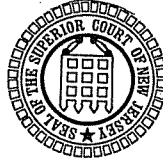


SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
CHRISTINE FARRINGTON
JUDGE



Hudson County Administration Building
595 Newark Avenue
Jersey City, New Jersey 07306
(201) 795-6489

December 22, 2011

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Re: The Galaxy Towers Condominium Assoc v. Township of North
Bergen, et al.
Docket No. HUD-L-4017-11

Dear Counsel:

The Galaxy Towers Galaxy Condominium Galaxy, Inc. opposed development of a 59 unit apartment building in North Bergen, on an undersized parcel, which backs into the Palisades and in close

proximity to a 36" natural gas pipeline for variances and preliminary and final site plan approval. This application seeks summary judgment on Counts 1 ("A Risk Assessment Analysis Should Be Prepared Which Identifies the Major Risks and a Mitigation Plan to Address Same"), 12 (Failure to Offer Vacant Property for Sale to Adjacent Properties to Avoid Undersized Lot Variance") and 20 ("Decision to Approve the Application was Arbitrary, Capricious and Unreasonable") of its complaint in lieu of prerogative writ. The Township of North Bergen cross-moves for an Order granting it summary judgment on the same three counts. The motion is partially granted in favor of Plaintiff on Counts 1 and 20, the Court finding the Planning Board's action to be arbitrary and unreasonable. The motion is granted in favor of the Defendant on Count 12. The reasons follow.

Galaxy brought a complaint in lieu of prerogative writ asking the Court to find that the Board's action in granting the variances was arbitrary, capricious and unreasonable. The main concerns of the Galaxy revolve around the safety issues of construction in close proximity to a 36" natural gas pipeline in proximity with an unstable and previously disturbed slope of the

Palisades.

These facts relative to this application are undisputed. Appleview LLC is the owner of 2.305 acres of designated Block 316, Lots 1, 2, 3, and 5.02 on the tax assessment maps of the Township of North Bergen in the P-2 Edgecliff Zoning District. Appleview also sought a reverse subdivision with regard to the individual lots. The Edgecliff Zone permits multi-family residential on minimum 5 acres lots.

The Williams Gas Pipeline-Transco operates a high-pressure 36 inch gas main which runs diagonally across Appleview's property at a height of approximately 90 feet and then parallel to Appleview's property, on the property of the Township's municipal utilities authority which shares a common boundry. There is alleged to be an access easement in favor of Transco on the Appleview property, although during the hearing Transco could not find the written easement.

Appleview submitted an application to the North Bergen Planning Board seeking preliminary and final site plan approval with variances to build a 59 unit multi-family building. The Board held ten hearing dates commencing June 24, 2010 and

concluding March 30, 2011. Appleview's property is bounded by the Galaxy Towers in Guttenberg to the south, the North Bergen Municipal Utility Authority's Woodcliff Sewage Treatment Plant (hereinafter "NBMUA") to the north, the Palisades to the west and River Road and the Hudson River to the east.

During the course of the ten months that the Board conducted hearings on the application, no one testified on behalf of Williams Gas Pipeline-Transco, nor did the Board produce any expert testimony regarding safety concerns raised by the Galaxy, relative to the risk of damage to the pipeline due to excavations of rock and soil from the Palisades during construction of the 59 unit building.

The applicant produced as witnesses Jose Caraballo, architect; Calisto Bertin, civil engineer, who also testified as traffic engineer; Lisa Mahle-Greco, geotechnical engineer, Johnson Soils; Bahman Isadmehr, Traffic and civil engineer; Roger NeNiscia, planning consultant.

Galaxy called Robert Cuniff, geologist; Richard Kuprewicz, gas pipeline expert; Richard Miller, Vice President of Galaxy; Peter Steck, planner.

No one from Transco testified.

The testimony on behalf of the Applevew, relevant to the issues raised in the Complaint, through direct and cross examination essentially was the following:

The project originally was configured as 60 units, 48 two bedrooms and 12 one bedroom steel and concrete building. It has 118 parking spaces, consisting of ground and garage parking and 5 handicapped spaces. The plan was amended to 59 units with 116 parking spaces.

The building exceeds the 25% lot coverage permitted.

The building's maximum height is 58 feet using the elevation from the center of River Road as required by the ordinance.

The parcel is 2.31 acres in area, comprised of four tax lots. Block 316, Lots 1, 2, 3, and 5.02.

The property is bounded on the north by the municipal sewerage treatment plant, on the east by River Road, on the south by the Galaxy, and to the south west Ferry Road, and due west the Palisades and apartment buildings. The southerly property line is also the municipal boundary between North Bergen and Guttenberg.

Although the property is regarded as vacant, there are some abandon tennis and basketball courts located thereon.

The ordinance for the P-2 zone, in which the property is located, requires a minimum lot size of 5 acres and maximum lot coverage of twenty-five percent. The project proposes lot coverage of 31.6 percent.

Impervious coverage permitted in P-2 is 65 percent and the applicant proposes 42.7 percent.

The building as proposed is 15 feet from the curb line, but not 15 feet from the property line. The ordinance requires a 15 feet setback for a paved sidewalk.

The applicant proposes a slope disturbance of an area 5,629 square feet which had been previously disturbed and graded.

Transco is to receive a license or an easement, (the issue was unresolved at time of hearing) for 20 feet along the northerly side of the property for access through Appleview's property for maintenance of the pipeline. The distance between the northerly side of the proposed building and the southerly limit of the proposed access ranges from zero to four feet. The easement or license will not be exclusive to Transco. The draft

of the easement did not contain any of the safeguards outlined in the Board engineer's review letter of October 18, 2010.

The experts for the applicant did not know the weight that a gas transmission pipeline can withstand.

Applevew's engineer, Bertin, testified that he calculated the distance from the back of the building to the cliff at 120 feet. There was disagreement between Applevew and Galaxy on the definition of cliff and from where the setback should be measured.

Within the 20 foot access license/easement to Transco, there will be excavation for drainage pipes, which in turn will be 18 feet from the existing gas line. The trench will be wider than the actual pipe, reducing the distance to the pipe during excavation to approximately 15 feet.

The front of the proposed building will be constructed on piles. The rear of the building will rest on rock. No blasting will take place to remove any excess rock. Approximately 1000 square feet of material, rock and soil, will be removed from the Palisades. The excavation of rock will come within 20 feet of the Transco pipeline.

Applevew's planner testified that the proposed development of the site eliminates the negative elements which exist (vacant, unkempt and disused property) while providing open area at the rear of the building which provides a permanent buffer for the cliff and provide a "visual resource." The proposed building is beneficial because there is a need for one and two bedroom housing units. The site will be an aesthetic improvement. The topographic conditions on the property are "extreme". The reduction in height and enlargement of the coverage is a benefit.

A N.J.S.A. 40:55D-70(c)(1) bulk variance is justified by the topographical conditions on the property. A (c)(2) variance under the same section, can be granted "without even considering the (c)(1) if the Board finds that the application or granting of the variances result in planning benefits, and those benefits outweigh any substantial detriments."

The maximum density in the P-2 zone is 75 units per acre and Applevew proposes what amounts to 26 units per acre on the 2.3 acre site.

There is no available land surrounding the site that could be added to the site to make it more conforming.

The testimony on behalf of the Galaxy, relevant to the issues raised in the Complaint, through direct and cross examination essentially was the following:

Appleview failed to offer its property for sale to Galaxy, which would have purchased it for fair market value.

There were alternatives for permitted uses which could have been conforming.

An apartment building with fewer units could have been more conforming.

Public safety and health is an important objective when a board is looking at plans to determine whether to grant variances.

There is a smell that comes from the adjoining sewerage treatment plant which is not conducive to residential use.

The board can require that the applicant demonstrate there are no environmental impacts.

The intent of the Township is to assure that the Palisades is adequately protected and not visually impaired.

Cliff is defined as everything from the edge of the precipice down through and including the talus slope of eroding

material that is generally less steep than the steeper part. It includes cliff, free face and talus slope.

Cliff face should be anything that is greater than 30 percent grade and should be considered cliff face regardless of the material that is made out of or that underlies it.

Forty percent (approximately) of the site in terms of horizontal area, acreage, is greater than a 30 percent slope.

There is a 50.7 percent grade for the slope just a few feet off the northern property. The southern edge of the property is steeper at 61.5 percent grade. Thirty-percent slope is ascertainable only by using the flat portion of the property almost out to River Road using an average grade.

To comply with the rear yard setback, the building would have to be 40 feet closer to River Road.

As the building is proposed, there is a negative rear yard setback.

At the closest point, the proposed building is 10 feet from the side yard boundary.

The landslide susceptibility map for Hudson County New Jersey shows this particular site as having a land slide class A-

4, which is fairly high, mostly because there's a slope that they classify as being 30 to 40 degrees on the site.

There are two types of soil relative to the pipeline route, each of which transmits energy at different rate. Vibration will impact different parts of the pipeline at different rates.

Construction details should include minimization of vibration, vibration monitoring with seismic receptor.

Gas mains and gas transmission lines have different properties. The Transco pipe appears to be a gas transmission pipe, but Transco is needed to characterize the pipe.

A rupture of a transmission gas pipeline is a microsecond fracture which can cause it to "zip and fracture like glass".

Pipeline explosions are large impact events. First responders cannot get close enough to rescue.

Pipeline operators have an important role in construction because ruptures can be caused by incidents other than direct impact such as landslides.

Developers need to ascertain the exact location of the pipeline and the depth of the pipeline at various locations. Those items can only be ascertained with the operator, Transco.

A risk assessment analysis is needed and Transco is the entity which should provide it.

Transco indicated it would prefer a 50 foot easement during a telephone conference with Galaxy's attorney.

Transco cannot locate the easement documents for the property.

Maximum allowable operating pressure MAOP permitted in a pipeline of this type and size is usually 1400 pounds per square inch. It appears this pipeline has a maximum MAOP of 350. The low number needs to be explained by Transco. It may indicate corrosion. It may indicate that the pipeline is "grandfathered" with an MAOP determination. It may mean that Transco, or its predecessors in title have lost the paperwork detailing how the MAOP was arrived at. The answer should be addressed by Transco.

Transco has not affirmatively stated that they have found no anomalies in the pipeline which lead Galaxy's expert to opine that there were anomalies, which perhaps Transco did not regard as significant.

The Planning Board refused to require Transco to be a joint applicant.

The Planning Board refused to subpoena Transco to answer the questions regarding safety of the construction over Appleview's objection.

Pipeline and Hazardous Material Safety Administration is the federal agency, under the Department of Transportation, which sets minimum requirements for interstate pipelines and certain other pipelines.

The Planning Board also refused to call Brian Coy of Pipeline and Hazardous Material Safety Administration to respond to safety questions raised by the objector's pipeline expert.

There was an incident on April 20, 2007 involving digging with a backhoe on the Appleview property. Members of the public called and were informed One Call System had not been contacted.

Galaxy's planner indicated the lot size was 3.4 acres where 5 were required. The proposed building had a foot print of 25 percent larger than should be permissible, comprising an area of about 6,629 square feet over what is permitted. The P-2 zone requested a 15 foot set back from the right of way of the property line. The pipeline constitutes an additional use on the property.

The rear yard set back is measured from where the slope starts at 30 percent. The back 72 feet of the proposed building violates the rear yard setback, comprising about 17,544 square feet of the building.

Site plan approval should address 1) two principal uses on the property, 2) pipeline safety, 3) inadequate stacking area for cars.

There is a need in New Jersey for low and moderate housing which was not addressed in Appleview's case, and no representation has been made that the proposed housing meets that criteria.

Many of the items characterized as benefits of the project are things required by the Township's code, i.e., elevator, handicapped parking, storm water retention, adequate parking. The zone is specific to the Palisades so hardship related to the Palisades topography is not "unusual". The benefit in terms of visual effect of having the building height 20 feet as opposed to the maximum is minimal - a matter of one or two degrees to a person viewing the Palisades from the water or from the top of the Palisades. Things that might constitute benefits would be

1) increasing the side yards which would serve the purpose of preserving the Palisades and the views thereof together with providing additional buffer between the building and the pipeline.

Public safety and environmental concerns can be taken into account in assessing the site plan. The site plan and variances proposed by the applicant are substantially detrimental to the zoning ordinance.

A list of the exhibits the parties agree were marked for identification is attached. (Exhibit A)

None of the letters from Transco, or its attorney were marked as exhibits. The Township admits as much but states, "With respect to the Transco letter and the various engineering reports of Derek McGrath, Township Engineer, please be advised that these letters were submitted to the Board, copied to the applicant and Mr. Lamb and discussed during the course of the hearings. It is the Planning Board's position that these documents are part of the record below irrespective of whether same was marked as a specific exhibit." Galaxy states, "I can confirm (Mark) Stevens' letter was not marked for identification at any hearing although

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it was discussed. In fact, when the letter was mentioned at the Planning Board I entered a strenuous objection that even the Board attorney noted was more forceful than a typical objection.

The basis for that objection, which I made at the March 30, 2011 hearing, was that the Board should not be considering letters from Transco or its attorneys unless the Association was provided with the opportunity to cross-examine a person with knowledge of the facts contained in the letter. The Board did not rule on my objection, but also did not mark the document as an exhibit or otherwise indicate how and to what extent the document would be considered. The issue was ignored. Indeed, the only reason that this letter was even mentioned was because I had renewed my prior request that the Board issue a subpoena to Transco right before the summations were to start to try one last time to obtain the appearance of someone knowledgeable. It appeared that the Board's response was that the subpoena was not necessary in light of the new "letter from Transco's attorney". Now reliance is sought by the Board and Developer (Appleview) on that third party document... We have the same position about Rick (Derek) McGrath's March 29, 2011 letter, which discusses details about the

inadmissible letter of Transco's attorney, not only for reasons already set forth herein, but also because Mr. McGrath was not in attendance at that March 30, 2011 meeting and therefore was unavailable for explanation to the Board or questioning by interested parties."

The Court, during oral argument on this motion, inquired of Applevew's attorney why the applicant did not bring forth a representative from Transco to put the safety issues to rest. The answer the Court received was not satisfactory.

The Court is aware from a submission of Applevew in support of this motion, of a letter from Transco dated March 13, 2007 to the North Bergen Building Department.

In that letter, Williams-Transco stated its objection to an earlier and larger proposed project as follows:

Williams-Transco operates a high pressure gas main (36") which runs through a portion of and then parallel to the subject property. It is the intention of this letter to highlight the many difficulties that will be encountered during the construction of this project, if it were approved, as it relates to the safety of the pipeline. More importantly, this proposed project will effectively pin the pipeline between the existing sewage treatment plant and a 9 story building, severely restricting access.

Areas of concern:

- Potential for Blasting into the Cliffside: With such close proximity to the pipeline (10FT-20FT) blasting may not even be an option considering the resultant stresses imposed upon the pipeline.
- Excavation operations: Prior to pouring a concrete foundation the contractor will need to dig parallel to the pipeline in excess of 400 FT. This type of operation has the potential to weaken lateral stability along the pipeline. With a loss of lateral stability, the pipeline could very well shift under its own weight resulting in high stress areas.
- Heavy construction vehicles operating on the pipeline: A typical construction vehicle will have a GVW of 70,000 -80,000 lbs. Under such loads, with a typical earth cover of 3FT, we require contractors to either construct crossing bridges in order to eliminate the resultant stresses due to vehicle crossings or mandate the use of smaller/lighter vehicles. In any case, as an operator we need to ensure the structural integrity of the pipeline during all aspects of this project.
- Severely limiting access to the pipeline: If this 9 story building were to be approved/constructed, the wide open access to which we presently enjoy would be cut down to a 10FT-30 FT skinny corridor (emphasis added). Considering, in the unlikely event, that a gas line rupture were to occur response time to gain access and repair will be increased significantly due to the obvious space limitations.

With that said, Williams Gas Pipeline firmly believes that this project will serve neither us, as a company, nor the residents of North Bergen if it were to come to fruition."

In the present application, the Board engineer and representative of Transco engaged in discussions and correspondence which in turn resulted in changes to the

applicant's plan and building method. Those changes included an elimination of the need for blasting on the site. The easement access remains at 20 feet however. Ultimately, Transco sent a letter dated November 10, 2010 to Applevew's engineer which states, "We have reviewed your revised drawings for project X276A, received with your letter dated October 8, 2010. We have no objection to your proposal as detailed in drawings C2.2, C2.3, C4.1 and C4.2. Please note that full acceptance of your plans are subject to receiving the "maintenance and access" agreements shown on your drawings. Without these agreements for access your project would impede our ability to safety (sic) work on the pipeline." (emphasis provided)

The Galaxy produced an expert concerning gas pipeline safety, Richard Kuprewicz of Accufacts, Inc. Kuprewicz testified that it was imperative for the Board to require a gas pipeline risk assessment analysis prior to approving the application, regarding the issues and concerns relative to construction within 15 feet of the pipeline.

Count 1 ("A Risk Assessment Analysis Should Be Prepared Which Identifies the Major Risks and a Mitigation Plan to Address

Same")

"A local zoning determination will be set aside only when it is arbitrary, capricious or unreasonable. Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agency involved." Kramer v. Seagirt 45 N.J. 268 (App. Div. 1965) at 296-297, cited in Medici v. BPR Co., 107 N.J. 109 (1987) at 15.

The Court cannot find, in light of the uncontroverted testimony of the Galaxy's gas pipeline expert, the failure of the Board to mark as exhibits various correspondence upon which they purported to basis their decision, the lack of opportunity of the Galaxy and other objectors to question the writers of the correspondence on the statements and conclusions based therein, including various correspondences between the Board engineer, Transco and the Appleview's engineer, that the decision of the Board was not arbitrary, unreasonable and capricious. The findings and conclusions in the Resolution approving the application have no basis in the record presented to the Court for review. The record is meager in terms of evidence which

could be construed to refute the testimony of the Galaxy's expert. The contradictory evidence is in large part elicited from persons admittedly unqualified to testify as experts on the issue of the gas pipeline safety, or is excludable as hearsay. These issues are compounded by the failure of the Board to require the in person testimony of persons offering opinions, unsworn and in letter form, who therefore were not available for questioning or cross examination. These letters include but are not limited to those of the Board Engineer, and others on his behalf to the Board. The letters of the Board engineer indicate his opinions regarding proposed safeguards and agreements outlined therein, but he did not testify, and was not available for cross examination. He was additionally unavailable for the last several meetings of the Board, for personal reasons. Further, the Board engineer is a civil engineer, as was the engineer for Appleview, and neither was qualified to testify regarding gas pipeline safety. Mr. Bertin, Appleview's engineer, who did testify and admit he was not qualified to as to gas pipeline, writes in a June 10, 2010 letter that the applicant has been "interfacing" with Transco and will comply with the recommendations of the

Board engineer. However, there is no evidence before the Court that the engineer's recommendations were or are incorporated into the license/easement agreement between Applevew and Transco. The Galaxy in its reply brief states that the Board continued to have its "head in the sand" on the construction and pipeline issues. The Court finds there was apparent complicity between the Board and the Applevew to the effect that neither would produce nor require the production of a representative from Transco to testify regarding the risks associated with the construction and the safety measures to insure the integrity of the pipeline. There are literally pages of transcript regarding the definition of the word "cliff" in the record below, but not one of qualified testimony on the subject of the gas pipeline on behalf of either the Board or the applicant. The Court finds the Board and Applevew, despite the urging of the Galaxy, repeatedly ignored the Galaxy's requests to have an expert on gas line safety from Transco or elsewhere appear and testify in support of the representations being made to the Board that construction of the project was safe. The Court finds that ex parte discussions with Transco are insufficient for the Board to fulfill its

statutory obligations to ensure that the development is safe for the public and there is no detriment, or that the detriment is outweighed by the benefits. The Court finds there is insufficient basis in the record to support the grant of the variance.

The Court is not finding that the failure of the Board to obtain the risk analysis suggested by the Galaxy's expert is a basis for finding the Board's determination arbitrary, capricious and unreasonable. The Court is finding there is no basis in the voluminous record of this application to find that the benefits of the development outweigh the detriments and the purposes of the municipal land use law are advanced and the safety issues addressed with regard to the gas pipeline issue where the only competent expert testimony on which the Board could base its decision is the testimony of the Galaxy's expert who testified that a risk analysis was required to determine that issue and whether in the face of admitted slope instability, construction could proceed in a manner which would not adversely impact the pipeline and whether the citizens in the vicinity surrounding the proposed development could be safeguarded.

Count 12 (Failure to Offer Vacant Property for Sale to Adjacent Properties to Avoid Undersized Lot Variance") The Galaxy argues that the applicant failed to prove it was entitled to a hardship or other variance for an undersized lot. The Galaxy correctly states that in N.J.S.A.40:55D-70(c), the New Jersey legislature authorized two separate types of bulk variances: (c)(1) or Hardship variances, and (c)(2) known as flexible variances. Hardship variances pertain solely to the physical condition of the property. It applies in cases where the owner asserts that no effective use of the property can be had if the variance is denied. Hardship variances for isolated undersized lots have particular rules and procedures which have been developed in the case law. Jock v. Zoning Board of Adjustment, 184 N.J. 562 (2005). Underlying the statute, the case law finds that what is essential is proof that the need for the variance is occasioned by the unique condition of the property that constitutes the basis for the claim of hardship. Lang v. Bd. of Adj., 160 N.J. 41 (1999). In Jock, supra, the Supreme Court quoting Commons v. Westwood, 81 N.J. 605 (1980), stated:

Related to a determination of undue hardship are the efforts which the property owner has made to bring the property into compliance with the ordinances specifications. Attempts to acquire additional land would be significant if it is feasible to purchase property from adjoining property owners. Endeavors to sell the property to the adjoining landowners, negotiations between and among the parties, and the reasonableness of the prices demanded and offered are also relevant considerations."

Applevue presented testimony at the hearing that there was no adjacent land to purchase to minimize the variance it sought for reduced lot size. The Galaxy presented testimony that although it did not have property to sell, that no inquiry was made by Applevue with regard to purchasing land from Galaxy. No proof was offered that Applevue contacted the NBMUA with regard to an attempt to purchase a portion of their land.

No proof was offered by Applevue at the hearing regarding any offer to sell its land, or part thereof to adjacent landowners. The president of the Galaxy testified that The Galaxy would be interested in purchasing Applevue's land at fair market value. Plaintiff forwarded a letter to the applicant in

September 2009 offering to purchase its property for \$1,534,000, or \$26,000 per unit without improvements, stating the offer represented fair market value. Counsel for the Galaxy represented that the Galaxy remains interested in Applevew's property.

The Court is not in a position to determine whether the Galaxy's offer to buy the property is a reasonable or market value offer. No testimony was presented by any real estate expert as to the value of the property, improved, unimproved, with variance and site plan approvals and without. Applevew presented testimony that it was unable to purchase adjoining property. The Courts have found that the willingness of an adjoining property owner to purchase is not necessarily controlling; the imposing of a condition is committed to the discretion of the zoning board. The Court finds that an offer to purchase or failure to purchase additional property is not a de facto defeat the variance but is only a factor to be considered by the Board. The Court finds that under the facts particular to this piece of the Board's decision in granting the variance was not unreasonable, arbitrary or capricious with regard to Applevew's failure to offer the property for sale to the Galaxy.

Count 20 ("Decision to Approve the Application was Arbitrary, Capricious and Unreasonable")

The Galaxy argues that the Board failed to find that the benefits of deviation from the ordinance and Master Plan outweighed the detriments and in fact that Applevue failed to meet its burden in this regard pursuant to the requirements of (c)(2). In Kaufmann 110 N.J. at 561 the Court stated: "No (c)(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must aptly benefit the community in that it represents a better zoning alternative for the property. The focus of a (c)(2) case will be.. on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community." It is undisputed that Applevue's development violates the rear yard setback. The zoning ordinance is the best indication of what the Township believed to be in its interests. The zone for this property states: "10. Purpose: To allow maximum potential development against the Palisades while preserving the view of and from the cliff from within as well as outside the waterfront area through height and lot coverage restrictions; to allow

flexibility in site design by acknowledging the topographical limitations inherent in potential sites.

Principal Permitted Uses: Residential (multifamily) office buildings, research laboratories, public parks and playgrounds. These uses are conditional."

The area and yard requirements are attached to the ordinance, including 5 acres minimum for residential use and 75 feet height restriction. In that the zoning permits "maximum" potential development, the Court finds that the Board could find that the interests of the community are advanced when permitting the development on an undersized lot. The Court finds, however, because of the lack of evidence in the record regarding the detriments, or lack thereof vis a vis the natural gas pipeline the Board had insufficient evidence to support a finding that the development's benefits outweigh the detriments. The Board was premature in voting on the variances and final site plan without the opportunity to review the easement/license and agreements between Applevew and Transco during and following construction. The Board has in essence given the developer carte blanche in determining the safety measures to be in place and adhered to

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during constructions. The Board has delegated the safety issue which is the Board's responsibility pursuant to New Jersey's Municipal Land Use Law to the developer whose interests include cost effectiveness and expedited construction, which interests may conflict with the Board's mandate to consider safety both during and after construction with regard to access and maintenance of the pipeline. This is arbitrary, capricious and unreasonable. This approach leaves the building inspector and Township engineer with no guidance or baseline. Letters from third parties, pamphlets and other generic instructions from Transco are not sufficient to address the safety issues. Without direct testimony from qualified Transco personnel, the Court is unable to find that the safety considerations required by the municipal land use law has been met. The matter is remanded to the Planning Board for findings on these issues. The Court retains jurisdiction.

Very truly yours,


Christine Farrington

FILED

DEC 22 2011

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CHRISTINE FARRINGTON, J.S.C.

Attorneys for Plaintiff, The Galaxy Towers Condominium Association, Inc.

THE GALAXY TOWERS CONDOMINIUM
ASSOCIATION, INC.,

Plaintiff,

-vs-

TOWNSHIP OF NORTH BERGEN PLANNING
BOARD; APPLEVIEW, LLC; JOHN DOES
1 - 5; and XYZ CORPORATIONS and/or
LIMITED LIABILITY COMPANIES A - E,

Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
HUDSON COUNTY

DOCKET NO. HUD-L-4017-11

Civil Action

ORDER

THIS MATTER having been opened to the Court by Beattie Padovano (Ira E. Weiner, Esq. appearing), attorneys for Plaintiff, The Galaxy Towers Condominium Association, Inc., and on notice to Gittleman, Muhlstock & Chewcaskie, LLP (Steven Muhlstock, Esq., appearing), attorneys for Defendant Township of North Bergen Planning Board, and Alampi & DeMarrais, LLC (Carmine Alampi, Esq. appearing) for an Order granting summary judgment in favor of the Plaintiff, the Court having reviewed the papers filed by counsel and having hearing oral argument thereon and for good cause shown;

IT IS on this 22 day of December 2011;

ORDERED that summary judgment pursuant to R. 4:46-2 is entered in favor of Plaintiff,

The Galaxy Towers Condominium Association, Inc. on Count 1, ~~X~~ and Count 20 of the Complaint; and

ORDERED that summary judgment pursuant to R. 4:46-2 is entered in favor of Defendant Township of North Bergen Planning Board, Appleview, LLC on Count 12 of the Complaint, and

IT IS FURTHER ORDERED that the Resolution of the Township of North Bergen Planning Board dated June 9, 2011 that approved the application of Appview, LLC be and is hereby void and of no force and effect; and

IT IS FURTHER ORDERED that a copy of this Order be served upon all counsel of record within 7 days of the date of receipt of a conformed copy of this Order.

Christine Farrington
HON. CHRISTINE FARRINGTON, J.S.C.

Opposed

Unopposed

* For reasons set forth in the letter opinion which is sent to counsel simultaneously with this Order.