Fta Realty

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Submitted February 6, 2012 -

Before Judges Parrillo and Skillman.

Plaintiffs appeal from a final judgment of the Law Division, which dismissed their complaint challenging various decisions of the Department of Transportation (DOT) relating to a change in the access points from plaintiffs' properties onto the adjoining roadways on the ground this court has exclusive jurisdiction to review such State agency decisions.

FTA Realty, L.P. (FTA) and the General's Group, L.L.C. (General) are affiliated real estate development companies that own contiguous lots located on Route 46 and the Bergen Turnpike near the Little Ferry Circle. On January 31, 2008, the DOT notified General and FTA that it planned to improve Route 46 and Little Ferry Circle, and that, as a part of its improvements, it planned to revoke the access from Route 46 to plaintiffs' properties as required by the New Jersey State Highway Access Management Code (Access Code). This notice was accompanied by a copy of the DOT's "Revocation of Access Plan" for the site. This plan included the DOT's proposal for alternative access, under which the only access to Route 46 from plaintiffs' lots would be from the Bergen Turnpike.

Following receipt of this notification, plaintiffs, who have plans to construct a ninety-two room hotel and possible restaurant/bar/catering facility on their property, had a series of meetings with representatives of the DOT to discuss their concerns regarding the elimination of their direct access to Route 46 as a result of the planned improvements to Route 46 and the Little Ferry Circle. These discussions resulted in a revision of the DOT's plans.

After receiving those revisions, General executed a "Lot Owner's Consent" form on June 10, 2008, agreeing to the DOT's revised plan for a change in its access to Route 46. This form also stated that the DOT "will provide all assistance necessary to provide the alternative, reasonable access as shown on the Plan . . . at its expense."

On November 21, 2008, General sent a letter to the DOT indicating that it was revoking its consent to the Revocation of Access Plan for its property on the ground that the plan was unreasonable and that their consent had been procured through misstatements and misrepresentations. According to the letter, when General signed the Lot Owner's Consent form on June 10, 2008, it was advised that

the traffic ingressing and egressing its property would have the benefit of a jughandle, which was to have been constructed at Valley Road and its intersection with Bergen Turnpike. Subsequently, however, General was informed that the State was proceeding with the improvement project but was not proceeding with construction of the jughandle.

On February 6, 2009, the DOT responded by a letter which stated:

I am writing in reply to your November 21, 2008 letter to Mr. Richard Thayer of this office concerning the captioned project.

Neither the Department nor its designer ever showed you[r] client a plan with a jughandle at Valley Rd. and Bergen Turnpike. Our designer may have indicated to your client that it was possible to make u-turns at this intersection but the construction of a jughandle was never part of the design of this project.

The General's Group does not have the right to revoke its consent to the access alteration.

Based on the above the Department will continue with its plans for this project based on having a signed Lot Owner's Consent from your client.

Although General executed a "Lot Owner's Consent" form with respect to the DOT's revised proposal for a change in the access to its property, FTA refused to sign a similar consent with respect to the DOT's revised proposal for a change in its access to Route 46. Following that refusal, FTA had an additional informal meeting on July 17, 2008 with representatives of the DOT regarding the proposal.

On August 22, 2008, the DOT sent FTA a letter which stated that it would not further revise its plan for a change in FTA's access to Route 46 and that if FTA wished to contest the DOT's decision, it should request a hearing before the Office of Administrative Law (OAL) within thirty days. The conclusion to this letter stated:

Based on the above, the Department has satisfied the requirement to hold an informal meeting, as set forth in N.J.A.C. 16:47-4.33(d)6. The NJDOT adheres to the proposed revocation of access plan dated January 2008, and sent with the notice dated May 20, 2008. The Department will schedule an appeal hearing with the Office of Administrative Law (OAL), pursuant to N.J.A.C. 16:47-4.33(d)4, if you contest the reasonability of the alternative access.

Please contact me at the Department in writing within thirty (30) calendar days of your receipt of this letter to request a hearing or please sign and return the attached Lot Owner Consent (LOC) form within thirty (30) calendar days of your receipt of this letter. Failure to respond to this notice is a waiver of your right to a hearing before the OAL.

FTA did not request a hearing before the OAL within thirty days of the August 22, 2008 letter. Instead, eighty-seven days later, on November 17, 2008, FTA sent the DOT another letter complaining about the alleged inadequacy of the access to Route 46 provided under the DOT's revised access plan and asking for "confirmation that this matter has been submitted to the Office of Administrative Law (OAL) for an appeal." Subsequently, on January 8, 2009, FTA sent another letter to the DOT reiterating its desire for a hearing before the OAL.

The DOT responded to FTA's November 17, 2008 and January 8, 2009 letters by a letter dated January 15, 2009, which stated in pertinent part:

Our Office is in receipt of your letters dated 11/17/08 & 1/8/09 requesting a hearing before the Office of Administrat[ive] Law for the above referenced property.

The Department's conclusion letter dated 8/22/08 stated the regulation that allowed the owner to request a hearing before the Office of Administrative Law; had thirty (30) days to contact the Department in writing. Failure to respond to the notice is a waiver of the owner's right to a hearing.

Your letter dated 11/17/08 requesting an OAL hearing had exceeded the thirty (30) day provision under the New Jersey State Highway Access Code. Thus, by regulation "The Department shall deem the lot owner's failure to respond to the notice as a waiver of the owner's right to a hearing."

On March 5, 2009, plaintiffs brought this action in the Law Division challenging the DOT's decisions set forth in the previously quoted letters regarding the change in the access points from their properties onto Route 46 and Bergen Turnpike. The DOT filed a motion to dismiss the complaint on various grounds including that because plaintiffs' action was for review of final administrative agency decisions, it should have been taken directly to the Appellate Division under R. 2:2-3(a)(2). The trial court granted the DOT's motion, concluding in a written opinion that "appropriate review of this matter is by direct appeal to the Appellate Division." The court also observed that the DOT "did offer Plaintiffs the opportunity to appeal to the OAL, but the Plaintiffs waived that opportunity . . . by failing to respond to [DOT's] notice within the applicable thirty-day period."

The Appellate Division has exclusive jurisdiction to review a decision by a State administrative agency or officer. See Infinity Broadcasting Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212, 222-23 (2006); Pascucci v. Vogitt, 71 N.J. 40, 52 (1976). This exclusive jurisdiction extends to both final and interlocutory decisions. See Sod Farm Assocs. v. Twp. of Springfield, 366 N.J. Super. 116, 131-32 (App. Div. 2004).

The DOT is a State agency. See Kolitch v. Lindedahl, 100 N.J. 485, 502 (1985). Therefore, any decision by the DOT under the State Highway Access Management Act, whether final or interlocutory, is reviewable only by this court. For this reason, the trial court correctly concluded that it lacked jurisdiction over plaintiffs' challenge to the DOT's decision regarding their right of access to Route

46.

Plaintiffs argue that even if the Law Division lacked jurisdiction to review the DOT's decisions, it should have transferred the case in accordance with Rule 1:13-4(a) rather than dismissing their complaint. We agree, at least with respect to those DOT decisions that were still subject to appeal to this court when plaintiffs filed their complaint in the Law Division. Cf. Kohlbrenner Recycling Enters., Inc. v. Burlington Cnty. Bd. of Chosen Freeholders, 228 N.J. Super. 624, 629 (Law Div. 1987), rev'd on other grounds, 248 N.J. Super. 531 (App. Div.), certif. denied, 127 N.J. 551 (1991). Rule 1:13-4(a) provides in pertinent part that "if any court is without jurisdiction of the subject matter of an action . . . , it shall, on motion or on its own initiative, order the action . transferred to the proper court." Moreover, "[i]f a trial court fails to transfer a challenge to state agency action to this court and instead decides the merits, we may exercise our original jurisdiction on appeal from the judgment and review the underlying agency action as if the challenging party had appealed directly to this court. Mutschler v. N.J. Dep't of Envtl. Prot., 337 N.J. Super. 1, 10 (App. Div.), certif. denied, 168 N.J. 292 (2001).

The last of the DOT's decisions challenged by plaintiffs' Law Division action were dated February 6, and January 15, 2009. Plaintiffs' Law Division complaint was filed on March 5, 2009, which was clearly within the forty-five day period allowed by Rule 2:4-1(b), for appealing the February 6th decision. The complaint was filed forty-nine days after the January 15th decision. However, the time for appealing a State administrative agency decision does not begin to run until "the date of service of the decision or notice of action taken." The record does not indicate when FTA was served with the DOT's January 15th letter. However, if FTA was not served with that letter until January 19th,[1] its March 5th challenge to that decision would have been timely, and even if its complaint was filed a day or two beyond the allowed forty-five day period, an extension of time would be warranted under the circumstances of this case. See R. 2:4-4(a). Therefore, we treat plaintiffs' complaint as an appeal from those two agency decisions.

However, we conclude that those appeals are clearly without merit and only require brief discussion. R. 2:11-3(e)(1)(E).

The January 15, 2009 letter simply notified plaintiffs that FTA's November 17, 2008 request for a hearing before the OAL regarding the DOT's August 22, 2008 decision refusing to further revise its access plan was untimely because it was not filed within the thirty-day period allowed by N.J.A.C. 16:47-4.33(d)(4). Although we assume the DOT has discretionary authority to extend this deadline, there is no basis for us to conclude that the DOT abused its discretion in failing to grant such an extension under the circumstances of the case.

The February 6, 2009 letter simply notified plaintiffs that General could not revoke the consent it had given on June 10, 2008 to the DOT's revised access plan. Again, although we assume that the DOT has discretionary authority to allow a property owner to revoke its consent to a modification in the

access to its property, there is no basis for us to conclude that the DOT abused its discretion in refusing to allow such a revocation, particularly in view of General's more than five-month delay in seeking this relief.

Accordingly, we affirm the trial court's dismissal of plaintiffs' complaint for lack of jurisdiction. We also affirm the DOT's January 15 and February 6, 2009 decisions.

1. We note that under Rule 1:3-3, "[w]hen service of a notice or paper is made by ordinary mail, and a rule or court order allows the party served a period of time after the service thereof within which to take some action, 3 days shall be added to the period."