SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3702-22

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF MADISON, a Municipal Corporation of the STATE OF NEW JERSEY.

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Argued April 30, 2024 – Decided June 5, 2024

Before Judges Rose and Torregrossa-O'Connor.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1694-15.

Derek W. Orth argued the cause for appellant AvalonBay Communities, Inc. (Inglesino Taylor, attorneys; John P. Inglesino, of counsel and on the briefs; Derek W. Orth and Alyssa E. Spector, on the briefs).

Gregory J. Castano, Jr., argued the cause for respondent Borough of Madison (Castano Quigley Cherami, LLC, attorneys; Gregory J. Castano, on the brief).

PER CURIAM

AvalonBay Communities, Inc. (Avalon) appeals from the July 14, 2023 Law Division order denying its motion to intervene as of right in the affordable

housing declaratory judgment matter brought by the Borough of Madison in which Madison was granted a conditional judgment of compliance and repose under New Jersey's Fair Housing Act (FHA), N.J.S.A. 52:27D-301 to -329, and applicable Mount Laurel[1] doctrine. Drew University previously successfully intervened in 2022 for the limited purpose of seeking possible inclusion of portions of Drew's land (Drew Forest or Parcels A, B, and C) in Madison's affordable housing plan. Thereafter, Avalon, a developer and contract purchaser of a portion of Drew's proposed property, sought to intervene, claiming its interests were not otherwise adequately represented. After considering Avalon's claims, we concur with the motion judge's determination that Avalon failed to satisfy Rule 4:33-1's requirements for intervening as of right and affirm.

I.

A. Madison's Judgment of Compliance and Repose

We summarize the relevant facts and procedural history from the motion record. On July 8, 2015, in accordance with the Supreme Court's holding in In

[1] Mount Laurel references collectively the "series of cases recogniz[ing] that the power to zone carries a constitutional obligation to do so in a manner that creates a realistic opportunity for producing a fair share of the regional present and prospective need for housing low- and moderate-income families." In re N.J.A.C. 5:96 & 5:97 (Mount Laurel IV), 221 N.J. 1, 3-4 (2015) (footnote omitted).

re N.J.A.C. 5:96 & 5:97 (Mount Laurel IV), 221 N.J. 1 (2015), Madison sought declaratory judgment in the Law Division confirming Madison's constitutional compliance with its affordable housing obligation and granting it a period of repose and immunity from related third-party lawsuits. It appears undisputed that Madison provided notice of the litigation from its inception to Avalon as an interested developer.

After successfully intervening, the Fair Share Housing Center (FSHC) entered into a settlement agreement with Madison on August 10, 2020, regarding Madison's Mount Laurel IV Housing Element and Fair Share Plan (fair share plan) for 500 housing units satisfying Madison's Third Round[2] affordable housing obligation. The resulting assessment of Madison's vacant land adjustment (VLA) and realistic development potential (RDP) showed 353 units as "unmet need."

In May 2021, Madison approved its fair share plan, along with the resulting spending plan, the necessary ordinances, and an affirmative marketing plan, and appointed a municipal housing liaison and administrative agents.

[2] "Third Round" refers to a municipality's obligation for affordable housing between the years of 1999 and 2025. See Matter of Twp. of Bordentown, 471 N.J. Super. 196, 209 n.2 (App. Div. 2022) (citing In re Declaratory Judgment Actions Filed By Various Muns., 227 N.J. 508, 531 (2017)).

Madison conducted necessary compliance hearings, for which Avalon had notice but declined to participate. The court-appointed Special Adjudicator[3] issued a comprehensive report recommending that the court grant Madison a conditional judgment of compliance and repose, which the court entered in favor of Madison on August 16, 2021.[4]

The court approved Madison's ordinances, resolutions, and fair share plan, determining all were "consistent with and . . . in compliance with the [FHA] (N.J.S.A. 52:27D-301 [to -329]), the Uniform Housing Affordability Controls (N.J.[A.C.] 5:80-26.1 [to -26.26]), the applicable Council on Affordable Housing substantive regulations, and the body of case law including the N[ew]J[ersey] Supreme Court Mount Laurel IV decision." The court also granted Madison ten years' "immunity," retroactive from July 1, 2015, expressly preventing

> all M[ount] Laurel builders remedy type lawsuits as well as any other lawsuits under the [a]ffordable [h]ousing [l]aws or other litigation challenging the terms set forth in the [s]ettlement [a]greement or

[3] The trial court order used the term "Special Master." We use the term "Special Adjudicator" because the Judiciary recently announced it is substituting the term "Special Adjudicator" for "Special Master." See Sup. Ct. of N.J., Notice to the Bar: Supreme Court Announces Adoption of Term "Special Adjudicator" to Replace use of "Special Master" (Apr. 5, 2024).

[4] The judgment of compliance was entered by a different Law Division judge.

> subsequent resolutions and ordinances, plans and reports, other than the actions brought to enforce the terms of the [s]ettlement [a]greement, the May 26, 2021 [fair share plan,] and the court's prior orders . . . .

Subsequently, in June 2022, Drew filed its motion to intervene and compel Madison's consideration of portions of its land, specifically Parcels A, B, and C, for possible inclusion in Madison's affordable housing plan. In September, the motion judge granted in part Drew's motion to intervene, denying Drew's request to vacate entirely the judgment of compliance and repose. The judge reasoned that Drew's vacant land would potentially "have a significant impact on Madison's RDP" making it "clearly the kind of 'changed circumstance' contemplated by the Supreme Court in Fair Share Housing Ctr. v. Twp. of Cherry Hill, 173 N.J. 393 (2002)" (citation reformatted). The judge required Drew's prompt submission to Madison of a survey of its proposed vacant land followed by Madison's submission of "an updated [m]idpoint [r]eview" to include Drew's proposed additional land. The judge further ordered that Madison "as appropriate update its [VLA]."

B. Avalon's Motion to Intervene

One year later, in June 2023, Avalon filed its motion to intervene as of right in this matter as the contract purchaser of Drew's proposed additional Parcels B and C. Although no contracts were presented, Avalon claimed it

"entered into a purchase and sale agreement with [Drew]" and was also pursuing a separate agreement to purchase property known as "3 Giralda Farms, Madison, New Jersey . . . compromising approximately [twenty-one] acres." Giralda Farms, a neighboring property, separately moved to intervene, similarly asserting its right to intervene and require Madison's consideration of its property for inclusion.[5] Avalon further asserted it had meetings with Madison regarding development of both Drew's and Giralda Farms' lands to meet its housing obligations.

On July 14, the motion judge, who had also previously decided Drew's motion to intervene, heard lengthy arguments with Madison asserting immunity and alternatively urging Avalon's application was untimely and its interests were already represented by Drew and the FSHC. Because Drew and Avalon shared the same counsel, Madison also sought disqualification of Avalon's counsel for the alleged conflict of interest in dual representation of buyer and seller of property.

[5] Giralda Farms did not appeal from the judge's denial of its motion and is referenced only for completeness in understanding Avalon's claims and the judge's ruling, as Avalon argued an additional interest as alleged contract purchaser of a portion of Giralda Farms' land.

As characterized by the motion judge, Avalon sought "to intervene in order to litigate the builder's remedy" as a developer seeking to build on both Drew's parcels and Giralda Farms' land. If Avalon's goal was not to pursue a builder's remedy, the judge questioned why Avalon's interest would not be adequately represented by Drew and the FSHC, when both had already taken the position that Drew's Parcels B and C are "appropriate for building" and should be included in Madison's plan. Avalon argued it should be allowed to intervene because it has the expertise in land development that Drew lacks and there are no other developers in the action. According to Avalon, "developer participation . . . should be encouraged as the developer has the resources to analyze these issues, research these issues, and bring these issues before the court." Avalon relied heavily on our then-recent unpublished decision in In re Twp. of S. Brunswick, No. A-3344-20 (App. Div. July 12, 2023), in which Avalon successfully intervened, urging the same result in Madison's litigation.[6] Giralda Farms similarly argued that the trial judge's permitting Drew to intervene reopened the VLA and Giralda Farms' vacant land should be included in that analysis.

[6] While references to unpublished opinions are generally prohibited, see Rule 1:36-3, we cite such a decision here to recount Avalon's argument.

Madison asserted its immunity and characterized the motions to intervene by Avalon and Giralda Farms as improper attempts "to exert influence on the [t]own." Madison reiterated its disagreement with the motion judge's decision allowing Drew to intervene, arguing that the judge improperly construed the Supreme Court's holding in Cherry Hill, 173 N.J. at 413-16.

In its order and accompanying July 14, 2023 oral decision, the judge denied Avalon's request to intervene finding Avalon failed to meet the requirements of Rule 4:33-1 because its interests were "adequately represented" by Drew and FSHC. The judge found "simply no reason for the builder to get involved." Emphasizing that its decision to allow Drew to intervene did not reopen the judgment of compliance for litigation by outside parties, the judge found Madison remained immune from third-party litigation, preventing both Avalon and Giralda Farms from intervening. The judge recognized "[v]ery significant factual differences" between Madison's litigation and that in In re Twp. of S. Brunswick. The judge also declined to determine whether counsel for Avalon had a conflict of interest, reasoning that such a conflict would arise

if Avalon indeed moved forward to purchase Drew's property.[7]

C. Avalon's Appeal

Avalon claims the trial judge erred in denying its motion as it met all requirements under Rule 4:33-1. First, as contract purchaser of a portion of successful intervenor Drew's proposed vacant land, Avalon asserts it will eventually step into Drew's shoes as owner, giving Avalon a direct interest in the property at issue in this action. Second, Avalon claims it must intervene to protect its individual interest as both "contract purchaser and proposed developer" because its "expertise" is needed to determine if Madison's plan is "a realistic opportunity" to construct affordable housing as mandated by the Mount Laurel doctrine.[8] Next, Avalon contends its interests are not adequately represented by Drew and the FSHC as neither is a developer that can provide practical assistance in assessing the construction plans. Finally, Avalon argues

[7] Although Madison did not raise the alleged conflict of interest on appeal, it merits noting that counsel's dual representation of Drew and Avalon on these motions somewhat generally undermines any claim by Avalon that its interests in this litigation are materially distinct from Drew's at this juncture.

[8] Despite Giralda Farms' failure to separately appeal, Avalon makes the same arguments as contract purchaser of a portion of Giralda Farms' proposed land, seemingly suggesting that regardless of Giralda Farms' absence in the litigation, Avalon should be permitted to intervene and advocate for use of Giralda Farms' land to satisfy unmet need.

that its motion was timely and would not unduly delay the action given that the judge ordered a midpoint review of Drew's proposal.

Madison renews its arguments that Avalon's untimely motion was properly denied as Madison is immune from builder's remedy lawsuits and other Mount Laurel litigation by virtue of its settlement agreement and judgment of compliance. Alternatively, Madison asserts that Avalon's interests are already represented by Drew and the FSHC.

II.

To successfully intervene under Rule 4:33-1, the moving party to must:

> (1) claim "an interest relating to the property or transaction which is the subject of the [litigation]," (2) show [the applicant is] "so situated that the disposition of the [litigation] may . . . impair or impede [the applicant's] ability to protect that interest," (3) demonstrate that the "applicant's interest" is not "adequately represented by existing parties," and (4) make a "timely" application to intervene.
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> [Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998) (quoting Chesterbrooke Ltd. P'ship v. Planning Bd. of Twp. of Chester, 237 N.J. Super. 118, 124 (App. Div. 1989)).]

Rule 4:33-1 "is not discretionary" if all "four criteria are satisfied." New Jersey Dept. of Env't Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 286 (App. Div. 2018) (quoting Meehan, 317 N.J. Super. at 568); see also Chesterbrooke, 237

N.J. Super. at 124. "A motion for leave to intervene should be liberally viewed." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:33-1 (2024) (citing Allstate N.J. Ins. Co. v. Neurology Pain, 418 N.J. Super. 246, 254 (App. Div. 2011)).

The movant has the burden to demonstrate grounds to intervene, including proof that existing parties will not adequately represent its interests. See Am. Civ. Liberties Union of N.J., Inc. v. Cnty. of Hudson, 352 N.J. Super. 44, 67 (App. Div. 2002). When an applicant's "position is essentially that of the [existing party]" and it is "in as good as a position as [the existing party] to prosecute the lawsuit," then the applicant fails to satisfy the third criteria. Builders League of S. Jersey, Inc. v. Gloucester Cnty. Utils. Auth., 386 N.J. Super. 462, 469 (App. Div. 2006). Importantly, "intervention as of right is not triggered merely because the parties do not see eye-to-eye on every aspect of the litigation;" instead, the rule requires that "the movant's interest is not adequately represented" by the existing parties. City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 3, 10-11 (App. Div. 2006) (holding that appellant-intervener provided no factual basis to support its speculative and conclusory assertion that the existing party did "not adequately represent its interest" in the valuation process of a condemnation action). Under Rule 4:33-1's verbatim federal

counterpart, Fed. R. Civ. P. 24(a), the "interest . . . must be direct rather than contingent, and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit." Wade v. Goldschmidt, 673 F.2d 182, 185 n. 5 (7th Cir. 1982) (quoting In re Penn Cent. Com. Paper Litig., 62 F.R.D. 341, 346 (S.D.N.Y. 1974), aff'd sub nom. Shulman v. Goldman, Sachs & Co., 515 F.2d 505 (2d Cir. 1975)); see also Exxon Mobil Corp., 453 N.J. Super. at 288-89, 296 (referring to federal case law interpreting Fed. R. Civ. P. 24(a) as persuasive authority).

Here, to assess Avalon's interest, if any, in Madison's declaratory judgment action, a brief review of applicable law informs our analysis. To comply with constitutional mandates, municipalities must provide a "realistic opportunity" for the development of their respective fair share of affordable housing. S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158, 221 (1983). Municipalities "need not guarantee that the required amount of affordable housing will be built, but must only adopt land use ordinances that create a realistic opportunity to meet the regional need and their own rehabilitation share." In re Adopt. of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 54 (2007). "Trial courts adjudicating Mount Laurel declaratory judgment actions 'should employ flexibility in assessing a' municipality's compliance

plan." Matter of Twp. of Bordentown, 471 N.J. Super. 196, 220 (App. Div. 2022) (quoting Mount Laurel IV, 221 N.J. at 3). Municipalities are authorized to use "means by any technique" to provide for their "fair share of low[-] and moderate[-]income housing" pursuant to the FHA and Municipal Land Use Law. N.J.S.A. 52:27D-311(a); see also N.J.S.A. 40:55D-8.7(a). Therefore, "[t]rial courts have broad discretion when reviewing a municipality's Mount Laurel fair share plan for constitutional compliance." Bordentown, 471 N.J. Super. at 217-18 (citing Mount Laurel IV, 221 N.J. at 30).

By affirmatively seeking and obtaining judgments of compliance, municipalities are afforded relief from most Mount Laurel litigation, thereby encouraging their voluntary satisfaction of constitutional affordable housing mandates. See Mount Laurel IV, 221 N.J. at 28-29 (holding that when determining a municipality's compliance, trial courts "may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation"); see also Hills Dev. Co. v. Bernards, 103 N.J. 1, 35 (1986) (recognizing pre-Mount Laurel IV "substantive certification" assured that a municipality's compliance "relieved [it] of the uncertainties and potential burdens of Mount Laurel litigation"). Plainly, with very limited

exceptions, "[o]nly after a court has had the opportunity to fully address constitutional compliance and has found constitutional compliance wanting shall it permit exclusionary zoning actions and any builder's remedy to proceed." Mount Laurel IV, 221 N.J. at 29 (emphasis added); see also Cherry Hill, 173 N.J. at 414 (recognizing that "[i]n the absence of substantive certification (or a judgment of repose)" a municipality remains "subject to challenge" for failure to satisfy its affordable housing obligations).

Such insulation from third-party intervention includes protection from pursuit of builder's remedies. "A builder's remedy provides a developer with the means to bring 'about ordinance compliance through litigation.'" Bordentown, 471 N.J. Super. at 221 (quoting Mount Olive Complex v. Twp. of Mount Olive, 356 N.J. Super. 500, 505 (App. Div. 2003)). In Mount Laurel II, the Supreme Court provided guidance that the trial court should "make as much use as . . . [possible] of the [municipal] planning board's expertise and experience so that the proposed project is suitable for the municipality," cautioning that courts "should guard the public interest carefully to be sure that plaintiff-developers do not abuse the Mount Laurel doctrine." 92 N.J. at 280-81. Ultimately, "[a] developer has no inherent right to a builder's remedy." Tanenbaum v. Twp. of Wall Bd. of Adjust., 407 N.J. Super. 446, 457 (Law. Div. 2006), aff'd, 407 N.J.

Super. 371, 376 (App. Div. 2009). To proceed, a builder's remedy "lawsuit [must] demonstrate[] the municipality's current failure to comply with its affordable housing obligations." Cranford Dev. Assocs., LLC v. Twp. of Cranford, 445 N.J. Super. 220, 231 (App. Div. 2016) (citing Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 560 (2002)).

Here, Madison was consistently voluntarily compliant with its constitutional obligations; there is no argument by Avalon to the contrary. Indeed, when compliance reviews reverted to the courts post-Mount Laurel IV, Madison proactively sought declaratory judgment from the trial court in 2015 to establish its compliance with its constitutional affordable housing requirements. The FSHC intervened reaching a settlement agreement with Madison, and in 2021, upon recommendation of the Special Adjudicator, the court granted Madison's conditional judgment of compliance and repose affording Madison ten years' retroactive "immunity" from third-party lawsuits related to its affordable housing plan.

We recognize that Drew successfully intervened, and the motion judge allowed consideration of Drew's vacant land in Madison's affordable housing plan. That decision is not the subject of this appeal, nor did Madison seek its review. Central to this calculus, however, is the limitation of the judge's decision

on Drew's motion to Drew's proposed portion of vacant land. The judge explicitly denied the application to reopen the matter to third parties.[9]

Against this backdrop and applying the relevant law, we discern no error in the trial judge's determination that Avalon, as developer and potential purchaser of a portion of Drew's proposed land, failed to meet the requirements for intervention as of right. We note initially that Rule 4:33-1's timeliness requirement, although not the basis for the motion judge's denial, presents an obstacle for Avalon, on notice of Madison's declaratory judgment action since 2015, its judgment of compliance since 2021, and Drew's application since 2022. Avalon, as a self-designated "potential developer" and "contract purchaser" of vacant land, never endeavored to speak or intervene when these issues regarding Madison's compliance or inclusion of Drew's proposed property were open before the motion judge. Despite that undue delay, we need not anchor our decision on Avalon's prior inaction. Instead, focusing as the motion judge did on Avalon's claim that its interests are not otherwise adequately represented

[9] In deciding Drew's motion, the judge expressly clarified, "[c]onsideration of 'Drew Forest' does not require [v]acating the [j]udgment. To do so would further delay those aspects of the Madison [fair share plan] that are presently in process. That would be clearly contrary to M[ount] Laurel goals and so was denied."

here, we conclude Avalon has not established that its interests are insufficiently protected by Drew and FSHC.

At this juncture, Drew remains the owner of the proposed land and presently advocates along with the FSHC for inclusion of the proposed vacant property in Madison's fair share plan. Represented by Avalon's counsel, Drew's position as the actual owner of the proposed vacant land mirrors Avalon's. That Avalon is the "potential" developer and potential owner of some portion of Drew's proposed property is unavailing. At most, it renders Avalon's interest in Drew's property aligned with, but once removed from, Drew's greater interest.

Avalon's desire to purchase nearby property belonging to failed intervenor Giralda Farms does not change the equation. Avalon's alleged future interest in property that has been determined to have no interest in this litigation adds no weight to Avalon's claim. Further, as the motion judge clarified:

> when Madison filed its application in 2015, as did a bunch of other towns . . . they all intended that if they [got] through the process they don't have to deal with this issue again for ten years. That was absolutely clear in the Supreme Court's decision . . . [and] in the minds of each and every one of the towns. So for me to allow . . . [Avalon] to intervene as to [Giralda Farms] or . . . [Giralda Farms] to intervene . . . is simply not possible.

The judge ultimately opined that Avalon "want[s] to intervene in order to litigate the builder's remedy . . . [that Avalon's] goal is to build on 3 Giralda . . . and also

Parcels B and C." Finding Madison immune from builder's remedy lawsuits by virtue of achieving compliance, the judge rejected Avalon's claims. We agree that Madison's good faith compliance protected it from litigation by third parties seeking to compel inclusion of land in all but a few limited circumstances not presented here.[10]

Whatever the label for Avalon's interest, we conclude Avalon falls short of establishing a right to intervene as a prospective builder or possible future owner of Drew's or Giralda Farms' land. Its status and "expertise" as a builder, does not fortify Avalon's claims at this stage as Madison has already established its compliance.

To the extent not addressed, Avalon's remaining arguments lack sufficient merit to warrant discussion in our written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

[10] We agree that any reliance, even if it were appropriate, on our unpublished decision in In re Twp. of S. Brunswick, is misplaced in the face of Madison's undisputed compliance with its constitutional obligations. There, Avalon's intervention was permitted only after the Township's noncompliance. See In re Twp. of S. Brunswick, slip op. at 63 (recognizing "immunity" from builder's remedy lawsuits is properly revoked where the town did not act "'with good faith effort and reasonable speed.'" Id. at 67 (quoting Mount Laurel IV, 221 N.J. at 33)).