SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2666-16T2

OAKS DEVELOPMENT CORP.,
JOHN J. BRUNETTI, and
MIDTOWN WATER COMPANY,

Plaintiffs-Appellants,

v.

THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, THE TOWNSHIP OF OLD BRIDGE, and THE OLD BRIDGE MUNICIPAL UTILITIES AUTHORITY,

Defendants-Respondents.

Argued March 6, 2018 – Decided April 30, 2018

Before Judges Yannotti, Mawla and DeAlmeida.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1909-05.

Eric I. Abraham argued the cause for appellants (Hill Wallack LLP, attorneys; Eric I. Abraham, of counsel and on the briefs; Christina L. Saveriano, on the briefs).

Louis E. Granata argued the cause for respondent (Louis E. Granata, PC, and McManimom, Scotland & Baumann, LLC, attorneys;

Louis E. Granata, of counsel and on the brief; Leslie G. London and Ted Del Guercio, III, on the brief).

PER CURIAM

Plaintiffs Oaks Development Corporation (ODC), John J. Brunetti (Brunetti), and Midtown Water Company (Midtown) appeal from an order entered by the Law Division on February 20, 2017, which affirmed a determination of defendant Old Bridge Municipal Utility Authority (Authority) denying plaintiffs' amended application to connect their development project to the Authority's system without a one million gallon water storage tank. We affirm.

I.

We briefly summarize the relevant facts and procedural history. In the 1950's, Brunetti's father acquired about 2500 acres of land in the Township of Old Bridge (Township), and the Township thereafter granted Midtown a franchise to operate a private water company in that area. The State authorized Midtown to exercise water diversion rights, and allowed it to operate as a public utility for the withdrawal, extraction, sale, and delivery of water. Midtown later drilled a well, built a treatment plant, and installed certain machinery and equipment in the franchise area.

The Authority commenced an action to acquire Midtown's property, machinery and equipment, and franchise rights, through the exercise of the power of eminent domain. To resolve that matter, Brunetti's father and the Authority entered into an agreement, dated December 13, 1967, which provided that Midtown would sell and convey to the Authority certain real property, as well as its artesian well, pumps, equipment, storage tanks, and related facilities, in exchange for the payment of certain amounts. Midtown also agreed to relinquish all water diversion rights in the property.

In addition, the Authority agreed to construct, at its own cost and expense, all wells, pumps, storage tanks, and treatment facilities necessary to furnish an ample supply of potable water of sufficient pressure and volume so that Brunetti's father and his grantees could develop and use their properties in the franchise area for any lawful purpose. The Authority also agreed to furnish, and Midtown agreed to take, up to five million gallons of water per day through metered connections with the Authority's mains.

Thereafter, Midtown, the estate of Brunetti's father, and the Authority entered into an agreement, dated January 18, 1986, which provided that all of Midtown's existing water users in the franchise area would become the Authority's customers, without any

payment by the Authority. The 1986 Agreement specified the rates Midtown's customers would be charged for the water they used, and provided that they would not be required to pay fees for any connections in the franchise area.

The 1986 Agreement further provided in pertinent part:

> 2. In the event that the . . . [Authority] supplies water to any other portion of the franchise area, not currently constructed, then, in that event, all customers who are supplied water by the . . . [Authority] shall become customers of the . . . [Authority] and shall pay the prevailing water rate and any increases as shall be approved in accordance with law to the . . . [Authority]. It shall be the obligation of . . . [Midtown] to construct and bear the full costs of all lines and other facilities within the franchise area in order to connect with the existing . . . [Authority] mains.
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> 7. In the event that . . . [Midtown] makes any additions to the existing water distribution system, . . . [Midtown] shall provide the . . . [Authority] "as built" drawings, properly certified by a licensed New Jersey professional engineer.
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> 8. It is the expressed understanding of all parties that nothing in this Agreement shall ever be construed to require the payment by the . . . [Authority] of any monies whatsoever for any purpose whatsoever.

In 2004, plaintiffs commenced an action in the Law Division seeking an order directing the Township and its Planning Board to

approve their application to construct a development on 433 acres of land in Midtown's franchise area, consisting of 1312 residential housing units and 600,000 square feet of commercial space. In December 2004, the trial court granted the relief sought and in March 2005, the Planning Board approved the application.

In 2006, plaintiffs submitted an application to the Authority for water and sewer service. At that time, the proposed development included 1380 housing units and 600,000 square feet of commercial space. The Authority retained CME Associates (CME), a firm of consulting engineers, to determine the impact the proposed development would have on the Authority's water distribution system and the improvements that would be required to provide water to the development.

In February 2007, CME issued a report recommending, among other things, that the Authority construct an elevated water storage tank with a minimum of two million gallons. According to CME, the tank would reduce the demand on the existing Browntown treatment plant and the Route 516 pump station during peak day demand, and provide redundancy in the event there was a supply pump failure. At some point thereafter, it was determined that a one million gallon storage tank would be sufficient and improvements to the Higgins Road/Route 516 interconnection were required.

In 2009, plaintiffs filed an amended complaint in the Law Division, alleging, among other claims, that the Authority breached its agreement to provide an adequate supply of water to the Oaks development, and improperly sought to "coerce" plaintiffs to construct improvements to benefit the entire water supply system. Plaintiffs claimed that the Authority had demanded improvements that were not reasonably required to provide water service to the Oaks development.

The trial court later ruled that the 1986 Agreement was the controlling agreement between the parties, and the agreement required plaintiffs to construct and pay for the lines and facilities needed to provide water to the Oaks development. After the trial court disposed of the remaining claims of the parties, the parties appealed.

We determined that the trial court correctly found that the 1986 Agreement controlled the relationship of the parties. Oaks Dev. Corp. v. The Planning Bd. of the Twp. of Old Bridge, No. A-4741-11 (App. Div. Oct. 8, 2013) (slip op. at 16-17). We held that the agreement clearly and unambiguously required plaintiffs to bear the costs of "all lines and other facilities" required to connect the proposed development with the Authority's water supply system. Id. at 17. We concluded, however, that the court erred by finding there was no genuine issue of material fact as to whether

the specific improvements at issue were required to provide water to the development. Id. at 18.

We remanded the matter to the trial court to determine whether the improvements at issue, specifically, the water storage tank, improvements to the Browntown treatment plant, and improvements to the Higgins Road/Route 516 interconnection, "are reasonably required to connect plaintiffs' properties to the Authority's water supply system." Id. at 34.

In September 2010, plaintiffs submitted an application to the Authority to connect the development to the Authority's system. The application included an on-site 1.75 million gallon water storage tank. In August 2011, plaintiffs submitted an amended application to the Authority, which reduced the water storage tank to one million gallons. Plaintiffs claimed the proposed tank would be sufficient to meet domestic water and fire suppression demands without adversely affecting the Authority's distribution system.

The Authority has a three-step approval process. An applicant must first obtain preliminary approval. If preliminary approval is granted, the applicant can seek tentative approval. After all issues are resolved, the applicant then can seek final approval. At some point, plaintiffs obtained preliminary approval of the amended application with the one million gallon storage tank, and

in September 2012, the Authority granted plaintiffs' application for tentative approval.

In April 2016, plaintiffs sought final approval but later submitted another application, which eliminated the one million gallon tank. Thereafter, the trial court remanded the matter to the Authority to conduct a hearing on the amended application. The Authority conducted the hearing on July 20, 2016.

At the hearing, Oaks presented testimony from engineers David G. Eareckson and Paul J. Paparella. Michael Roy, the Authority's consulting engineer, and Michael McClelland of CME also testified. The Authority voted to deny the application, finding that the one million gallon storage tank was reasonably required to provide water to the Oaks development.

Plaintiffs then sought review by the trial court of the Authority's decision. The trial court filed a written opinion and judgment dated February 20, 2017. In its opinion, the court noted that the parties had not addressed the improvements to the Browntown treatment plant and the Higgins Road/Route 516 interconnection. Thus, the only improvement at issue was the one million gallon storage tank.

The court found that there was sufficient credible evidence in the record to support the Authority's finding that a one million gallon storage tank was required to provide adequate water flow

to the development. The court concluded that the Authority had sound reasons for rejecting the testimony of plaintiffs' experts, and its decision was not arbitrary, capricious, or unreasonable. This appeal followed.

II.

On appeal, plaintiffs argue that the Authority's decision to require the construction of the one million gallon water storage tank was arbitrary, capricious, and unreasonable. Plaintiffs contend the Authority's decision is not supported by the evidence presented at the July 20, 2016 hearing.

The decision of a local government agency is entitled to "a presumption of validity, and a court may not substitute its judgment for that of the [agency] unless there has been a clear abuse of discretion." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (citing Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002)). The court may not reverse an agency's decision unless it is "arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole." In re Stallworth, 208 N.J. 182, 194 (2011) (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)).

At the hearing on July 20, 2016, plaintiffs presented a report and testimony by Paparella. In his report, Paparella noted that

the addition of the Oaks development could potentially have an adverse impact on the Authority's distribution system. He said there were two options: to increase the supply of water, or increase the supply of water and build a storage tank. Paparella stated that the Authority cannot obtain additional groundwater; therefore, it must purchase additional supply from Middlesex Water Company (MWC).

Paparella pointed out that the Authority's contract with MWC requires it to pay a premium if it purchases more than three million gallons per day (MGD). He stated, however, that records from January 2007 to December 2015, indicated that the Authority exceeded three MGD on seven hundred days, and it exceeded four MGD on more than one hundred days. Paparella said the Oaks development would increase demand by .35 MGD, and the Authority could increase its purchases to 2.65 MGD, which would allow the Authority to operate at a four MGD daily peak without premium charges.

Paparella opined that a water storage tank is not required if the Authority increases its supply of water. He stated that increasing supply and adding the tank would require a capital investment of several million dollars. He asserted that if the supply is adequate to meet daily demand, the existing storage capacity throughout the system would be adequate to meet the system

demands, including the additional demand needed to serve the Oaks development.

Eareckson testified that the average peak flow demand for the system with the development was 400 gallons per minute (GPM). He also considered fire flow, which he determined was 1650 GPM. He opined that based on his analysis, the development would not have a negative impact on the system and a water storage tank was not required. He agreed with Paparella that the Authority only had to increase the supply by purchasing more water from MWC.

Roy offered a contrary view. He stated that based on his analysis, a one million gallon storage tank was required to connect the Oaks development to the system. In his report, Roy stated that:

> Economics are not the only concern that the [Authority] has with increased reliance on purchased water to meet daily and hourly demands. Reliability for the supply of water by MWC has become an issue as the [Authority] has received requests from MWC to reduce its take during high demand periods. Typically, during the high demand summer months when the [Authority] is experiencing increased demands, so are other MWC customers connected to their system. Further, the [Authority] continues to have quality issues with the water provided by MWC with regard to disinfection byproducts, requiring the [Authority] to cease its take of water from MWC when the byproduct levels approach the regulatory threshold.
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> [T]he connection of the Oaks to the existing system has never been a supply problem. The [Authority] has stated that there is ample water supply available for both its existing customers and the proposed development. The negative impacts of the proposed development are within the distribution system and its ability to deliver water from the Water Treatment Plants and interconnections to existing connections once the proposed development is connected. The diversion of water from the existing connections to supply the Oaks . . . where there is no present demand results in decreased service to the existing customers in terms of lower pressures and storage tank levels.

McClelland opined that based on the computer modeling, the Authority's distribution system could not meet the peak demand and fire flow generated by the Oaks development without having an adverse impact in other areas of the system. He also recommended the construction of the storage tank.

The Authority decided that the views expressed by Roy and McClelland were more persuasive than those provided by plaintiffs' experts. As the trial court recognized, the Authority had the discretion "to accept or reject" the experts' opinions. Allen v. Hopewell Twp. Zoning Bd. of Adjustment, 227 N.J. Super. 574, 581 (App. Div. 1988). We conclude the Authority's decision to accept Roy's and McClelland's opinions on the need for the water storage tank was not an abuse of discretion.

As Roy explained, the addition of the Oaks development did not create a supply problem in the system. Rather, the development had a negative effect upon the Authority's distribution system because it diverted water from existing connections and water storage facilities. Moreover, in his report, McClelland noted that model runs had been performed to assess the impact of the Oaks development on the Authority's water supply system. In that report, he stated:

> The model indicated that the system is not capable of providing consumption demands and the residential and commercial fire flow demands imposed in the system at the Oaks [development] on a [p]eak [d]ay with all pumps running. The model indicates that the Authority cannot maintain a minimum of [twenty pounds per square inch] throughout the system and stored water volumes are significantly impacted under near future peak day conditions with the indicated fire flow demands without operational changes.

Thus, as the trial court found, there is sufficient credible evidence in the record to support the Authority's determination additional water storage capacity is required to provide service to the Oaks development and maintain adequate water supply throughout the Authority's service area. The evidence supports the Authority's finding that the addition of the one million gallon storage tank was reasonably required to provide service to the Oaks development.

III.

Plaintiffs argue that at the hearing Roy admitted additional infrastructure is not required to connect the Oaks development to the Authority's system. According to plaintiffs, the storage tank will be placed in the least optimal location. Plaintiffs argue this indicates the Authority is requiring them to construct a storage tank that is not required for their development, but instead needed to fix existing deficiencies in the system.

The evidence presented at the hearing indicates, however, that the key consideration is the effect the Oaks development will have on the Authority's distribution system, not the location of the storage tank. Furthermore, at the hearing, the Authority's experts did not state that the storage tank was required to fix existing deficiencies in the system. Rather, Roy and McClelland both testified that a water storage tank was required to address the impacts that the addition of the Oaks development would have on the Authority's system.

Plaintiffs further argue that the Authority intentionally overestimated the requirements for fire flow, which led to flawed assumptions in the water-demand computer modeling. The record shows that Eareckson calculated fire flow of 1650 GPM. However, McClelland stated that his firm had utilized a value of 2500 GPM

in its analysis, and noted that a fire flow of 2500 GPM had been "used for ten years."

In his report, McClelland stated:

> The developer's engineer determined the needed fire flow figures based on a number of assumptions, such as the type of units, the type and materials of construction, presence or type of fire walls, the presence of sprinklers, distance between buildings and the contents of the commercial structures, all of which remain unknown at this time. Further, the maximum needed fire flow appears to be 2,150 [GPM] as noted above. Using 2,500 [GPM] for the needed fire flow value in the model is not overly conservative and within sound engineering judgment given the variables contained in the fire flow calculation assumptions.

The Authority was not required to accept Eareckson's fire flow analysis, and reasonably chose to rely upon the fire flow value presented by McClelland, which was the value that had been used for many years.

Moreover, at the hearing, Eareckson testified that 400 GPM is the anticipated average peak flow demand of the system. He asserted that based on that analysis, a water storage tank is not required. Eareckson admitted, however, that regulations of the New Jersey Department of Environmental Protection (NJDEP) require that average peak flow demand be determined by multiplying the average daily water demand by a factor of three. N.J.A.C. 7:10-11.5(f).

Eareckson used a multiplier of 1.6. He said that is the demand at which the Authority has been operating, but he acknowledged that the NJDEP's approval would be required to install the new water mains to the Oaks development. The Authority did not err by rejecting Eareckson's calculation of average peak flow demand, which was inconsistent with the NJDEP's regulation.

We have considered plaintiffs' other arguments and conclude they are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.