Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-4337-78

HARRY'S VILLAGE, INC.,

Plaintiff-Respondent

vs.

EGG HARBOR TOWNSHIP, EGG HARBOR TOWNSHIP RENT REVIEW BOARD, and FORTY EIGHT STATES RESIDENTS ASSOCIATION,

Defendant-Appellants

CIVIL *ACTION*

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION

SAT BELOW

HON. GEORGE B. FRANCIS, A.J.S.C.

BRIEF AND APPENDIX
FOR
DEFENDANT-APPELLANT, FORTY EIGHT STATES RESIDENTS ASSN.

FILING FEES WAIVED R 1:13-2

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3T - Stenographic Transcript of Rent Control Hearing before Egg Harbor Township Rent Review Board, April 9 and 10, 1979.

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PROCEDURAL HISTORY

On August 10, 1978, a hearing was conducted before the Egg Harbor Township Rent Review Board regarding an application for a rent increase by plaintiff, Harry's Village, Inc. #1, with respect to a certain mobile home park in Egg Harbor Township formerly known as Forty Eight States Mobile Home Park. At the conclusion of the hearing, the Rent Review Board granted the landlord a substantial rent increase which included the tenants assuming the utility costs previously borne by the landlord as part of the rent.

Plaintiff in the within matter brought this action by way of Complaint In Lieu of Perogative Writ (Da 1-5) seeking to overturn the prior decision of the Egg Harbor Township Rent Review Board, to declare the Egg Harbor Township Rent Control Ordinance (Da 6-21) unconstitutional in whole or in part and to grant plaintiff the rent increases requested in its application. The suit named as defendants Egg Harbor Township, Egg Harbor Township Rent Review Board and the Forty Eight States Residents Association.

Prior to the defendant, Forty Eight States Residents Association, ever being served with a Summons and Complaint, a hearing was conducted and the Court made certain rulings on November 29, 1978. The Court ordered in part that the matter was to be remanded to the Egg Harbor Township Rent Review Board for specific findings of fact and conclusions, all of

which were to be reduced to writing, and that the plaintiff was ordered to file an Amended Application with the Egg Harbor Township Rent Review Board and a hearing was to be conducted de novo. (Da 22-23).

Defendant, Forty Eight States Residents Association, was served with a Summons and Complaint in the within matter on January 5, 1979. Said defendant filed an Answer on January 17, 1979. (Da 24-25).

Testimony was heard before the Egg Harbor Township Rent Review Board regarding the Amended Application (Da 27-56) of the plaintiff on the evenings of February 5, 1969 (1T), March 29, 1979 (2T) and April 9, 1979 (3T). The final determination of the Rent Review Board on April 9, 1979 was to grant increases regarding the three different size lots making the monthly rentals of same $100.00, $110.00 and $115.00 per month. In addition, the tenants were to assume all utility costs. (Da 57).

On April 16, 1979, counsel for the Forty Eight States Residents Association received a copy of a letter from plaintiff's counsel addressed to counsel for the Egg Harbor Township Rent Review Board advising that "hearing on the most recent decision of the Rent Review Board in Harry's Village #1 will be held before Judge Francis commencing at 9:00 A.M. on Tuesday, May 22, 1979". (Da 58).

Hearing and argument on the constitutionality of the

Egg Harbor Township Rent Control Ordinance, on its face and as applied, along with argument on the specific decision rendered by the Egg Harbor Township Rent Review Board on the Amended Application of plaintiff, were held before Judge Francis on May 22, 1979 and June 5, 1979. Judge Francis ruled on all issues on June 19, 1979 (4T). Final Judgment was signed on June 20, 1979 (Da 59-60).

Notice of Appeal was filed by defendant's, Forty Eight States Residents Association, on August 1, 1979. (Da 61-64).

STATEMENT OF FACTS

Pursuant to the Court Order for remand of November 29, 1978, plaintiff filed an Amended Application for rent increase with the Egg Harbor Township Rent Review Board. (Da 27-56) This application sought a tax surcharge, capital improvement surcharge and a hardship surcharge. The main component of the increase was the hardship surcharge, by which plaintiff sought to completely restructure the rent levels in the mobile home park to meet operating expenses, mortgage payments and obtain a reasonable profit. (Da 33-34)

The Rent Review Board elected to hear testimony with respect to each of the three areas of plaintiff's application for which an increase was sought. (1T, 2T and 3T). The Rent Review Board also made separate findings of facts and decisions regarding each of the three areas. (Da 57)

The plaintiffs called, as witnesses in support of its application, Harry Jenkins, President of Harry's Village #1, Inc. (1T 19-77; 2T 66); Harry P. Cranmer, an accountant (1T 78-112; 2T 27-44; 3T 144-151); and Ackley O. Elmer, a real estate appraiser (1T 123-169).

Defendant, Forty Eight States Residents Association, in opposition to the plaintiff's application, presented testimony by Thomas H. Costa, a certified public account (2T 14-66); Mrs. Connie Daisey (2T 75-76); Lillian Houser (3T 24-38); Pauline Triebel (3T 38-43; Rosemary Smith (3T 53-64);

1 Emma Wizemann (3T 11-24); John Gilbert (3T 64-75); Katherine
2 Pike (3T 43-53); and John Weaver (3T 75-81), all tenants
3 in the park, and also John Auer and David Charney (3T 90-96),
4 tenants in other parks in Egg Harbor Township.

5 The Board called as its own witness Chris R. Rahmann,
6 Township Engineer, who testified with respect to the capital
7 improvement surcharge. (2T 4-27).

8 After consideration and deliberation, the Board found
9 with respect to the application for a tax surcharge that
10 "The petitioner has shown that there is an increase in taxes
11 of $2,538.62...a cost per square foot of .000227328 cents."
12 (1T 120,9).

13 With respect to the capital improvement surcharge, the
14 Board found "Based on the testimony of Mr. Rehmann, Mrs. Daisey,
15 and Mr. Jenkins that the usefull life of the road is 15 years,
16 and...on the basis that the Board grants capital improve-
17 ment assessments of $0.35 per lot on the basis of 226 lots
18 or on the table on page 6, the lot size #1 would be $0.21 per
19 lot, lot size #2 would be $0.30 per lot and lot size #3
20 would be $0.40 per lot". (2T 99,16).

21 Following testimony with respect to hardship surcharge,
22 the Board determined the final decision should grant three
23 rental rates for the three different size lots within the
24 park. The Board then determined a hardship surcharge that
25 was based upon the finding of fact as to hardship being

1 experienced by the landlord and also as to hardships being
2 experienced by the tenants. (3T p. 151 to 230). The Rent
3 Review Board considered the evidence presented to them on
4 various issues, such as: the value of the park (see, eg.
5 3T 156-157); the method and manner in which plaintiff
6 financed the purchase price of the park in 1977 (see, eg.
7 3T 165-166); return on investment (3T 173); the deprecia-
8 tion line item in plaintiff's operating expense report (3T
9 179); the increase of rent due to allocation of fuel costs to
10 tenants (3T 173); the profit on the hardship surcharge (3T
11 191); the hardship on the landlord (3T 226,12) and the general
12 hardship of tenants to pay the requested increase (3T 169,4).
13 After lengthy consideration of the evidence presented, the
14 Board granted hardship surcharges in the amounts of $86.24,
15 $95.90, $100.31 according to the three different size lots,
16 making the total rents for the three size lots $100.00, $110.00
17 and $115.00. Additionally, tenants were to assume the obliga-
18 tion of the fuel.
19 Judge George Francis heard extensive argument from all
20 parties on May 22, 1979 (4T 2,128) and June 5, 1979 (4T
21 59,129).
22 On May 22, 1979 and June 5, 1979, the Court heard argu-
23 ment by the parties as to the plaintiff's contention that
24 the Egg Harbor Township Rent Control Board acted arbitrarily
25 and made their decision with respect to the plaintiff's applica-

1 tion for a rent increase in an unreasonable manner and that
2 the decision was not based upon the evidence that was before
3 the Board. The plaintiff and defendants attempted to support
4 their positions by referring to portions of the stenographic
5 transcript of the rent review hearing proceedings. (4T 2- 140).
6 The Court also heard argument on plaintiff's challenge
7 to the constitutionality of Egg Harbor Township Rent Contorl
8 Ordinance and also whether the notice provisions of N.J.S.A.
9 2A:18-61.1(f) applied to rent increases granted by rent review
10 boards. (4T 104). On June 19, 1979, the Court below
11 rendered its decision directly from the bench. (4T 141,19-178).
12 The Court found that the Egg Harbor Township Rent Control
13 Ordinance as a whole provides adequate means for a landlord
14 to passthrough costs, including a reasonable profit. (4T
15 142,19). The Court further found that specific sections of the
16 Ordinance met constitutional standards.
17 The Section 4(d) requirement that a building inspectors
18 certification be obtained by the landlord was not oppressive,
19 burdensome or a penalty. (4T 147,20). Section 5 (restrict-
20 ing rents); Section 6 (maintenance or standards); Section 7
21 (adjustment of rents); Section 8 (tas surcharge); Section 9
22 (capital improvement surcharge); and Section 10 (hardship
23 surcharge) all met the constitutional mandate for a just and
24 reasonable return. (4T 156,17).
25 In addition, the Court below ruled that the ordinance

1 provides sufficient procedural due process safeguards. (4T 157
2 10 - 59,9). The Court found that the notice to quit pro-
3 vision of N.J.S.A. 2A:18-61.1(f) "not applicable to tenancy
4 problems involving rent review boards..." (4T 163,23 and 24).
5 Finally, the Court completely reexamined the specific
6 rental amounts authorized by the Rent Review Board. (4T
7 164,23 to 178). The Court, using only the figures contained
8 in plaintiff's Amended Application for rent increase (Da 33).
9 recomputed and calculated the hardship increase sought by
10 plaintiff. The Court arrived at revised rental amounts of
11 $103.00, $118.00 and $128.00 per month depending on lot size.
12 These rents were in excess of those granted by the Rent Review
13 Board, or $100.00, $110.00 and $115.00 per month. (4T 175,10
14 and 11).
15 The Court ordered its rent increase to become effective
16 retroactive to May 1, 1979. (4T 176,1). The Final Judgment
17 embodying these figures and rulings was signed on June 20,
18 1979(Da 59-60) A notice of appeal was filed by defendant,
19 Tenants Association on August 1, 1979. (Da 61-64)
20
21
22
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25

LAW AND ARGUMENT

POINT I: THE COURT EXCEEDED ITS SCOPE OF REVIEW WHEN IT OVERTURNED THE DECISION OF THE EGG HARBOR TOWNSHIP RENT REVIEW BOARD WITH REGARD TO THE HARDSHIP SURCHARGE.

Over the years there has been a great deal of litigation with respect to the powers of the courts to overturn decisions made by quasi judicial administrative agencies. The general rule is that when the administrative board's decision is supported by the substantial evidence presented to the board, the judiciary will not interfere with the determination made by same. In Re Petition of Bergen Co., 31 N.J. 254 (1959). Miraph Enterprises, Inc. vs. Board of Alcoholic Beverage Control for the City of Paterson, 150 N.J. Super 504, 508 (A.D., 1977). The test for judicial review of administrative action is clearly set forth in Freud vs. Davis, 64 N.J. Super 242, at 246 (A.D., 1960):

> "This court held in Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501, 504 (1956), that the generally accepted gauge of administrative factual finality is whether the factual findings are supported by substantial evidence. Ordinarily, the court will not resolve conflicting evidence independently of the factual conclusion of the respondent agency. The conventional formula for judicial application of the substantial evidence rule is that there must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. vs. National Labor Relations Board, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951). As the court said in that case, respondent is an agency "presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carried the authority of an expertness which courts do not possess

"and therefore must respect." And see New Jersey Bell Tel. Co. v. Communications Workers, etc., 5 N.J. 354, 377-9 (1950). The question is: Could a reasonable man, acting reasonably, have reached the decision sought to be reviewed, from the evidence found in the entire record, including the inferences to be drawn therefrom? See Stason, "'Substantial Evidence' in Administrative Law," 89 U. Pa. L. Rev. 1026, 1038 (1941); Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis," 58 Harv. L. Rev. 70, 89 (1944)."

Deference should be granted by the Court to the expertise of the agency even when the issues are such that the Court could evaluate them equally as well. Elizabeth Lodge 289 BPOE vs. Legalized Games of Chance Comm., 67 N.J. Super 239 (A.D., 1961); In Re Emmons, 63 N.J. Super 136, 138 (A.D., 1960); Zacharie vs. New Jersey Real Estate Commission, 53 N.J. 60, 62 (A.D., 1958).

In the decision of D, L. & WR Co. vs. City of Hoboken, 10 N.J. 418 (1952), Justice Brennan, writing the opinion for the Court regarding an appeal from a judgment of the Division of Tax Appeals settling an assessment, stated, at 425, that:

> "Appellate courts should not inject themselves into the field of original valuation in such cases except in very exceptional circumstances... The task of coordination and evaluation of such evidence has been expressly committed by the Legislature to the Division of Tax Appeals, a body contemplated to bring an informed judgment from specialized experience to the nice balancing and ultimate resolution of the many complex factors involved."

Like the Board Justice Brennan was speaking of, the Egg Harbor Township Rent Review Board has been established by

the Township of Egg Harbor and the Board is comprised, pursuant to Ordinance No. 2, 1977, so as to include two members who are landlords of property effected by the ordinance, three members who are home owners and are neither directly or indirectly a landlord or a tenant, and two members who are tenants residing in property effected by the ordinance who are not directly or indirectly landlords. (Da 2). Considerable care was taken to arrive at a basis for whom should serve on the Rent Review Board so as to make the Board better able to balance the conflicting arguments which come before it and not to be weighted against either the landlords or tenants. The courts have already recognized that a Rent Review Board "is explicitly designed to reflect all points of view, to exercise continuing supervision over the operation of the rent control ordinance and to provide relief for landlords who are unable to meet their expenses to recover a reasonable project." Brunetti vs. Borough of New Milford, 68 N.J. 576, 589-90 (1975).

The substantial evidence rule has long been held applicable to municipal administrative bodies. As to zoning boards of adjustment, the Court can overturn a board decision only if the board acted arbitrarily or unreasonably, that is, without evidence to support its decision. See, for example, Mariam Homes, Inc. vs. Board of Adjustment of Perth Amboy, 156 N. J. Super 456, 458 (A.D., 1976), aff'd. at 75 N.J. 508

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1 (1978). Home Builders Assn. of Northern New Jersey vs.

2 Paramus, 7 N.J. 335, 344 (1951). The Courts have, thus far,

3 required parties to exhaust all proceedings available before

4 rent review boards prior to initiating court challenge to a

5 rent control ordinance. Brunetti, supra, 590.

6 In the case at bar, the record fully demonstrates that

7 the Egg Harbor Township Rent Review Board carried out its

8 mission and mandate. The Rent Review Board, a voluntary

9 group, heard three nights of extensive testimony concerning

10 the merits of plaintiff's Amended Application. (1T, 2T and

11 3T). Many items contained in the application, especially

12 those concerning the hardship surcharge, were subject to

13 conflicting testimony by both lay and expert witnesses. Based

14 on its review of the testimony of witnesses and exhibits,

15 the Rent Review Board arrived at what it determined to be a

16 proper rent level under the tax, capital improvement and hard-

17 ship surcharge provisions of its ordinance.

18 Yet despite this careful and exhaustive process, the

19 Court below completely revised the rental increase allowed

20 plaintiff. (4T 164,23 to 135,11). In so doing, the Court

21 limited itself to a consideration of basically one piece of

22 evidence introduced at the Rent Review Board proceeding, that

23 is, the plaintiff's Amended Application:

24 "Now, to get, gentlemen, to the figures.
As I indicated, the figures must be taken
25 into consideration as a basis for the hard-

1 ship, and this must be done without considering the validity of those figures,
2 but I take it counsel will concede, all counsel will concede, that we are concerned with the figures set forth in the
3 application, and I am talking about the figures set forth on Page 19.
4
5 I am referring right now to the Departmental Operating Statement for the seven months ending May 31, 1978. Is
6 that correct?" (4T 164,23 to 25 - 165,1 to 9).

7 While the Court asserts that it will use these figures
8 in its own calculation of the rent increase "without con-
9 sidering the validity of those figures", a review of the cal-
10 culations reveals that the Court solely and completely relied
11 on plaintiff's figures -- <u>and only those figures</u> -- in making
12 its determination. (4T 166,18).

13 The Rent Review Board, on the other hand, considered a
14 number of factors placed into evidence in addition to plain-
15 tiff's "figures" contained in its Amended Application. The
16 example, which follows, demonstrates the broad scope of
17 evidentiary review undertaken by the Rent Review Board in
18 making its final decision as to appropriate rent levels.

19 Extensive testimony was placed on the record concerning the
20 value of the mobile home park, which included the purchase price
21 paid by plaintiff in November, 1977, and plaintiff's method
22 of financing this purchase. Mr. Jenkins, plaintiff's Presi-
23 dent, testified that plaintiff paid approximately $2,000,000
24 for the park (see 1T 53,16). Mr. Jenkins also testified that
25 the plaintiff obligated itself to pay a $1,500,000 mortgage

to the seller with payments of $8,000 interest per month from February, 1978 to March 1, 1980, at which point the full unpaid balance become due along with accrued interest of $117,504. (1T 61,8). Mr. Jenkins testified that refinancing would be required in 1981 (1T 64,7). Jenkins further testified that the investment in plaintiff corporation consisted of $600.00 worth of stock. (1T 64,12).

In addition, the Rent Review Board heard considerable testimony from experts regarding the reasonableness of both the purchase price and the financing scheme. Plaintiff's real estate appraiser, Elmer O. Ackley, testified that he thought the $2,000,000 purchase price was a reasonable one and that the method of financing was not an unusual business practice. (1T 126,24-- 133,21). However, Mr. Ackley also testified that the assessed value of the property was $526,000 and that the investment of plaintiff was prudent only if plaintiff could obtain significantly higher rents from tenants. (1T 142, 11 to 18). Mr. Ackley also testified that consideration was not given to rental income prior to the purchase and that the purchase was consumated with the assumption that rents could be raised to what the market could bear, absent rent control. (1T 157, 7 to 16). The defendant tenant's expert, Thomas Costa, an accountant, testified that in his opinion the purchase price paid and the financing scheme were a financially unrealistic venture for

plaintiff corporation:

Q "If we assumed from the balance sheet, Page 18, that the actual capital of the corporation is in fact as stated, $600.00, do you have an opinion from an accounting standpoint as a practicality of such a corporation with a $600.00 capital asset purchasing a 2.2 million dollar business?

A I have never seen it and I do not think I ever will see it again. It is vaguely -- well, when you consider that he threw in 300,00 from the other corporation which he controls and some other cash which he reported as loans to keep it going, why --
Q Assuming the loans are loans or obligations to the corporation?
A No, it would be -- it would be impossible in my mind to see how he could pay the 1.6 million odd dollars on the Sage Investment mortgage and never get any of his money back or meet that payment, period." (1T 157, 22 to 25 - 158, 1 to 12).

Plaintiff's accountant, Harry P. Cranmer, testified that in his opinion, the price paid by plaintiff for the park was not realistic in view of the prior rental income generated by the park:

Q Mr. Cranmer, when you testified in August of 1978 on Page 73 you testified that you in fact had not reviewed the books of Sage Investment prior to the sale to Mr. Jenkins.
A That is correct.
Q Although you had been employed by Mr. Jenkins and then worked for Mr. Jenkins prior to the time that he attempted to buy this mobile home park?
A That is correct.
A You also testified, and I am reading at the end of Page Nine, or the beginning, and it reads as follows:
"If I looked at the books and records and they produced this kind of information I would advise him not to even buy if it was worth a million dollars because the purchase price has nothing to do with that, he would be operating at a loss," and is that still your opinion?
MR. COLE: No rent increase?

BY MR. BEAKLEY:
Q Based on the figures is that still your opinion?
A That would be my opinion. You do not buy a business that is operating at a loss when it is frozen, the rent is frozen, no matter what the purchase price is.
Q If we have an operation which is restricted by law as to the income being the rents which is the only income according to your testimony to the mobile park portion of the corporation, why would one buy it, why would it be a good buy?

MR. COLE: I object to the form of the question. The rents are not frozen indefinitely. That is why you have a Rent Review Board, to give landlords relief where it is proper.

THE WITNESS: The question again?

(The court reporter reads the pending question).

THE WITNESS: I do not know that it would be a good buy. I think I testified to the contrary. (2T 130,7 to 25 - 131,1 to 19).

With this type of evidence on the record, the Rent Review Board considered the value of the park, the price paid by plaintiff and plaintiff's financing scheme in its determination of appropriate rent levels. (4T 151-230). A perusal of the Rent Review Board discussion of the evidence demonstrates this concern:

"MR. WILLIAMS: Well, what it all comes down to is that it all leads right from the beginning like I said, it was not a prudent investment to start off with. Any businessman I assume before they would go into it, go in to buy a venture like this, takes the cash flow to know how much income he is going to be making, he checks the cash flow, and how much he can recover on his initial investment, whether it be five years, six years, and so on, but somewhere he is going to have a break even point.

At this rate when he bought this park at this price it could have gone on for

30 years but he limited himself, he put himself on the five year mortgage, the baloon mortgage. It started off with five, I believe, when he bought the park.
Like I say, it is a ridiculous price to pay for something that you know you are not going to be making any money on unless you get this sort of rent increase. What is to stop this man from selling this park and starting all over again? Are we going to give the next buyer an enormous increase to cover his losses? When does it stop?
We have here and we are sitting here as a rent leveling board and we set a level. If somebody comes in here, you know, and they try to take advantage of the situation and they try to use these figures and use or find a flaw in the ordinance, try to find a loophole, that is all we are faced with. In other words, you might have a situation here that is not going to stop. They will keep doing it and doing it. How can you stop that? What is to guaranty him or guaranty us that this won't happen again, and that we won't be back here a year from now with another owner who owns the same park, what will stop that from happening?" (4T 165,16 - 167,5).

And further on in the Rent Review Board discussion:

"MR. DE BARYSHE: What I am saying is he will not have the money to do it. If I were considering investing and building a mobile home park and looking at the record I personally would not think it would be a very good investment. So that while we may be taking care of the hardship of people living in the park now, someone else who they want to come and move in, move into a mobile home, move into the area, may not find any mobile homes to move into.
Outside of that I suspect we have come up with as good as a compromise as we could possibly be able to come up with, as is possible to come up with.
MS. LITTLE: Anybody else?
MR. WILLIAMS: I would like to add, though and even with the rent increase, any rent increase, it is increasing the cash flow of the park income and that any money that had been invested I believe can be recaptured if it were to be sold later on.
MR. DE BARYSHE: But who would buy it?
MR. WILLIAMS: Well, who bought it to begin with?

MR. DE BARYSHE: Well, evidently some suckers do come along and evidently Mr. Jenkins was the last one." (4T 225,12 - 226,13).

This one factor -- value and financing -- is outlined here at length to illustrate the process by which the Rent Review Board arrived at its decision. Other issues were presented on the record and also considered by the Rent Review Board:

depreciation; (3 T 173)

allocation of fuel costs to tenants; (3T 173)

the hardships on the tenant to pay and the plaintiff's difficulty in making mortgage payments. (3T 169,4)

These issues were considered in addition to the bare figures presented by plaintiff in his Amended Application.

The consideration of these factors was a proper one for the Rent Review Board. Section 10(e) of the Egg Harbor Township Rent Control Ordinance provides:

> "(e) The Rent Review Board, in determining the hardship surcharge, may consider, in addition to the facts submitted by the landlord, past profits, condition of the premises, the degree of hardship to the landlord and the degree of hardship to the tenant."

Consideration of factors such as value, financing structure, tenant inability to pay and return on investment are integral components of the just and reasonable return formula developed by the New Jersey Supreme Court for municipal rent control ordinances. Hutton Park Gardens vs. West Orange Town

Council, 68 N.J. 543 (1975); Brunetti vs. New Milford, supra; Troy Hills Village vs. Parsippany - Troy Hills Township Council, 68 N.J. 604 (1975); Helmsley vs. Borough of Fort Lee, 78 N.J. 200 (1978). The factors in this formula were stated in Troy Hills, supra, 628-30:

> "In determining what is a "just and reasonable" return, the court must evaluate the interests of the consumer and general public as well as the interests of the landlord. Hutton Park, supra, 68 N.J. at 570 and cases cited therein. It is no objection that rental levels under the ordinance incidentally cause the value of the property to decline. Furthermore, rent levels may permissibly work hardships on landlords in atypical cases, may drive inefficient operators out of the market and may preclude persons who have paid inflated purchase prices for buildings from recovering a fair return. However, to be "just and reasonable" a rate of return must be high enough to encourage good management including adequate maintenance of services, to furnish a reward for efficiency, to discourage the flight of capital from the rental housing market, and to enable operators to maintain and support their credit. A just and reasonable return is one which is generally commensurate with returns on investments in other enterprises having corresponding risks. On the other hand it is also one which is not so high as to defeat the purposes of rent control nor permit landlords to demand of tenants more than the fair value of the property and services which are provided. The rate need not be as high as existed prior to regulation nor as high as an investor might obtain by placing his capital elsewhere."

Despite the Rent Review Board's consideration of the broad range of issues presented to it in evidence, the Court completely shelved the Rent Review Board decision. On its own, the Court failed to consider, and seemingly rejected, such

issues as value, financing structure, tenant hardship to pay, and allocation of fuel charge to tenants. The Court rejects any consideration of the items to which it could not ascribe a specific numerical value. The Court blindly accepts plaintiff's figures on its application as correct and proceeds to calculate rent solely on the basis of those figures. In so doing, the Court overstepped its review which is limited to the issue of whether or not the Rent Review Board had sufficient evidence before it to justify its decision. Bow and Arrow Manor vs. Town of West Orange, 63 N.J. 335, 343 (1973); Cooper vs. Maplewood Club, 43 N.J. 495, 503-4 (1964). The Court cannot re-decide the plaintiff rent increase application, ab initia on its merits. Mariam Homes, supra, 458.

The Court itself expresses discomfort with its actions:

> "Now, that brings up certain questions. Number one, what about myself making independent findings of fact here in coming up with these figures? Under the circumstances of this case it is a rarity when a Judge does that, particularly when the scope of review is essentially arbitrariness, but this Court has to give relief. I indicated before there is no more remand because if we attempt to remand this again we deny relief." (4T 175,12 to 20).

In sum, the Court should not have made any independent findings because the Rent Review Board's conclusions were reasonably and legally grounded in light of all the evidence which was presented to the Board. It is important to note that the Board and not the Court was in the best position to

1 determine the credibility of the witnesses. Smith vs. E.T.L.
2 Enterprises, 155 N.J. Super 343 (A.D., 1978). Mason vs.
3 Evans, 5 N.J. Super 338, 341, (A.D., 1949). Even when the
4 determinations of administrative agencies are appealed they
5 are generally sustained if the factual determinations are
6 supported by the substantial evidence on the whole record.
7 Atkins vs. Parsekian, 37 N.J. 143 (1962). It was improper for
8 the Court to substitute its judgment with the specialized
9 judgment of the Egg Harbor Township Rent Review Board which
10 has been entrusted with the fulfillment of the legislative
11 policy as set forth in the Township's ordinance. To do this,
12 would constitute the judicial exercise of an administrative
13 function. There is a vital distinction, related to the con-
14 stitutional separation of powers between the functions of the
15 judicial and administrative tribunals. Care should be taken
16 that there shall be no encroachment by one upon the other.
17 In Re Plainfield - Union Water Co., 14 N.J. 296 (1954).
18 The only time the Court should have interfered with the
19 determination such as that which was before it is if there
20 is shown a clear abuse of discretion or a deviation from the
21 course of administrative conduct that has been recognized as
22 proper. Schinck vs. Board of Education of Westwood Consoli-
23 dated School District, 60 N.J. Super 448 (A.D., 1960).
24 Even when a matter is remanded by the Court back to an
25 administrative board, the Court must accept the determination

by the board as being proper under normal circumstances. In the recent case of South Burlington County NAACP vs. Township of Mt. Laurel, 161 N.J. Super 317 (Law Div., 1978), the Court found that:

> "I cannot say that the conclusion adopted by Mt. Laurel as to its fair share of low and moderate income housing opportunities are unreasonable simply because others disagree with them."

The fact that plaintiff disagreed with the determination of the Board or even if the Court disagreed with that determination, it was not sufficient for the Court to overturn the decision of the Egg Harbor Township Rent Review Board.

POINT II: THE COURT ERRED IN NOT REQUIRING COMPLIANCE WITH N.J.S.A. 2A:18-61.1(f) AFTER GRANTING THE RENT INCREASE SOUGHT BY PLAINTIFF.

To effectuate a valid rental increase under New Jersey law, a landlord must perform two requirements: the landlord must give to his tenant (a) a valid notice to quit, and (b) notice of the increase in rent. N.J.S.A. 2A:18-61.1(f) provides in part:

> "No lessees or tenant or assigns... may be removed by the County District Court or the Superior Court..., except upon establishment of one of the following grounds as good cause: (f) The person failed to pay rent after a valid notice to quit and notice to increase said rent, provided the increase is not unconscionable and complies with any and all other laws or municipal ordinances governing rent increases."

A valid notice to quit can be accomplished by notifying the tenant in the manner set out in N.J.S.A. 2A:18-56, stating

particularly:

> "No judgment for possession...shall be ordered unless: (b) The tenancy, if a tenancy from month to month has been terminated by the giving of one month's notice to quit which notice shall be deemed to be sufficient:..."

Any notice of rent increase must include a notice to quit. It cannot stand alone. Skyline Gardens, Inc. vs. McGarry, 22 N.J. Super 193, (A.D., 1952) found a notice of rent increase defective because the landlord failed to terminate the old tenancy. Judge Conlon held, (at 196):

> "The order of the federal authority merely empowered the landlord to increase the rent to $72.00. Its Order had no other effect, and in order to entitle himself to the increase, the landlord was bound to fulfill the legal requirements of giving a notice to quit as well as a notice of the increase. Having failed to do so, the tenant was liable to pay only the old rental under the month to month tenancy which had not been terminated."

Bhar Realty Corp. vs. Decker, 49 N.J. Super 585 (A.D., 1958), relied upon the Skyline Gardens decision in its holding that a prior tenancy agreement had to be terminated and a new tenancy agreement at the new rental rate had to be offered if a rent increase was to be valid. Furthermore, the Court ruled on the sufficiency of the "notice to quit" requisite and its contents, holding that the notice to quit ought to apprise the tenant (at 589):

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> "(1). That the relationship of landlord and tenant exists between the parties;
>
> (2). That the premises are to be vacated and possession thereof delivered to the landlord by a certain day;

(3) That the tenant's right to possession will expire on that day;

(4) And the reason for termination permitting eviction under statutory provisions, where applicable."

Hertzberg vs. Seigel, 8 N.J. Super 227 (A.D., 1950) held that the statutory notice to quit is also required, even where the landlord was granted the increase by the local housing office, holding (at 230):

> "The order of the Area Rent Director was not self executing to become effective it required service upon the tenant of a notice to quit and of increase in rent."

The rationale behind each of the above decisions requiring the notice to quit relies upon contract theory. To create a tenancy at an increased rental, the old tenancy must be terminated. To do this a notice to quit must be given together with a notice of the rent increase. The tenant thereby has the option of entering into the tenancy or rejecting same by vacating the leased premises. An agreement cannot be imposed upon the tenant to pay the rent increase. Hertzberg vs. Seigel, supra, (at 230). In addition, the tenant must be apprised of his option to either vacate or pay the increased rental amount in advance of date upon which the increase sought is to become effective.

On April 10, 1979, the Egg Harbor Township Rent Review Board decided upon plaintiff's Amended Application for rent increase and set the rent levels at $100.00, $110.00 and $115.00 respectively. (3T 277). This increase was to

become effective prospectively. (4T 228,3).

The Egg Harbor Township Rent Control Ordinance, Section 12(b), provides for specific notice requirements from Rent Review Board decision (Da 18):

> "(b) Upon arriving at a determination on a landlord application, the Rent Review Board shall notify the landlord in writing of its determination, whereupon the landlord shall forthwith deliver a copy of said determination, by certified mail or personal service to each affected tenant."

The Egg Harbor Township Rent Review Board notified the plaintiff of its decision. (Da 57). This notice provided that the rent increase granted become effective on May 1, 1979. On May 24, 1979, plaintiff mailed to all park tenants a notice that the rent was increased on May 1, 1979, which additionally stated that "If you fail to pay the above rent for May and June prior to Wednesday, June 27, 1979, you are hereby notified to vacate and quit the premises now occupied by you no later than June 27, 1979" (Da 67). A copy of the Rent Review Board decision was attached.

When the Court recalculated the rent and arrived at entirely different rent levels than those of the Rent Review Board, the Court also held that the revised increase would become effective on May 1, 1979 (4T 176,1). The Court rendered its decision on June 19, 1979. The Court then ordered a new notice of the revised rent levels be mailed to all tenants. (4T 176, 10).

In addition, the Court ruled that the notice requirements of N.J.S.A. 2A:18-61.1(f) do not apply to rent increases granted under a municipal rent control ordinance which contains its own notice provisions:

> "Before I get into the actual dollar and cent application here I will deal with this question of statutory notice under 2A:18-61.1. That calls on an ordinary or the regular notice to quit, on tenancy action in the District Court for a notice, Section (f). I would hold that rent control which is and has been held under state constitutional permissiveness as a valid legislative act of a municipality, calls for certain notice requirements in that act, and to permit a municipality which is a creature of the state to set its own scheme of notice to tenants as to protected rent increases places it on a parity with the requirement, the state requirement, and I would hold that the state requirement is satisfied, or better still and probably more accurately, not applicable in tenancy problems involving Rent Review Boards where the ordinances as to those Boards call for appropriate notice to a tenant and that relief will be sought. The tenant then has to determine in his own mind or in their own minds what contingencies might arise, the extent, and so forth, of the increase." (4T 163,8 to 25, 164,1 to 4).

The Supreme Court has put to rest the question of whether or not municipal rent control ordinances preempt the Summary Dispossess Act, N.J.S.A. 2A:18-53 et. seq. and the 1974 Residential Amendments, N.J.S.A. 2A:18-61.1 et. seq. In <u>Brunetti</u> vs. <u>Borough of West Milford</u>, 68 N.J. 576 (1975) the the Court addressed a rent control ordinance which contained eviction provisions identical to those of N.J.S.A. 2A:18-61.1 et. seq. The Court mandated that state Summary Dispossess

1 provisions preempt municipal rent control ordinances:

2 "With the enactment of N.J.S.A. 2A:18-61.1 in 1974, which sets forth specific enumerated grounds of eviction, there can no longer be any doubt that the Legislature intended to preempt this area of the law. Consequently, we hold that provisions in municipal ordinances which set forth grounds for eviction or dispossession are invalid as having been preempted by state enactments." Brunetti, supra, p. 603.

7 It is submitted that the notice provisions of N.J.S.A.
8 2A:18-61.1(f) are indeed applicable to rent control ordinance
9 authorized rent increases. N.J.S.A. 2A:18-61.1(f) specifically
10 requires that rent increases comply "with any and all other
11 laws or municipal ordinances governing rent increases." The
12 notice to quit - notice of rent increase requirements goes
13 hand-in-hand with rent control ordinance compliance.

14 Even though receiving authorization to increase rents
15 at the specified amounts from both the Rent Review Board and
16 the Court, plaintiff was required to meet the notice provisions
17 of N.J.S.A. 2A:18-61.1(f). This plaintiff clearly did not do.
18 The initial notice of May 24, 1979 was defective in that it
19 was retroactive to May 1, 1979 and did not terminate the
20 month-to-month tenancies in advance of the increase. The
21 Court further erred in its retroactive application of the
22 revised rent levels to May 1, 1979 and in dismissing the
23 61.1(f) notice requirements altogether.

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24 Without the required notice to quit and notice of rent
25 increase prescribed by N.J.S.A. 2A:18-61.1(f), the increases

authorized by both the Rent Review Board and the Court are effective and not binding upon the tenancies in plaintiff's mobile home park.

POINT III: EGG HARBOR TOWNSHIP RENT REVIEW BOARD ERRED IN HEARING THE PLAINTIFF'S APPLICATION WITHOUT THE PLAINTIFF COMPLYING WITH SECTION 4(d) OF THE EGG HARBOR TOWNSHIP RENT CONTROL ORDINANCE.

The Egg Harbor Township Rent Control Ordinance states under Section 4, Subsection (d) that an application by the landlord, except an application for a tax surcharge, shall include a certification from the Egg Harbor Township Building Official stating the extent of compliance with the Egg Harbor Township Property Maintenance Code, Applicable Fire Code, Health Code, and statutes of the State of New Jersey by the dwellings in question. (Da 11). No such certification was presented with the plaintiff's Amended Application before the Rent Review Board. Counsel for the defendant-Tenants Association argued that without such a certification being submitted the Board was without jurisdiction to hear the matter. This Motion was denied by the Board, as follows:

> "MR. BEAKLEY: Before we start, a preliminary statement, I have a question as to jurisdiction. It's come to my attention in the Section 4D of the Egg Harbor Township Rent Control Ordinance an application by the landlord except an application for a tax search or shall include a certifiecation from the Egg Harbor Township building official stating extended compliance with the Egg Harbor Township maintenance code, applicaable fire code, health code and statutes

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ordinance, it is not so oppressive as to come within the concern again of Modular Concepts. There the landlord had to run around to each of the agencies who were far removed from the building and there is no question of the impracticality and oppressiveness of that requirement in Modular.

Here the building inspector who is presumably familiar with his own ordinances and with applicable state statutes dealing with this is in a position to certify and certify quickly." (4T 147, 7 to 19).

The Court failed to address the application of the Section 4(d) certification requirement to the specific case before it. Defendant-Tenant Association had specifically raised the issue in its brief to the Court. See Da 72 [illegible]. The Court only said: "One other item. No, I have dealt with that and that is the certifications that are required" (4T 164,21 to 22). The Court made no ruling in the failure of plaintiff to supply a Section 4(d) certification in its Amended Application.

It is submitted that since Section 4(d) of the Egg Harbor Township Rent Review Ordinance met the constitutional test of <u>Modular Concepts</u>, supra, then plaintiff should have been required to provide the building inspector certification. Section 4(d) of the Egg Harbor Township Rent Control Ordinance would also be approved under the most recent guidelines set forth in <u>Orange Taxpayers Council, Inc.</u> vs. <u>City of Orange</u>, 169 N.J. Super 288 (A.D., 1979) at pages 302-303. The Egg Harbor Township Rent Review Board and the Court should not have proceeded to consider plaintiff's Amended Application

in the State of New Jersey by the dwelling in question. And as Section 1 subsection B includes Mobile Home Parks as dwellings and I've been advised that this certificate has not been filed and the question is as to whether or not the Board has jurisdiction to hear this matter.

MR. KRANTZ: Mr. Beakley, I will answer that.

MR. COLE: I can answer it too.

MR. KRANTZ: Well, if you don't mind, Mr. Cole, I am the attorney for the Board, you are the attorney for the applicant so why don't we leave it that way for the moment.

First of all, the Township doesn't have a Property Maintenance Code and second of all we no longer require it. If there are violations which you allege you may bring forth those violations, anything you may deem either a violation of the code or even anything which is something that you may deem not in conformity with what the rents would justify, you may bring that forward.

MR. BEAKLEY: My question, Mr. Krantz, is that the section of the ordinance which is still in effect indicates that this shall be included and it would seem to be a prerequisite for filing an application before the Board, I mean -- this section has not been deleted from the ordinance --

MR. KRANTZ, It's not been deleted but we are not -- we are not requiring it, we are not requiring it. (1T 5, 24 to 25, 6 and 7, 1 to 10).

The Court below ruled that Section 4(d) of the Egg Harbor Township Rent Control Ordinance was distinguishable from a similar provision found unconstitutional in Modular Concepts, Inc. vs. South Brunswick Township, 146 N.J. Super 138 (A.D., 1977). (4T 145,21 to 147,21). The Court below stated its findi of constitutionality as follows:

"And since it is a certification by the building official himself, and since he is called upon to produce this and should prodice it promptly under the

absent submission of all information, statements and certifications required under the Egg Harbor Township Rent Control Ordinance.

CONCLUSION

The court below exceeded its scope of review when it overturned the decision by the Egg Harbor Township Rent Review Board. From rents of $102.00 average rents per tenants per month, the Rent Review Board granted an increase of 100, 110 and 115. The Courts, granted an increase to plaintiff of 103, 118 and 120 per month. The Court below does not have the power or authority to grant rent increases. Only the Egg Harbor Township Rent Review Board has that power under its Rent Control Ordinance. For this reason, action by the Court below must be vacated and the initial decision of the Rent Review Board restored.

In addition, the increase granted by both the Court below and the Rent Review Board is ineffective because the notice to quit provisions of the Anti-Eviction Law, N.J.S.A. 2A:18-61.1(f) has not been complied with and the Rent Review Board considered plaintiff's application in the first instance without a building certification being submitted under Section 4(d) of the Egg Harbor Township Rent Control Ordinance.

The decision of the Court below should be reversed

1 for the reasons outlined herein.

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Respectfully submitted,
CAPE-ATLANTIC LEGAL SERVICES

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BY: /s/ David G. Sciarra
DAVID G. SCIARRA

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