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New Jersey Appellate Division Holds Variance Condition Requiring Owner Occupancy of Unit in Two-Family Dwelling Is Discriminatory Against Renters and Unenforceable

The New Jersey Appellate Division has affirmed the decision of the trial court (trial court) that the borough of Point Pleasant's (borough) prohibition against renting one unit of a two-family dwelling as a condition of a variance permitting the construction of a two-family dwelling in a zone permitting single-family residences was arbitrary, capricious, unreasonable and contrary to state public policy.[1]

In 1993, the plaintiff and her husband (collectively, the Tirpaks) purchased an existing two-family residence located in a zone designated for single-family use. The Tirpaks applied to the borough zoning board (zoning board) for a variance to permit the demolition of the existing two-family residence and construction of a new two-family residence in its place. The zoning board approved the variance but required the Tirpaks to file a deed restriction limiting the use of one unit as an owner-occupied residence. The Tirpaks filed the deed restriction and abided by its terms for more than 20 years. Following the death of her husband, the plaintiff sought to sell the property. She appealed to the zoning board for relief from the deed restriction in an attempt to remove the restriction as an impediment to sale. The zoning board denied the relief, finding that the deed restriction was a reasonable restraint on the use of the property, in part because the restriction brought the residence into greater conformity with the single-family zone.[2] The plaintiff brought a court action for relief from the deed restriction.

The trial court found that prohibiting the rental of both units was an improper exercise of the zoning powers of a municipality. The deed restriction was not reasonably calculated to achieve a legitimate objective of the zoning ordinance; whether the two units were occupied by only co-owners, only tenants, or one owner and one tenant, the property would be used by two families regardless.[3] Further, the court found that the differentiation between renters and owners was discriminatory against people based upon their economic status and contrary to state public policy.[4] Finally, the court rejected the borough's claim that the plaintiff's challenge was untimely. It noted that courts are permitted, if not required, to enlarge the time a suit can be brought where there are constitutional or public policy issues present.[5] Consequently, the trial court determined that the deed restriction was invalid and unenforceable.

The Appellate Division affirmed the trial court's decision, finding that the trial court "correctly enforced the fundamental, if not immutable, principle that 'zoning enabling acts authorize local regulation of 'land use' and not regulation of the 'identity of status' of owners or persons who occupy the land."[6] The Appellate Division also noted that even if the borough's contention that property owners who live on the premises are more likely than absentee owners to ensure that their tenants will obey noise, parking and other local ordinances was true, the deed restriction was an attempt to improperly delegate to a private landlord a portion of the municipality's police powers and its exclusive responsibility to enforce local laws. The court noted that had the borough desired to preserve the single-family character of the zone, it never should have approved the variance for the two-family dwelling.[7] Finally, the court endorsed the trial court's election to adjudicate the merits of the case under the "interests of justice" exception to the time bar,[8] given the "important public values" involving "a perpetual restriction on the identity of the premises' occupants."[9]

These cases have been approved for publication and may be relied on as precedent in other cases.[10] The Appellate Division's ruling demonstrates that the court will not permit a municipality to overstep its zoning powers and regulate the identity of occupants under the guise of regulating land use, a proclivity of government that rulings such as this one helps contain.

Should you have any questions concerning this decision or land use issues in general, please feel free to contact any of the attorneys on the sidebar.

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[1] *Tirpak v. Borough of Point Pleasant Beach Bd. of Adjustment*, No. A-5088-17T1, 2019 WL 507717, at *1 (N.J. Super. Ct. App. Div. Feb. 11, 2019). *Tirpak v. Borough of Point Pleasant Beach Bd. of Adjustment*, No. L-002918-17, 2018 WL 7271295, at *1 (N.J. Super. Ct. Law Div. May 3, 2018), *aff'd*, No. A-5088-17T1, 2019 WL 507717 (N.J. Super. Ct. App. Div. Feb. 11, 2019).

[2] *Id*.

[3] "Whether both units in the d??uplex are occupied by tenants, or by co-owners, or by one owner and one tenant, the result is the same: this is a?? two-family use of the property." *Id*. at *4.

[4] *Id*. at *5.

[5] *Id*.

[6] *Tirpak*, 2019 WL 507717, at *1 (citing Edward H. Ziegler, Jr.,*Rathkopf's The Law of Zoning and Planning*, § 81.7 (4th ed. 2005)).

[7] *Id*. at *2.

[8] The relevant time bar exception is set forth in in Rule 4:69-6(c).

[9] *Id*. at *3.

[10] Although the cases have been approved for publication as of the date hereof, they have not yet been assigned a citation in the New Jersey reports.

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