

NOT FOR PUBLICATION WITHOUT APPROVAL OF  
THE TAX COURT COMMITTEE ON OPINIONS

**TAX COURT OF NEW JERSEY**

**Patrick DeAlmeida**  
Presiding Judge



R.J. Hughes Justice Complex  
P.O. Box 975  
Trenton, New Jersey 08625-0975  
(609) 292-8108 Fax: (609) 984-0805

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Peter J. O'Connor, Esq.  
Fair Share Housing Center, Inc.  
510 Park Boulevard  
Cherry Hill, New Jersey 08002

Steven M. Eisner, Esq.  
Eisner and Fowler  
76 E. Euclid Avenue, Suite 101  
Haddonfield, New Jersey 08033-2334

Re: Evans-Francis Estates Associates, LP v. Township of Cherry Hill  
Docket No. 012386-2011

Dear Counsel:

This letter constitutes the court's opinion with respect to defendant's motion to dismiss the Complaint pursuant to N.J.S.A. 54:51A-1(b) because all taxes due and payable for tax year 2011, the tax year under review, were not paid at the time that the Complaint was filed. For the reasons explained more fully below, defendant's motion is granted.

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I. Findings of Fact and Procedural History

This letter opinion sets forth the court’s findings of fact and conclusions of law on defendant’s motion. R. 1:6-2(f). The following findings of fact are based on the certifications and exhibits submitted by the parties on the motion. R. 1:6-2(d).

Plaintiff, Evans-Francis Estates Associates, LP, owns a 4.2-acre parcel of vacant land in defendant Cherry Hill Township. The parcel is designed as Block 521.17, Lot 40 and is located at 460 Evesham Road. For tax year 2011, the property was assessed as follows:

Land	\$ 844,000
Improvement	<u>\$ 00</u>
Total	\$ 844,000

The Chapter 123 ratio for Cherry Hill Township for tax year 2011 is 46.94%, which results in an equalized assessed value of \$1,798,040 ( $\$844,000 \div .4694 = \$1,798,040$ ).

Plaintiff is a limited partnership formed by Fair Share Housing Development, Inc., for the purpose of building fifty-four units of affordable rental housing and a community building on the subject property. The parcel, which was carved out of the Short Hills Farm, a larger plot of land slated for mixed-use, mixed-income development, is included in the township’s “fair share” plan to meet its obligation to provide low and moderate income housing as required by the Mount Laurel doctrine, see Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975) and Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1993), and the Fair Housing Act, N.J.S.A. 52:27D-301 to -329.19. Restrictions on the property limit its use to this purpose.

In resolutions memorialized on February 20, 2011, the Cherry Hill Township Planning Board issued preliminary and final site plan approval and three variances for plaintiff’s intended development of the property. After a legal challenge by a neighborhood association, the

Superior Court, Hon. Theodore Z. Davis, J.S.C., issued an Order effectively affirming the municipal approvals for construction of plaintiff's project as a component of the municipality's Mount Laurel compliance plan.

On August 17, 2001, the developer of Short Hills Farm conveyed title to the subject property to plaintiff for \$1 to facilitate construction of the project.

On April 14, 2003, the Superior Court, Appellate Division, affirmed the development approvals and the decision of Judge Davis.

Over the next several years, plaintiff applied for construction and permanent financing for the project from a variety of state and federal government entities. The financial plan included the sale of government-approved tax credits. Plaintiff encountered a number of difficulties in obtaining the funds necessary to build the affordable units it proposed for the property. Despite the involvement of the Superior Court, which has oversight of the township's compliance with the Mount Laurel doctrine, the Department of Community Affairs, the New Jersey Housing and Mortgage Finance Agency, and federal agencies, plaintiff has yet to secure the funds necessary to begin construction of the project. Plaintiff concedes that its inability to start construction is due, in part, to the collapse of the tax credit equity market as a result of national economic conditions beginning in early 2008.

In addition, plaintiff contends that the municipality's reluctance to having affordable units constructed on the property contributed to the financing obstacles. Two examples are cited in support of this argument. First, according to plaintiff, at a time when financing for the project had been tentatively secured, the township wrongfully withheld distribution of gap funds from its affordable housing trust account, causing a withdrawal of funding from other sources. Second,

plaintiff contends that the municipality's refusal to execute a payment in lieu of taxes agreement with respect to the property caused the withdrawal of a subsequent round of commitments.

Moreover, in 2009, the township planning board informed plaintiff that the 2001 approvals for the project had lapsed because the project had not been completed in the timeframe established by the board. According to plaintiff, the planning board's decision with respect to the lapse in approvals is unlawful and resulted in the withdrawal of additional funding commitments for the project. A challenge to the planning board's determination regarding the lapse in approvals is pending before the Superior Court. Plaintiff's request for an extension of financing and its renewed applications for funds in light of the planning board's decision were denied by relevant agencies.

Plaintiff did not make timely tax payments on the property over the years preceding this appeal. Apparently, plaintiff had the intention of satisfying tax arrearages with funds secured for the construction of the housing project. Plaintiff viewed the unpaid taxes as a component of the cost of carrying the property to be financed along with construction costs once all funding sources had been finalized. At the end of 2010, all outstanding local property taxes on the subject property, which exceeded \$400,000, were recovered by the township through the issuance of tax sale certificates. No taxes have been paid on the property for tax year 2011. The municipality attempted to sell tax sale certificates for tax year 2011, but could find no purchasers. As a result, the township issued tax sale certificates to itself for that year, generating no tax revenue for the municipality. As of September 27, 2011, approximately \$40,000 in taxes for tax year 2011 remained unpaid.

In early 2011, plaintiff filed a petition of appeal with the Camden County Board of Taxation challenging the assessment on the property for tax year 2011. It is plaintiff's position

that the assessment on the property exceeds its true market value because the tax assessor failed to consider the effect that court-ordered affordable housing restrictions have on the value of the property. See Prowitz v. Borough of Ridgefield Park, 237 N.J. Super. 435 (App. Div. 1989), aff'd, 122 N.J. 199 (1991). In addition, plaintiff suggests that the municipality's failure to reflect in the assessment the restrictions on the property represents a failure by the municipality to ensure that the development of the property as affordable housing is a realistic possibility. According to plaintiff, the assessment in excess of true market value poses a significant financial obstacle to the realization of affordable housing on the property.

On July 1, 2011, the county board dismissed plaintiff's appeal for failure to pay all taxes and municipal charges up to and including the first quarter of 2011 pursuant to N.J.S.A. 54:3-27.

On August 15, 2011, plaintiff filed a Complaint with this court challenging the Judgment of the county board. As noted above, at the time that plaintiff filed its Complaint, none of the taxes due and owing on the subject property for tax year 2011 had been paid.

On September 12, 2011, defendant moved to dismiss the Complaint pursuant to N.J.S.A. 54:51A-1(b), which requires a taxpayer to have paid at the time of the filing of the Complaint all taxes due and owing for the tax year under review.

Plaintiff opposes the motion and asks the court to relax the tax payment requirement. Plaintiff's written opposition to defendant's motion appears to request that plaintiff be relieved entirely of its tax payment obligation until resolution of this appeal. At oral argument, however, plaintiff's counsel proposed that the court reduce plaintiff's outstanding tax obligation by 75% (the percentage reduction plaintiff believes it will achieve with its appeal), and establish a monthly payment plan for the amount of taxes that would be due on the reduced assessment until the substantive issues raised in the appeal are decided.

## II. Conclusions of Law

N.J.S.A. 54:51A-1(b) provides:

At the time that a complaint has been filed with the Tax Court seeking review of judgment of county tax boards, all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid. Notwithstanding the foregoing, the Tax Court may relax the tax payment requirement and fix such terms of payments as the interests of justice may require.

The Appellate Division recently underscored the importance of N.J.S.A. 54:51A-1(b) in Dover-Chester Assocs. v. Township of Randolph, 419 N.J. Super. 184 (App. Div.), certif. denied, 208 N.J. 338 (2011). As the court explained, “[b]ecause the right of appeal in the Tax Court is statutory, the appellant must comply with all applicable statutory requirements for the Tax Court to entertain the appeal.” Id. at 190 (citing General Trading Co. v. Director, Div. of Taxation, 83 N.J. 122, 127 (1980); Royal Bradley Assocs. v. Borough of Bradley Beach, 252 N.J. Super. 401, 403-04 (App. Div. 1991)). A “taxpayer who seeks to appeal from a judgment of the county board of taxation must therefore comply with the tax payment requirement in N.J.S.A. 54:51A-1(b) unless the Tax Court determines to exercise its limited discretion” under the statute to relax the tax payment requirement. Ibid.

N.J.S.A. 54:51A-1(b) was enacted to ensure the uninterrupted flow of revenue to the municipality while a tax appeal is pending. Sun Pipe Line Co. v. Township of West Deptford, 25 N.J. Tax 466, 475 (Tax 2010). “The purpose of the tax payment requirement is to protect the municipality’s interest in receiving timely payment of taxes to provide the revenue necessary for governmental operations.” Dover-Chester, supra, 419 N.J. Super. at 201 (citing J.L. Muscarelle, Inc. v. Township of Saddle Brook, 14 N.J. Tax 453, 457 (Tax 1995)). “When the flow of

revenue is interrupted, the burden of an appealing taxpayer's unpaid taxes is shifted to the other taxpayers in the district and reflected in the reserve for uncollected taxes." Ibid.

Relaxation of the tax payment requirement is "granted sparingly, and in limited circumstances." Wellington Belleville, LLC v. Township of Belleville, 20 N.J. Tax 331, 336 (Tax 2002)(footnote omitted). The "court must weigh all evidence relating to the totality of the circumstances resulting in non-payment of taxes, and make a fact sensitive determination on a case-by-case basis, as to whether the statutory tax payment should be relieved in the interests of justice.'" Dover-Chester, supra, 419 N.J. Super. 202 (quoting Huwang v. Township of Hillside, 21 N.J. Tax 496, 505 (Tax 2004)). In Wellington Bellville, supra, Judge Bianco established a three-part test to guide the court in determining whether relaxation of the tax payment requirement is justified:

At a minimum, it would seem that such circumstances must be (1) beyond the control of the property owner, not self-imposed, (2) unattributed to poor judgment, a bad investment or a failed business venture, and (3) reasonably unforeseeable.

[20 N.J. Tax at 336.]

Plaintiff argues that relaxation of the tax payment obligation is justified by its prolonged inability to secure financing for its project and the municipality's intentional frustration of the construction of affordable housing on the subject property. While the court has no reason to doubt plaintiff's good intention to build affordable housing on the subject property, the record does not support relaxation of the tax payment requirement for the tax year 2011 appeal. None of the three Wellington Bellville factors have been satisfied here. Plaintiff's failure to plan for the complications associated with the construction of affordable housing was a decision within plaintiff's control. Electing not to pay taxes on the property for multiple years in the hope that

eventual financing for the property would satisfy tax arrearages was an exercise in poor judgment by plaintiff. Each of the difficulties in obtaining financing and final approval for its project noted by plaintiff in its opposition papers were readily foreseeable.

The construction of affordable housing as an element of a municipality's compliance with the Mount Laurel doctrine is an endeavor fraught with complications, both legal and financial. It would be naïve for an affordable housing developer such as plaintiff to assume that it could navigate the myriad planning approvals, legal challenges, financing applications, neighborhood opposition, environmental considerations, and competing development demands associated with the development of a municipality's Mount Laurel affordable housing without having to pay the costs associated with carrying the property until the development is realized. Yet, plaintiff took title to the subject property in 2001 without having obtained the financing it needs to complete the project and without having made provisions for the payment of taxes on its property until financing could be secured.

In the first eleven years that plaintiff owned the property it did not challenge the assessment, even though a 1989 Appellate Division opinion provides what appears to be a reasonable basis for a claim that the tax assessor failed to consider the development restrictions on the property when determining its true market value. Plaintiff could either have paid the taxes and filed an appeal with the county board of taxation or approached the tax assessor in an effort to negotiate a reduction in the assessment in any of the tax years preceding 2011. Instead, plaintiff elected, several years ago, to stop paying taxes on the property. This exercise in poor judgment interrupted the flow of finances to the municipality and resulted in the eventual sale of over \$400,000 in tax sale certificates. As for tax year 2011, the only year before the court, the

municipality was unable to find a purchaser for over \$40,000 in tax sale certificates. The outstanding taxes for tax year 2011 have not been realized by the municipality.

Finally, although the erosion of national economic conditions may have been out of plaintiff's control, the inability to secure readily funding and final approvals for the construction of affordable housing was reasonably foreseeable. As the numerous published opinions regarding the Mount Laurel doctrine demonstrate, the construction of affordable housing is not a simple proposition. As noted above, legal, financial, economic, and practical considerations conspire to delay the expeditious construction of affordable housing. As unfortunate as those circumstances may be, they must be anticipated by a developer. Plaintiff should have planned for these eventualities, either by securing a reserve for the payment of taxes, postponing the transfer of title to plaintiff, or entering into an agreement with the developer with respect to responsibility for carrying costs until financing and final approvals for the project had been secured.

The Wellington Belleville court examined similar circumstances. There, the taxpayer purchased property with the intent to remove asbestos that polluted the parcel and secure a change in zoning to allow the property's development for commercial purposes. 20 N.J. Tax at 332-333. Unable to secure the necessary approvals for its plan, the taxpayer experienced severe financial difficulty and sought relaxation of the tax payment requirement in the interest of justice. Judge Bianco explained that "municipal approvals, the decontamination process and demolition, all necessary to accomplish plaintiff's objectives, are commonplace and reasonably foreseeable, and should have been anticipated by plaintiff." Id. at 337. Similarly, the obstacles encountered by plaintiff in securing the approvals and financing necessary to construct its project are "commonplace and reasonably foreseeable" and should have been anticipated by plaintiff.

The court is cognizant of the fact that defendant has a constitutional obligation to provide its fair share of affordable housing and to take affirmative measures to make identified affordable housing opportunities realistic. Plaintiff contends that defendant's failure to reduce the assessment on the subject property to reflect the restrictions that exist on its development makes realization of affordable housing on the parcel not realistic. According to plaintiff, the municipality is aware that plaintiff cannot carry the financial burden associated with the assessment and is attempting to block through an excessive assessment what the municipality has been unable to block through other channels.

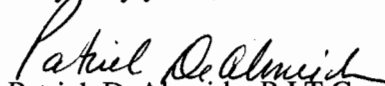
There is nothing in the law, however, that requires the taxpayers of Cherry Hill Township to subsidize plaintiff's ownership of land that may ultimately be used to satisfy the municipality's Mount Laurel obligation. Plaintiff acknowledges in its opposition papers that governmental financing for the taxes on undeveloped property slated for affordable housing is not available. The fact that the Legislature has not authorized such financing suggests that it is expected that an entity holding property for potential development as part of a municipality's Mount Laurel compliance plan will satisfy its tax obligations while the property is not being used to support affordable housing. In addition, the Supreme Court's considerable jurisprudence with respect to the Mount Laurel doctrine and the legislative enactments enforcing municipal fair share obligations contain no rule that property identified for the development of affordable housing is insulated from paying local property taxes while development approvals are sought. In fact, even after construction of affordable housing units, plaintiff would be responsible for paying at least a share of the cost of the burden that the property will impose on municipal coffers. Plaintiff admits that its project, once constructed, would be subject to a payment in lieu of taxes agreement with the municipality.

In light of these circumstances, the court concludes that the interests of justice do not require that plaintiff be relieved of its tax payment obligation with respect to its tax year 2011 appeal. Plaintiff is, in effect, in no different position than any other developer whose planned construction has been stymied by sour economic conditions, an inability to secure financing or local development obstacles. Having entered the real estate development market, albeit to construct affordable housing, plaintiff must plan to cover its financial obligations, including its local property taxes, during the period it holds title to property slated for development. The fact that plaintiff seeks to assist Cherry Hill Township in satisfying its constitutional obligations under Mount Laurel does not erase plaintiff's obligation, like all other property owners, to pay its taxes.

If, as plaintiff contends, the municipality has failed to fulfill its obligation to take affirmative steps to ensure that affordable housing will be constructed on the subject property that claim can be raised before the Superior Court Judge overseeing the municipality's compliance with the Mount Laurel doctrine. In order to challenge the assessment on the subject property in this court, however, plaintiff's outstanding tax obligations for the year under review must be paid. Of course, nothing in this opinion prevents plaintiff from approaching the municipal tax assessor to request a reduction in the assessment on the property for tax year 2012 based on the holding in Prowitz, supra. The assessments for tax year 2012 have not yet been finalized.

Defendant's motion to dismiss the Complaint is granted.

Very truly yours,

  
Patrick DeAlmeida, P.J.T.C.