. Township Comm. of Tp. Middletown, 403 N.J. Super. 146, 196 (App. Div. 2008).

   Furthermore, N.J.S.A §40:9A provides that, "No local government officer shall be deemed to have a conflict of interest in an application, if... no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group." N.J.S.A §40:9A.

   In the instant application, Higgins Memorial Home may very well benefit from the construction of a catering hall as opposed to the construction of a competing funeral home, or any other type of establishment permitted in the Freehold Center Core Redevelopment Zone (hereafter "FCCRZ"), this benefit is no greater than any other owner of a like-business owner

would receive. Thus, such an interest would not be sufficient in and of itself, to disqualify Mayor Higgins from participated in the instant proceedings.

Furthermore, it has been held that "the owners of any property within 200 feet of property to be effected by an appeal to a board of adjustment." McNamara v. Saddle River Borough, 64 N.J. Super. 426, 430 (App. Div. 1960). However, Defense Counsel for the Mayor and Borough has provided a report from the Freehold Borough Assessor's Office, which indicates that Higgins Memorial Home, the funeral home owned by Mayor Higgins, is neither within 200 feet of 17-19 South Street, nor is it within 200 feet of the Stavola Lot. Furthermore, the proceedings prior to the filing of the instant complaint in lieu of prerogative writ all took place before the Redevelopment Entity, not the zoning board of adjustment.

This Court finds that Mayor Higgins receives no more of a material or monetary gain as a result of the construction of Applicant's catering hall, than any other owner of a like-business could reasonably be expected to accrue and that any perceived additional benefit is precisely the type of remote, speculative, and nebulous interests that would unjustifiably deprive a municipality of the service of its duly elected or appointed officials. Thus, Plaintiff's application to overturn the decision of the Redevelopment Entity because of Mayor Higgins's participation in the hearings is DENIED.

3. As to Plaintiff's allegations that executive sessions were undertaken in violation of the Open Public Meetings Act:

N.J.Stat. §10:4-12(b)(7) explicitly provides that "[a] public body may exclude the public only from that portion of a meeting at which the public body discusses any... pending or anticipated litigation or contract negotiation... in which the public body is, or may become, a party, or matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." N.J. Stat §10:4-12(b)(7).

It is well settled that the pending or anticipated litigation under N.J. Stat §10:4-12(b)(7) "empowers a public body to exclude the public, [and enter into an executive session] to protect any "material covered by the attorney-client privilege." To invoke this exception, "the subject under discussion must be the 'pending or anticipated litigation' itself, i.e., the public body must be discussing its strategy in the litigation, the position it will take, the strengths and weaknesses of that position with respect to the litigation, possible settlements of the litigation or some other facet of the litigation itself." Burnett v. Gloucester County Bd. of Chosen Freeholders, 409 N.J. Super 219, 236-37 (App. Div. 2009).

Defense Counsel on behalf of the Mayor and Council of Freehold indeed concedes that, in response to Plaintiff's Counsel's inquiry as to cross-examination of witnesses, and about the appeal process in the event that cross-examination is denied, an executive session was entered into by the Redevelopment Entity. While Plaintiff's counsel contends that his intent was not

meant to threaten litigation, nevertheless Defendant, in response to this inquiry, contends that it believed that the public body may become a party to the litigation if cross-examination was not permitted, and entered into an executive session for the purposes of discussing the ramifications of permitting Plaintiff's Counsel to cross-examine Applicant's witnesses. The purpose of entering into this executive session as well as the matters discussed at that session, namely the consequences of denying Plaintiff's attorney cross-examination, and whether the Redevelopment Entity could become a party to the litigation if it denied the Plaintiff's request, fall squarely within the pending litigation exception. Thus the Redevelopment Entity was entitled to meet in executive session with its attorney for the purposes of discussing the position it will take as to Plaintiff's Counsel's request and what consequences the denial of that request may bring.

This Court dismisses the allegations as to any other executive sessions being entered into, as lacking factual support in the record. There is no record that any other executive session was entered into. Plaintiff contended in its papers and in oral argument that the Redevelopment Entity met in an improper executive session on June 22, 2015 prior to rendering its decision. Plaintiff further claimed that he had a witness who would verify this meeting. However, in response, Defendant's Counsel has provided the supplemental minutes which indicates that this meeting was merely an agenda review, which is open to the public, and at which no substantive issues are discussed. There is insufficient bases to permit this court to hold that an impermissible executive session was entered into on June 22, 2015. There is likewise no indication that the any meeting with between the Redevelopment Entity and its planner ever actually occurred. Accordingly, Defendant's application to render the decision of the Redevelopment Entity void under the Open Public Meetings Act is DENIED.

For the foregoing reasons, **IT IS SO ORDERED** that:

The decision of the Redevelopment Entity, finding that the off-site parking scheme is in compliance with the FCCRP, is hereby upheld. This matter is hereby remanded to the Planning Board for site-plan approval and for a determination as to the feasibility of the parking plan set forth by Applicant Exquisite Caterers.

Hon. Paul X. Escandon, J.S.C.