LAUREL BUILDERS,
Petitioner,

v.
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

Decided January 6, 1981

Initial Decision

SYNOPSIS

The parties in this action brought cross motions for summary decision to determine whether or not petitioner is entitled to a sewer extension ban exemption, pursuant to N.J.A.C. 7:9-13.6(a)1. The petitioner contended that it had made substantial expenditures in good faith reliance upon a permit or approval, thereby qualifying for an exemption and that the State should be estopped from denying an exemption by reason of certain alleged dilatory conduct by the Division of Water Resources.

The administrative law judge found that the petitioner had purchased 11 acres of land for development and an additional two acres of land needed for drainage at a price of $25,000. The petitioner proceeded to expend $4,671.50 (all but $31.50 was spent for legal, engineering and filing fees) to obtain final approval for the development. On June 2, 1980, a year after receiving such approval, the petitioner applied for a sewer extension permit which it had known it would need since the inception of the project to provide adequate drainage of the property.

On August 5, 1980, the Department of Environmental Protection issued a formal sewer extension ban covering the sewer plant that would service petitioner’s development. On August 18, 1980, the petitioner’s application was reviewed and denied solely on the basis of the sewer extension ban.

The administrative law judge rejected the petitioner’s contention that the $25,000 paid for the drainage land plus the legal and engineering fees needed for approval constituted the substantial expenditures required by the regulation to qualify for a sewer extension ban exemption. The judge determined that the specific language of the regulation prohibits engineering, architectural and legal fees from being considered in determining whether substantial expenditures have been made. The judge also rejected the petitioner’s contentior
that the $25,000 paid for the drainage land should be considered comparable to the installation of drainage pipe.

In addition, the judge determined that even if these expenditures had met the other requirements of the regulation, the expenditures were not made in good faith reliance upon a permit or approval since it is well settled that such expenditures must follow a permit and not be in anticipation of it.

As to the petitioner’s argument that the State should be estopped from denying an exemption because of its alleged dilatory action, the judge found that any expenditures made by the petitioner were not made in reliance upon any extended failure by the Division of Water Resources to follow its own regulations or upon any Division advice that no sewer ban was in effect.

Accordingly, the administrative law judge concluded that the petitioner had not met the criteria for a sewer extension ban and that the Division was not estopped from denying the exemption.

Peter R. Richards, Esq. for Petitioner (Richards, Martinez & Mullaney, Attorneys)

Susan J. Vercheak, Deputy Attorney General, for Respondent (James R. Zazzali, Attorney General of New Jersey, Attorney)

SMITH, ALJ:

The parties have brought cross motions for summary decision to determine whether or not petitioner is entitled to a sewer extension ban exemption, pursuant to N.J.A.C. 7:9-13.6(a)1. The petitioner’s application for an exemption was denied by the respondent. Petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

N.J.A.C. 7:9-13.6 provides as follows:

(a) The Department shall consider exemptions to sewer extension bans in order to provide relief to persons that suffer certain types of substantial harm due to the imposition of the sewer extension bans, or when, in the opinion of the Department there is a compelling public need for a proposed facility. The burden of proof is upon the applicant. The Department shall presume that all applicants have knowledge of the ban after the effective date of the order, and the Department shall not grant an exemption to any party who subsequently proceeds with a proposed project and thereby increases or creates the hardship which is the basis for the requested exemption. An applicant for an exemption must submit a
plan for water conservation plumbing, and the implementa-
tion of such plan will be a condition of the exemption. An
applicant for an exemption must prove to the satisfaction of
the Department that it meets any of the criteria outlined
below:

1. If the municipality, prior to receipt of the order imposing
the ban, has issued a building permit, final subdivision
approval, or other type of approval, the construction cov-
ered by such permit or approval may be exempt. The
applicant must show that, in good faith reliance upon the
permit or approval, he or she has made substantial ex-
penditures for improvements to the property prior to the
issuance of the order. The payment of taxes, the purchase
price, expenditures for preparation of engineering and
architectural plans and for legal fees, and other costs not
expended for physical improvements to the land shall not
be considered in determining "substantial expenditures."

The petitioner contends, firstly, that it has made substantial ex-
penditures in good faith reliance upon a permit or approval, thereby
qualifying for an exemption. The second, alternative, contention is
that the State should be estopped from denying an exemption by
reason of certain allegedly dilatory conduct by the Division of Water
Resources. With regard to the first contention, the facts are stipu-
lated, for the purpose of this motion, to be as follows:

On March 14, 1977, Albert Procassini and George Zervos formed
Laurel Builders, a partnership, for the purpose of subdividing and
developing 11 acres in Bordentown Township for residential use. Mr.
Procassini and his wife owned the property since 1972. Their resi-
dence is located on the property. The partners intended to develop 22
one-half acre residential lots, one already occupied by the Procassinis
and another to be occupied by Mr. and Mrs. Zervos. The remaining
20 lots would be improved and sold.

The partners were aware, by virtue of experiences that need not be
detailed here, that the property suffered from a serious surface water
drainage problem. The only reasonable way they could anticipate
receiving local subdivision approval would be to drain the surface
water across Georgetown Road, which the property abutted. The
water would then traverse lots 2i and 2j of block 129, then owned by a
third party. The water would finally enter Laurel Run Stream. It was
clear to the partners, and a stipulated fact in this hearing, that no
other feasible plan existed. The partners were compelled to negotiate
the purchase of the aforementioned two lots across Georgetown
Road. The owner of those lots was, coincidentally, soliciting bids for
the purchase of the lots, and would not consider selling only an easement for drainage purposes. The partners purchased the lots for $25,000. The reasonableness of that price is not contested here.

The partners proceeded to apply for and obtain, on November 10, 1977, conditional approval for the subdivision, now called Yorktown Village, from the Burlington County planning board. On March 8, 1978, preliminary subdivision approval was granted by the Bordentown Township planning board. Both approvals required that the surface water drain across the two lots on the other side of Georgetown Road.

The partners proceeded to expend $4,671.50 (all but $31.50 was spent for legal, engineering and filing fees) to obtain final subdivision approvals. Those approvals were granted on June 21, 1979, by Bordentown Township and June 28, 1979, by Burlington County.

There is no clear explanation why a year expired before the petitioner applied for a sewer extension permit. Nevertheless, that application was made on June 2, 1980. On August 5, 1980, a formal sewer extension ban was issued to the Bordentown Township Municipal Utilities Authority for the Laurel Run plant, the plant that would service petitioner's development. On August 18, 1980, the petitioner's application was reviewed and denied on the sole basis of the extension ban entered 13 days earlier. The petitioner contends that the $25,000 purchase price of the two lots needed for drainage and the legal and engineering fees needed for approval constitute the substantial expenditures necessary to qualify for a sewer extension ban exemption. However, it seems clear that the specific language of the regulation prohibits engineering, architectural and legal fees from being considered in determining whether substantial expenditures have been made. Therefore, I will not count those expenses.

The same regulation also excludes "the purchase price . . . " However, the petitioner argues that the $25,000 purchase price was not the purchase price of the land to be developed. It was, instead, comparable to the installation of drainage pipe, since it served only a drainage purpose and was not an actual part of the development itself.

I CONCLUDE that the proffered distinction is a distinction without a difference. All portions of the real estate of a development serve some functional purpose, whether the portion is contiguous to a larger tract or separated from it by a road. A particular area of land may serve to support a home, or it may serve to support a roadway, or it may be set aside for recreational use, or even left in its natural state as part of a cluster zone requirement. It may also serve drainage purposes. Indeed, even the very lots on which the homes are built, the
roadway, and curbs serve drainage functions. The fact that the two lots were purchased solely to serve a drainage function does not separate the purchase price of those lots in any meaningful way from the purchase price of the main property.

Even if there were a difference between the purchase price of the two drainage lots and the purchase price of the property, that purchase price was expended prior to the receipt of any approval. This again is specifically violative of the regulation, which requires that the expenditures, in order to constitute a hardship, must be made in good faith reliance upon a permit or approval. It has been well settled that such expenditures must follow the permit or approval and not be in anticipation of it. *Lom-Ran v. Dept. of Environmental Protection*, 163 N.J. Super. 376 (App. Div. 1978); *In the Matter of Cape May Green, Inc.*, (N.J. Super. App. Div., June 28, 1978, A-4885-76) (unreported). This principle follows the general rule that the courts of this State have adopted in zoning cases, that such preliminary expenses are made at the risk of the developer. *Sautto v. Edenboro Apartments*, 69 N.J. Super. 420 (App. Div. 1961).

The petitioner urges that were he less conscientious and were he to have waited for an approval to be issued contingent upon the purchase of those lands, and he then went out and purchased those lands, he would have made the expenditures in reliance upon a municipal approval. He describes the application of the principle in *Lon-Ran* and *Sautto*, supra, as an unreasonable punishment for his conscientiousness in acquiring the lots he would obviously have had to acquire in order to obtain approval. This is not so. It is clear that the approvals, in any event, would not become effective until he purchased the lots in question. Even if the approvals were issued contingent upon that purchase, the approval would not be legally effective until the purchase was made and the contingency met. Therefore, the purchase would still not be made in good faith reliance upon an approval, but as part of the necessary expenditures to obtain the approval.

In summary, the expenses of the petitioner may not be considered and do not constitute substantial harm in the sense intended by the regulation.

The petitioner urges that the regulation, if interpreted to bar his application, is an invalid regulation as being arbitrary, capricious, and not reasonably related to the purpose of the enabling act. I disagree. It is axiomatic that "the safeguarding of the public health has long been considered an essential government function within the police power of the State." *State v. Owens Corning Fiberglass Corp.*
100 N.J. Super. 366, 381 (App. Div. 1968). Since a pollution control act has the clear purpose of protecting the public health and welfare, such an act is entitled to a liberal construction for the accomplishment of its obvious beneficial objective. Id., at 382. The regulation in question is clearly designed to protect the environment from pollution. The sewer ban was issued, pursuant to N.J.A.C. 7:9-13.5(a)2, because the Laurel Run treatment plant had exceeded its capacity for the nine months preceding issuance of the ban.

A regulation that recognizes and exempts hardship from the effect of a ban, but does not accept expenditures that the law recognizes to be made at the risk of the developer as constituting that hardship, seems to me to be reasonably related to the broad authority in the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. It is there stated that the pollution of the ground and surface waters of this State continues to endanger the public health and that it is the policy of this State to restore, enhance and maintain the chemical, physical and biological integrity of its waters to protect public health. N.J.S.A. 58:10A-2. The statute, by its own terms, must be construed liberally to accomplish those purposes. N.J.S.A. 58:10A-12. The Commissioner, in adopting the regulation in question, has struck a fine balance in favor of the environment and against developers, except where those developers have proceeded beyond the planning stage and have actually begun construction or expended substantial amounts of money directly related to construction in good faith reliance upon a permit already issued. This is a fair balance well within the power of the Director to strike.

The petitioner finally argues that the Division of Water Resources should be estopped from denying its application by reason of the Division’s allegedly dilatory conduct. The thrust of the argument is that the Division sat by and watched the petitioner expend substantial sums of money knowing that it would have to issue a sewer ban imminently and would probably stop the petitioner’s project from going forward. The petitioner changed its position in reliance upon the silence of the Division as well as upon certain specific advice it received from the Division. The change of position was the petitioner’s decision to apply for local approval, a decision that now requires it, if the exemption is not granted, to go back to the local planning boards and request extensions. Petitioner contends that it would not have applied if it knew that the ban was going to issue because it does not strategically desire to request extensions from the local boards, but would prefer to have to receive its approval from the local boards.
only once. The expenditure of monies is an additional change of position.

The facts, for the purpose of this motion, as alleged by the petitioner, are as follows.

On March 29, 1979, the Division’s revised regulations concerning sewer bans, N.J.A.C. 7:9-13.1 et seq., became effective. The new regulations established a comprehensive scheme for imposing sewer extension bans, providing that to control pollution from municipal treatment works, the Department “shall” act to prevent and abate pollution. N.J.A.C. 7:9-13.1c. To achieve that purpose, the Department “will” take two steps. N.J.A.C. 7:9-13.1f).

First, when the committed flow of a treatment plant reaches or exceeds 80 percent of its designed flow, the Department “shall” issue a warning notice to the sewerage authority or municipality. N.J.A.C. 7:9-13.1f(1). The warning notice “shall” require the sewer authority within 45 days of the notice to prepare and submit a program to prevent overload of the facilities pursuant to N.J.S.A. 58:10A-6(h)(3), or to submit a certification that it will not permit committed flow to exceed design flow. N.J.A.C. 7:9-13.4a. Upon receipt of a warning notice, the sewer authority or municipality “shall” give public notice “in a manner designed to inform local residents, developers, the local planning boards and other affected persons.” N.J.A.C. 7:9-13.4b. The public notice “shall” include certain information, including the committed and designed flow of the plant and “a statement that the treatment works is approaching design flow and that a sewer extension ban could be imposed when committed flow reaches 100 percent of design flow.” N.J.A.C. 7:9-13.4b1-4.

Second, when committed flow reaches 100 percent of design flow, the Department “will” cease issuing sewer extension approvals and order the sewer authority or municipality to cease sewer extension approvals. N.J.A.C. 7:9-13.1f2. To impose such a sewer extension ban, the Department must make certain findings of fact and issue an administrative order containing specific requirements, including a provision that public notice must be given to “residents of the affected area, landowners therein, and other persons or legal entities affected” at intervals of no more than six months. N.J.A.C. 7:9-13.5.

At the time the regulations were adopted, in March 1979, the Laurel Run plant had been running substantially over its design flow since December 1978. On April 25, 1979, (interestingly, a month in which the Laurel Run plant ran within its design flow capacity) an internal memorandum was generated in the Division which recommended that a ban be imposed.
In May, June, and July 1979, Laurel Run continued to operate over capacity, and DEP took no action. On August 6, 1979, DEP sent a letter to the Bordentown Township Administrator, noting that Laurel Run was over capacity, asking for information and clarification concerning the situation, and stating that, pending resolution of the problem, DEP would reject all proposed sewer extension projects. The letter did not contain formal references to the warning provisions and the sewer ban provisions. Bordentown Township treated the letter as an inquiry only, and gave no public notice of it.

For the next nine months, September 1979 through May 1980, Laurel Run continued to operate over capacity. DEP took no overt action.

Sometime between October and December 1979, a partner in Laurel Builders was advised personally by a DEP employee that no sewer ban was in effect. On June 2, 1980, Laurel Builders applied for a sewer extension permit. The petitioner was again advised by a DEP employee that no ban was in effect. In June and July 1980, Laurel Run continued to operate at or over capacity. DEP took no overt action. The sewer ban was issued on August 5, 1980.

The precise argument of the petitioner is that the period from March 29, 1979 (the effective date of the new regulations) to August 5, 1980 (the date of the sewer ban) constituted an extended failure by DEP to comply with its own regulations. That extended failure, ignoring its own requirements of public notice, coupled with two affirmative representations (in late fall or winter 1979 and on June 2, 1980) that no sewer ban was in existence, when by regulation it should have been, constituted a misrepresentation or a concealment of material facts, satisfying the first element of estoppel.

It is not necessary for me to decide whether that proposition is true. The change in position to the petitioner's detriment, another necessary element of estoppel, is described with particularity in the petitioner's brief. The first prong of the argument is simply the expenditure of the $4,671.50 for fees already referred to. Quoting from the brief, those expenses were made

... in reliance on the belief that no sewer ban was in effect and the property would be able to be developed. Most of the expenses were paid in connection with procuring final subdivision approval from Bordentown Township, which was received on June 21, 1979. Such final approvals are valid for two years, unless extensions (not more than three of one year each) are granted by the Planning Board. N.J.S.A. 40:55D-52. Had the partners known the truth about the Laurel Run plant, they would have postponed the expenditures until they knew they could obtain the
sewer approval within the statutory two-year period, thereby avoiding the substantial possibility which now exists that they will be compelled to go through the expensive local subdivision approval process a second time, and the certainty that they at least will be compelled to seek a time extension from the Planning Board, which the Board is not compelled to grant.

Petitioner contends that these expenditures, and change of position, are sufficient reliance to trigger the estoppel doctrine.

I FInd as a fact from the affidavits of the petitioners, as reinforced by the argument in petitioner’s brief, that the financial expenditures were made as follows:

A. $1,950 on March 20, 1978, paid to Thomas Norman, Esq., for legal services in connection with obtaining subdivision approvals from Bordentown Township.


C. $525 on March 24, 1979, paid to the Township of Bordentown as an application fee for final subdivision approval.

D. $610 on March 24, 1979, paid to the Township of Bordentown for technical review of final plans for Yorktown Village.

E. $355 on August 3, 1979, paid to Thomas Norman, Esq., for legal services in connection with obtaining subdivision approvals from the Township of Bordentown.

F. $31.50 on August 10, 1979, paid to Delaware Valley Spray Service, for weed removal at the Yorktown Village site.


It can be seen from expenditures A through D that of the total of $4,671.50 expended by petitioner for fees, $3,785 were expended prior to the effective date of the regulations, i.e., March 29, 1979. Certainly, those expenses could not have been made in reliance upon any extended failure to follow regulations not yet in effect. Furthermore, expenditure E of $355, although made on August 3, 1979, was made for legal services in connection with obtaining subdivision approvals from the Township of Bordentown. Final subdivision approval was granted on June 21, 1979. Therefore, that $355 was incurred prior to June 21, 1979. I FInd as fact that the expenditures were not made in reliance upon any extended failure by the Division to follow its own regulations or upon the oral advice by a Division employee that no sewer ban was in effect, said advice given in autumn 1979 and June 1980.
I FIND from expenditure C that the application for final subdivision approval was filed on March 24, 1979. The decision to file that application was obviously made sometime prior to that date. This is consistent with the date of the issuance of the final approval, June 21, 1979. Therefore, I FIND as fact that the decision by the petitioner to apply for final subdivision approval was made prior to the effective date of the regulations, March 29, 1979. There was no reliance in that decision upon any extended failure of the Division to follow its own regulations or upon the oral advice in the autumn of 1979 and June 1980 that no sewer ban was in effect.

Because of these findings, I CONCLUDE that as a matter of fact no change of position to the petitioner's detriment occurred in reliance upon any act of the Division of Water Resources. Therefore, it is not necessary to analyze the other elements of estoppel or to engage in lengthy legal citation.

In summary, I CONCLUDE that the petitioner has not met the criteria for a sewer ban extension exemption, that the criteria are lawful, and that the Division is not estopped from denying that exemption to the petitioner. The Division's denial of petitioner's application for a sewer extension ban exemption is affirmed.

Adopted by Silence Pursuant to N.J.S.A. 52:14B-10(c)
by the Department of Environmental Protection.