SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5875-13T3

THE FOUR FELDS, INC. d/b/a
L. EPSTEIN HARDWARE CO. and
REASONABLE LOCK & SAFE, INC.,

Plaintiffs-Appellants,

v.

THE CITY OF ORANGE TOWNSHIP;
WALTER G. ALEXANDER VILLAGE
URBAN RENEWAL III, LLC, ORANGE
HOUSING DEVELOPMENT CORPORATION;
and McMANIMON, SCOTLAND and
BAUMANN, LLC,

Defendants-Respondents,

and

HARVARD DEVELOPMENT URBAN
RENEWAL ASSOCIATES, LLC,

Defendant.

Argued February 7, 2018 - Decided May 23, 2018

Before Judges Fuentes, Koblitz and Suter.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4978-13.

Jeffrey S. Feld argued the cause for appellants.

Robert D. Kretzer argued the cause for respondent City of Orange Township (Lamb Kretzer LLC, attorneys; Robert D. Kretzer, on the brief).

Demetrice R. Miles argued the cause for respondents Walter G. Alexander Village Urban Renewal III, LLC, Orange Housing Development Corporation and McManimon, Scotland and Baumann, LLC (McManimon, Scotland & Bauman, LLC, attorneys; Demetrice R. Miles, on the brief).

PER CURIAM

Plaintiffs appeal from a May 29, 2014 order dismissing their complaint in lieu of prerogative writs. We affirm substantially on the basis of the trial court's written findings, but remand for consideration of the appropriate remedy for the conflict in legal representation due to counsel for defendant Orange Housing Development Corporation (OHDC) previous representation of the mayor and city council in a limited scope engagement that included the preparation of the contract at issue here.

In a previous unpublished case we commented on plaintiffs' counsel's mode of litigation on behalf of his parents' businesses, which applies equally here. Feld v. City of Orange Twp. (Feld VI and VIII), Nos. A-3911-12 and A-4880-12 (App. Div. Mar. 26, 2015) (slip op. at 1-4). On June 18, 2013, plaintiffs filed a complaint in lieu of prerogative writs seeking to void various resolutions and ordinances pertaining to the agreements between defendant City of Orange Township (City), and defendants OHDC, Walter G. Alexander

Village Urban Renewal III, LLC (WGA III LLC), and Harvard Development Renewal Associates, LLC (Harvard LLC), arising from two redevelopment projects in the City.

Counts two, four and six[1] concerned a project developed by WGA III LLC, called Walter G. Alexander Village Phase III (WGA Phase III). In count two, plaintiffs alleged that City Ordinance No. 16-2013, which authorized the mayor to execute a financial agreement for a long-term tax exemption for the WGA Phase III project, was ultra vires and "an arbitrary, capricious, and unlawful act in derogation of public policy." The basis for plaintiffs' claim was that the ordinance did not state on its face specific findings that supported granting the long-term tax exemption for the project.[2] Plaintiffs also sought an injunction restraining the City from issuing any further permits or approvals for the project until WGA III LLC's predecessor had paid all outstanding water and sewer obligations for WGA Phases I and II.

[1] Counts one, three, and five, which involved the Harvard Printing Press Project, have been resolved pursuant to a settlement agreement that required the parties to be bound by the court's decision in any trial between plaintiff and the remaining defendants.

[2] The counts against WGA III LLC do not specify the factual or legal bases for those claims. But the WGA III counts follow and mirror preceding claims against Harvard LLC.

In count four, plaintiffs challenged City Council Resolution 208-2013, which waived the normal twenty-day estoppel period before Ordinance No. 16-2013 would have taken effect. They sought declarations from the court that Resolution 208-2013 was void as ultra vires and in violation of N.J.S.A. 40A:20-12, N.J.S.A. 40A:20-17(c) and N.J.S.A. 40:48-27, and that the commencement of plaintiffs' action had stayed the effective date of Ordinance No. 16-2013.

This count also alleged that the City was required to have published the Resolution in the Record-Transcript and the New Jersey Star Ledger and that the publication needed to state "the 20 day limitations of actions." Nevertheless, paragraph 255 of the complaint admitted that plaintiffs had not confirmed whether the notice of adoption was published in a newspaper of general circulation in Essex County.

In count six, plaintiffs sought to void Resolution 161-2013, which was the resolution of need for WGA Phase III, because, they alleged, there had been no finding that the project met all or part of the municipality's low- and moderate-income housing obligation.

Count seven alleged that the simultaneous legal representation of the City and OHDC, which was the WGA III redeveloper, by defendant McManimon Scotland & Baumann (MSB)

violated Rule of Professional Conduct (RPC) 1.8(k) and created an appearance of impropriety. Plaintiffs asked the court: to declare that MSB had violated the Rules of Professional Conduct; to void the WGA Phase III payment in lieu of taxes (PILOT) agreement ordinance and all related ordinances; to direct the City to limit contracts for outside professional redevelopment services to twelve months; to direct the City to retain independent outside special redevelopment counsel; and to compel MSB to disgorge all fees received in connection with the WGA Phase III.

In addition to declarations specific to each ordinance, plaintiffs also sought to have the court: generally declare that the City had deprived plaintiff and "other stakeholders" of unidentified constitutional statutory rights and privileges; award attorney fees; enjoin "the 'walk-on' consideration and approval of non-emergent resolutions and materials not contained in the Agenda Packet"; and compel the City "to announce at the commencement of each meeting and to provide immediate access to all proposed 'walk-on' emergent resolutions affecting the health, safety and welfare of stakeholders."

After a two-hour hearing on May 29, 2014, the court issued a written order dismissing plaintiffs' complaint. First, the court found "in favor of the defendants with respect to plaintiffs' argument" that the WGA Phase III PILOT agreement "does not comply

with N.J.S.A. 40A:20-15 & 16," stating "although the language of the financial agreement could have specifically referred to section 15 & 16, rather than N.J.S.A. 40A:20-1 et seq., this minor drafting issue does not rise to the level of error to warrant the court's intervention."

Second, the court found in defendants' favor "with respect to the annual PILOT payments of 7.5% of annual gross revenue," because "N.J.S.A. 40A:20-12(b)(1) prescribes [] annual payments not to exceed 15% of the annual gross revenue in the case of low and moderate income housing," the City's agreement with WGA III LLC was "permissible," and "any objection that 10% should have been charged is a suggestion left to the voters and not the judiciary."

Third, the court found "in favor of the defendants on the issue of the alleged missing redevelopment agreement" between the City and WGA III LLC. The court found the City "did not err when it entered into the redevelopment agreement" with OHDC "as opposed to" WGA III LLC. Neither N.J.S.A. 40A:20-4 and -5, nor the unpublished Law Division case cited by plaintiffs "make it clear that the City . . . has erred."

Fourth, the court found no conflict of interest for MSB "as drafters of the PILOT agreements," determining "the two duties, representation of [OHDC] as general counsel, and representation

of the City of Orange Township, as redevelopment Counsel, were not in direct conflict, nor does the [c]ourt find that the original drafting caused any disadvantage to the redeveloper."

Finally, the order stated plaintiffs had "raised a colorable argument regarding the City of Orange Township's compliance with Open Public Records Act," and "if the City is not in strict compliance, [plaintiffs] may come back to [c]ourt."

On June 27, 2014, after the twenty-day timeline to file such an application under Rule 4:49-2 had passed, plaintiffs filed a motion to alter or amend the court's May 29 order dismissing their complaint. This motion was denied on August 8, 2014.

We affirm substantially on the basis of the trial court's findings on all issues except the attorney conflict issue. Any additional arguments raised by plaintiffs and not addressed in this opinion are without sufficient merit to require a written opinion. R. 2:11-3(e)(1)(E). We add the following with regard to the attorney conflict.

Plaintiffs argue that the trial court erred when it refused to void the WGA Phase III PILOT Ordinance and agreement on the basis that MSB had a disqualifying conflict of interest because the law firm represented both the City and the WGA Phase III developer, OHDC. They argue that the representation violated RPC 1.8(k) and "the appearance of impropriety" standard that the

Supreme Court applied in Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 222-23 (2013), to attorneys who represent municipal bodies.

The appearance of impropriety standard did not apply here because MSB was not acting as an advisor to the municipal governing body in that body's role as a quasi-judicial entity. But MSB's representation of OHDC and WGA III LLC violated the RPC 1.8(k) per se bar established by the New Jersey Supreme Court prohibiting the representation of a private party before a governing body by an attorney who has a limited scope engagement with that governing body. It also violates RPC 1.7(a) in that the PILOT contract was prepared by the firm for the City and signed by its client OHDC.

The appearance of impropriety standard, however, does not apply. The Supreme Court has rejected the general application of the appearance of impropriety standard when evaluating whether an attorney's conduct created a conflict of interest prohibited under RPC 1.7, 1.8 or 1.9. Kane Properties, LLC v. City of Hoboken, 214 N.J. at 220; In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. 549, 562 n.5 (2006). It also has rejected the principle, urged by plaintiffs, that the appearance of impropriety standard should necessarily be applied where the asserted conflict of interest involves lawyers for public entities. In re Supreme Court Advisory Committee on Professional

Ethics Opinion No. 697, 188 N.J. at 568-69.

The appearance of impropriety standard remains applicable only to the conduct of "municipal officials acting in a quasi-judicial capacity," and it extends to the legal advice and representation provided by "an attorney advising a governing body in its performance of a quasi-judicial act." Kane Properties, LLC v. City of Hoboken, 214 N.J. at 220-22. The signing of the financial agreement for the WGA Phase III PILOT Ordinance, however, was not a quasi-judicial act. Contrary to plaintiffs' assertion, the appearance of impropriety standard was inapplicable to the evaluation of whether MSB had a conflict in its representation of the WGA Phase III entities while it also served as the City's redevelopment special counsel.

MSB's conduct in this matter nevertheless ran afoul of the proscriptions of the Rules of Professional Conduct. A lawyer may not represent a client if that representation will involve a concurrent conflict of interest. RPC 1.7(a). The specific Rule for concurrent representation for lawyers who serve public entities is set forth in RPC 1.8(k):

> A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and

> competent representation to either the public entity or the client.

A public entity may not consent to representation otherwise prohibited by RPC 1.8. RPC 1.8(l). The proscription against concurrent conflicts of interest applies equally to transactional matters. Comando v. Nuqiel, 436 N.J. Super. 203, 214 (App. Div. 2014).

The Supreme Court has articulated clear, stair-step guidelines for evaluating RPC 1.8(k) conflicts for lawyers who provide legal representation for municipal entities. In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. at 568-69. First, an attorney who "plenarily represents a municipal governing body . . . will be barred from representing private clients before that governmental entity's governing body and all of its subsidiary boards and agencies, including its courts." In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. at 568-69. Second, an attorney who "plenarily represents an agency subsidiary to the governmental entity's governing body . . . will be barred from representing private clients before that subsidiary agency only." Ibid.

Third, an attorney engaged by a governmental entity's governing body for only limited scope duties, such as the attorneys here, is barred "from appearing on behalf of private clients before that governmental entity's governing body only." Id. at 567. A

limited-scope engagement does not serve as a "per se bar" to prevent that attorney "from appearing on behalf of private clients before that governmental entity's subsidiary boards, agencies and courts." Ibid.

The circumstances here fall within the third guideline. MSB was engaged by the City for the limited purpose of acting as redevelopment counsel. In that capacity, it was barred from representing any private client before the City's governing body, which included "the municipal body as represented through its mayor, council and other officials." Id. at 567; see In re Advisory Comm. on Prof'l Ethics, 162 N.J. 497, 504 (2000). MSB was subject to the per se bar in its representation of OHDC and WGA III in these circumstances, because the City Council and the Mayor were the governing body, rather than subsidiary boards of the municipality.

To the extent that the court failed to apply RPC 1.8(k) because it believed that either OHDC or WGA III was a public entity, neither the record nor the law provide any evidential basis for that decision. Despite the suggestion in its name, "Orange Housing Development Corporation," that OHDC might be a part of City government, it was a non-profit New Jersey corporation. The record supports the conclusion that it was a private non-profit New Jersey corporation.

Nor was WGA III LLC a public entity. It was a limited liability urban renewal entity, established according to the provisions of the Long Term Tax Exemption Law (LTTEL), N.J.S.A. 40A:20-1 to -22. No provision in LTTEL automatically renders all nonprofit developers or all urban renewal entities public bodies. To the contrary, the Legislature envisioned that private enterprises would serve as urban renewal entities to provide a source of private capital for the restoration of blighted and neglected properties. N.J.S.A. 40A:20-2. The statute allows for urban renewal entities in the form of either limited-dividend corporations or nonprofit entities. N.J.S.A. 40A:20-3(g).

The determination of whether a LTTEL developer or urban renewal entity is a public or private body depends on the particular factual circumstances of the entity and its relationship with the municipality. Case law provides two contrasting examples.

In Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519, 522 (2005), the Supreme Court held that private nonprofit redeveloper Lafayette Yard was a public body subject to the provisions of the Open Public Meetings Act (OPMA) and the Open Public Records Act (OPRA). Lafayette Yard was established solely to assist the City of Trenton in redeveloping a parcel of Trenton-owned property into a hotel,

conference center and parking facility. Ibid. Although it was empowered to exercise the general powers of a nonprofit corporation, its certificate of incorporation and bylaws imposed specific constraints that gave Trenton control over its operations. Id. at 522-523.

It was able to issue tax exempt bonds on behalf of Trenton, title to its property would revert to Trenton once the indebtedness was retired, all of the seven uncompensated members of its board of trustees were selected by the mayor or city council, which had the authority to remove them, and any amendment to the by-laws had to be approved by the mayor. Id. at 523. Based on these circumstances, the Supreme Court concluded that Lafayette Yard was "an 'instrumentality or agency created by a political subdivision'" and a "public body" that performed governmental functions and was subject to both OPMA and OPRA. Id. at 522 (quoting N.J.S.A. 47:1A-1.1).

We reached the opposite result in concluding that an urban renewal entity was not subject to the provisions of the Prevailing Wage Act, N.J.S.A. 34:11-56.25 to -70, because it was not a "public body" doing "public work." Foundation for Fair Contracting, Ltd. v. State Dep't of Labor, Wage & Hour Compliance Div., 316 N.J. Super. 437, 444-47 (App. Div. 1998). Circle F Urban Renewal Limited Partnership was an urban renewal entity organized pursuant

to LTTEL. Id. at 440-41. The fact that the source of construction funds for the urban renewal project was a grant from a public body was immaterial. Id. at 447. We recognized that LTTEL provided in N.J.S.A. 40A:20-4 that the undertaking of a project by an urban renewal entity pursuant to a municipal redevelopment plan "shall be deemed" a delegation of the municipality's powers. Ibid. We said, however, that delegation "does not, however, turn the developer into a public body." Ibid.

There is no dispute that WGA III was a limited-dividend urban renewal entity. Its certificate of formation stated that it was formed for a public purpose under LTTEL, but that public purpose did not negate its status as a for-profit entity privately owned by Joseph Alpert and OHDC. It was neither a division of the City nor under its control. Unlike Trenton redeveloper Lafayette Yard, the City had no role in choosing its owners, board, or shareholders, or in its governance, other than requiring that the corporation comply with applicable laws.

Moreover, MSB's recusal from advising the City on the WGA III project did not alleviate the conflict. MSB's role as special redevelopment counsel to the mayor and City Council created a per se bar to its representation of private clients in transactions with Council and City officials. In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. at 566-

67. Neither MSB nor the City observed that bar when MSB served as counsel on behalf of a private client in an agreement signed by the mayor and approved by Council.

Not only did MSB serve as limited scope counsel for the City, but MSB had been serving as City redevelopment counsel while it had prepared and filed the documents that created the WGA III LLC entity, and MSB also had prepared the WGA Phase III PILOT agreement on behalf of the City. Although prejudice is not a factor in evaluating the existence of a per se conflict based on dual representation involving a municipal body, Id. at 566, the involvement of MSB with both sides of the contract violates RPC 1.7(a) as well as RPC 1.8(k).

We are concerned that a remedy fashioned by us might interfere with the public good under current circumstances. Those circumstances are not in our appellate record. We therefore remand to the trial court to review the current situation and fashion an appropriate remedy for counsel's conflict of interest. A remedy might begin with an objective expert review of the contract, at MSB's expense, to determine if it was fair to the parties.

Affirmed in part and remanded in part for proceedings consistent with this opinion. We do not retain jurisdiction.