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Land Owner's Rights When Building Permits Are Issued in Error

... Continued from Our February 2014 and April 2014 Issues

Another case that followed and interpreted the Hill decision is Jesse A. Howland & Sons, Inc. v. Freehold, 143 N.J. Super. 484 (App.Div. 1976). Howland considered the question of what was meant in the Hill decision by the requirement that the issuance of the building permit must have been made "in good faith" in order for equitable estoppel to apply.

"If the appearance of some reasonable basis for issuance of the permit is what was meant by the majority in Hill when they spoke of the issuance of a building permit 'in good faith,' then our departure from Hill may be more apparent than real." Id. at 489.

Picking up that notion in a later case, the Court in Tp. of Mahwah v. Landscaping Technologies, Inc., 230 N.J. Super. 106 (App.Div. 1989) was faced with a situation in which the Defendant had obtained a certificate of continued occupancy from Plaintiff township's construction official that stated the use to which Defendant intended to put the land was a valid nonconforming use that could continue in operation. Defendant acquired the property in reliance upon the certificate issued by plaintiff's construction official. After Defendant expanded its business to its rear lot, it received a letter from Plaintiff that stated that Defendant could not use its rear lot for such a purpose until it applied for and received a zoning variance. The Court in Tp. of Mahwah stated:

> In such a case, the Jantausch court reasoned, the concept of estoppel would perhaps be germane. Here, it cannot be said that the construction official, who was requested only to issue a Certificate of Continued Occupancy, acted within the "ambit of his duty" by stating in his covering letter of February 21, 1986, that "the business is a legal non-conforming use and can be continued as is." Moreover, we cannot say that the administrative official merely made "an erroneous and debatable interpretation of the ordinance." The ordinance clearly prohibits all commercial uses in the R20 zone. Equally clear is the fact that defendant's nursery business does not enjoy the status of a nonconforming use on the rear lot.
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> Hill v. Bd. of Adjust., Bor. of Eatontown, supra, is distinguishable in that the question before that court was whether or not a variance granted by a board of adjustment from a seven-foot sideyard requirement should be affirmed. In affirming, the court took into consideration the fact that the building inspector had mistakenly

Continued on reverse page ...

YMCA Hold Harmless Clause Held No Bar To Suit in Slip and Fall Case

The NJ Appellate Division ruled that despite signing a contract with a hold harmless clause when he joined a health club, a man is not barred from bringing suit to recover for injuries sustained when he slipped and fell on the stairs while headed to an indoor pool. James F. Walters v. YMCA, Superior Court of New Jersey, Appellate Division, decided August 18, 2014.

Plaintiff James F. Walters appealed from the order of the Law Division dismissing his personal injury cause of action against defendant YMCA. Applying the Supreme Court's holding in Stelluti v. Casapenn Enters., Inc., 203 N.J. 286 (2010), the trial court granted defendant's motion for summary judgment based on an exculpatory clause in the membership agreement signed by plaintiff as a condition of accessing defendant's facilities and using its physical exercise equipment.

Plaintiff argued the trial court erred in construing the exculpatory clause as a bar to his cause of action because his accident was caused by a negligently maintained stair tread. According to plaintiff, the basis of his cause of action is predicated on the ordinary common law duty of care owed by all business operators to its invitees, and thus it is completely unrelated to the inherent risky nature of the activities offered by health clubs.

Continued on reverse page ...

out of order

"I don't give them hell. I just tell the truth and they think it is hell."

- Harry S. Truman

"Truth exists. Only lies are invented."

- Georges Braque

Building Permits Issued in Error

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> issued a building permit for the construction of a garage which would violate the sideyard requirement, that construction was almost entirely complete in reliance on the permit, that many other buildings in the area were also violating the sideyard requirement and that the balance of relative hardships weighed in favor of the variance. The question presented was not, as it is here, whether the municipality should be estopped from enforcing its ordinance. Here, we gather that although defendant applied for a variance, the application was abandoned.
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> We follow the reading given Hill by Howland v. Freehold, 143 N.J. Super. 484 (App.Div.1976), certif. den. 72 N.J. 466 (1976), that the finding of "good faith" on the part of the administrative official can only be satisfied by a finding that "an issue of construction of the zoning ordinance . . . was, when the permit was issued, sufficiently substantial to render doubtful a charge that the administrative official acted without any reasonable basis." Id., 143

Thus, the court in Tp. of Mahwah held that Plaintiff was not estopped from enforcing its ordinance because its construction official had acted outside the ambit of his duty. Furthermore, expansion of a nonconforming commercial use within a residential zone was not merely an erroneous and debatable interpretation of the ordinance.

In conclusion, the most recent reported decision following in the line of cases emanating from Hill, Howland and Jantausch, is Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132 (App.Div. 2013). It restates the law that has been developed within the above cases, and distills those cases into four elements of proof required for an application of estoppel against a public entity in the context of issuance of building permits:

> In the specific context of the issuance of building permits, the application of estoppel requires proof of four elements: (1) the building permit was issued in good faith, (2) the building inspector acted "'within the ambit of [his] duty'" in issuing the permit, (3) a sufficient question of interpretation of the relevant statutes or zoning ordinances as to "render doubtful a charge that the . . . official acted without any reasonable basis" for issuing the permit, and (4) there was "'proper good faith reliance'" on the issuance of the permit. Jesse A. Howland & Sons, Inc. v. Borough of Freehold, 143 N.J. Super. 484, 489, 363 A.2d 913 (App.Div.) (quoting Hill v. Bd. of Adjustment, 122 N.J. Super. 156, 162, 299 A.2d 737 (App.Div.1972)), certif. denied, 72 N.J. 466, 371 A.2d 70 (1976). Id. at 152 - 153.

YMCA Slip and Fall Case

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The motion judge concluded that the Supreme Court's holding in Stelluti was dispositive of the legal issues raised in this case. That judge found plaintiff was contractually barred from seeking compensatory damages against defendant based on a claim of ordinary negligence. The judge rejected plaintiff's argument seeking to limit the scope of the Court's holding in Stelluti to apply only to claims based on engaging in the kind of risky activities offered by health clubs. Although plaintiff was not engaged in any physical exercise when he slipped and fell on the steps that led to the indoor pool, the judge found the pool area was "just another type of equipment that is being offered by the health club."

Thus the legal question presented on appeal by the Walters case was whether a fitness center or health club can insulate itself through an exculpatory clause from the ordinary common law duty of care owed by all businesses to its invitees (an issue not addressed or decided by the Court in Stelluti).

At the time the accident occurred, plaintiff had been a member of this YMCA for over three years. The membership agreement he signed contained the following "hold harmless" provision in all capital letters: I AGREE THAT THE YMWCA WILL NOT BE RESPONSIBLE FOR ANY PERSONAL INJURIES OR LOSSES SUSTAINED BY ME WHILE ON ANY YMWCA PREMISES OR AS A RESULT OF A YMWCA SPONSORED ACTIVITIES [SIC]. I FURTHER AGREE TO INDEMNIFY AND SAVE HARMLESS THE YMWCA FROM ANY CLAIMS OR DEMANDS ARISING OUT OF ANY SUCH INJURIES OR LOSSES.

The Supreme Court's decision in Stelluti was grounded on the recognition that health clubs, like defendant, are engaged in a business that offers its members the use of physical fitness equipment and a place to engage in strenuous physical activities that involve an inherent risk of injury. The Court upheld the defendant's limited exculpatory clause in Stelluti because the injury sustained was foreseeable as an inherent aspect of the nature of the business activity of health clubs.

However, given the expansive scope of the exculpatory clause here, the Appellate Court held that if applied literally, it would eviscerate the common law duty of care owed by defendant to its invitees, regardless of the nature of the business activity involved. Such a prospect would be inimical to the public interest because it would transfer the redress of civil wrongs from the responsible tortfeasor to either the innocent injured party or to society at large, in the form of taxpayer-supported institutions. Thus, the Appellate Division disagreed with the motion judge and reversed on appeal.