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November 30, 2006

File No.: 3625

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Kenneth E. Pringle, Esq.,
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Via Telefax - 732-280-2402

Re: RB Monmouth, L.L.C. v. Zoning, Bd, of Adj. of Boro. of Red Bank
Docket No.: MON-L-5378-06

Gentlemen:

Enclosed please find Verified Complaint, Order to Show Cause and Certification in the above captioned matter. Although I am yet to receive a signed copy of the Order to Show Cause, I was advised today by the Chambers of Honorable Lawrence M. Lawson, A.J.S.C., that a hearing on this filing has been scheduled for Wednesday, December 6, 2006 at 11:00 A.M. before Judge Lawson.

Upon receipt of a signed Order, I shall forward same to you.

If you have any questions, please feel free to contact me.

Very truly yours,

WJP/msw
Enclosure
cc: RB Monmouth, L.L.C.

WAYNE J. PECK
Managing Member

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION - CIVIL PART
DOCKET NO.:

1 X - - - - - X
2 R. B. MONMOUTH LLC, et al.:

3 :
4 : Plaintiffs,
5 :

TRANSCRIPT

-vs-

6 :
7 : ZONING BOARD OF ADJUSTMENT:
8 : OF RED BANK, et al., :
9 :

OF
MOTION

10 : Defendants :
11 : :
12 : X - - - - - X

Held at: Monmouth County Courthouse
71 Monument Park
Freehold, New Jersey

Heard on: December 6, 2006

B E F O R E:

THE HONORABLE LAWRENCE M. LAWSON, A.J.S.C.

TRANSCRIPT ORDERED BY:

WAYNE J. PECK, ESQ.

A P P E A R A N C E S:

WAYNE J. PECK, ESQ.
Attorney for the Plaintiff

THOMAS HALL, ESQ.
Attorney for The Borough of Red Bank

KEVIN KENNEDY, ESQ.
Attorney for Red Bank Zoning Bd. of Adjustment

Audio Operator:

R. Freeman

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THERESA GRIBBEN
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1 hey, --

2 THE COURT: If I found that -- just suppose I
3 found that Ms. Nicosia was in conflict.

4 MR. KENNEDY: Uh hum.

5 THE COURT: And I remanded the matter back
6 for a new hearing, what would you have done?

7 MR. KENNEDY: Given the timeframe I would
8 probably say you need to submit new plans at least so
9 that Board members can have them. There are new Board
10 members. I mean, I don't believe that there are 15
11 extra sets of plans in the Board secretary's office, --
12 there might be now after my letter, that could be
13 submitted.

14 If it was a remand for the situation of you
15 as a Board didn't get enough information on the
16 parking, that's different. I don't know and I think
17 given the timeframe, I would respectfully suggest that
18 it's not inappropriate for, and the change of
19 membership, for new plans to be submitted and sent in.

20 THE COURT: What about the checklist? If the
21 application was complete when it went before you
22 before, and it's the same application, why isn't it not
23 complete now? They use the same material used before.

24 MR. KENNEDY: I agree with that. And if -- I
25 would suggest that the applicant, if they had submitted

1 a traffic impact statement, and I don't know that they
2 have but if that had been submitted, I would prefer
3 that it come from the applicant to the Board engineer
4 as opposed --

5 THE COURT: Why?

6 MR. KENNEDY: Well, because I just feel it's
7 not going to make a clean record if the Board secretary
8 or the Board engineer or my office has to pick through
9 the old file and take this, don't take these site plans
10 that are in the old file, don't take these
11 architectural plans, but we're going to take this
12 traffic impact. I just think that makes an unclear
13 record.

14 THE COURT: Why should the plaintiff do
15 anything when it was the Board that was in error by
16 letting Ms. Nicosia sit?

17 MR. KENNEDY: Well, Your Honor --

18 THE COURT: Why? Let's get down to the real
19 nitty gritty. Ms. Nicosia sat and Ms. Nicosia, I
20 think, I don't find a conflict, okay? I still, but the
21 Appellate Division has spoken, so I can't say anything,
22 okay? However, why should the plaintiff now be
23 penalized because the Board and this Court made a
24 mistake?

25 MR. KENNEDY: Well, I guess at a minimum, if

1 they come before us with their new engineer, their
2 engineer will be testifying to plans which he
3 presumably did not prepare. I mean, I'm not trying to
4 make things difficult. I mean, I think that as soon as
5 the application is deemed complete, they get on the
6 agenda like everybody else.

7 THE COURT: So, you want him to get a new
8 traffic statement?

9 MR. KENNEDY: If one has already -- a traffic
10 impact analysis is a checklist item. So, I think the
11 key is they either submit one or they ask for a waiver.
12 I tend to think that, I don't know that the Board would
13 grant a waiver.

14 I am not sure if one was submitted in the
15 prior application. I did not see that in my list, but
16 if it was, I have no problem and the engineer has no
17 problem if they just take it, they the applicant, take
18 it and submit however many copies they need to submit
19 to the Board.

20 THE COURT: Do you have it, Mr. Peck?

21 MR. PECK: As usual Your Honor has cut right
22 to the issues because you asked Mr. Kennedy the same
23 question my client asked me. If the Board screwed up,
24 why am I getting punished for it?
25 Your Honor, Mr. Kennedy's litany of what we

1 went through is correct. We submitted new plans
2 because Kevin said to me, I don't think we have 15
3 plans floating around. I said to my client, we got to
4 get him new plans. He said, we have a new -- you have
5 different applicant. So, we gave him a new disclosure.

6 He said well, we have pay to play
7 legislation. We gave that to him. He said, well, you
8 know, the engineer's going to have to review the plans.
9 I'm not suggesting, and I hope the Court doesn't think
10 I was, that the engineer shouldn't review the plans so
11 that when we come to a hearing he says the usual, this
12 catch basin detail is not on -- you remember those
13 days.

14 We submitted escrow fees. So, everything
15 that they need because time has passed, we provided to
16 them. But back in 2002 either a traffic study was
17 submitted which is incumbent upon them to have, or it
18 wasn't and they failed to ask for it. And we were
19 still decided to be complete so I'm still complete.

20 Same thing with soil borings. The survey is
21 more than 12 months old. No kidding. This case has
22 been kicking around for four years. So, my client now
23 has to go out and hire a surveyor to re-survey the
24 property? I will ask the Court to take judicial notice
25 that we haven't had many earthquakes in Red Bank in the

1 past few years. It hasn't moved, it hasn't changed.

2 If the survey was good enough for them to
3 review then, it's still good enough for them to review.
4 And with all due respect, my client is entitled to be
5 treated differently than anybody else. Because my
6 client is back here now because the Board screwed up.

7 The Court got it 100 percent right but the
8 Board screwed up. And the Appellate Division said,
9 you're going back for a new hearing not to redo the
10 application. I just want a hearing date.

11 I mean, with with all due respect, Your
12 Honor, my client is now carrying this property for
13 \$50,000 a month while they decide oh gee, we can't find
14 the traffic report from four years ago. It just -- I
15 find this incredulous that I can't get a hearing date.

16 When I have a hearing date, the engineer
17 probably the night of the hearing as they always do,
18 will hand my engineer a 15 page report of all the
19 things he doesn't like about the plan and we're going
20 to have to address them as we would at any public
21 hearing.

22 But to tell us, well gee, you don't have a
23 traffic report four years later. And you don't have a
24 new survey four years later. And you don't have soil
25 borings four years later. You had that chance.

1 Nothing about what went on after that changed the
2 Municipal Land Use Law as it relates to what's
3 complete.

4 And this is a new applicant. But
5 applications aren't about the people. They're about
6 the projects and the land. Those items that relate to
7 the people, disclosure, pay to play, we provided all
8 that to them, because Kevin said to me, Wayne, you
9 know, I really need those and I agreed with him and I
10 sent them into him.

11 So, after we gave them everything they want
12 and I get a letter saying your application is not
13 complete, -- I was surprised to put it mildly, Your
14 Honor.

15 THE COURT: Okay, Mr. Kennedy.

16 MR. KENNEDY: Your Honor, I would just say
17 just so the record is clear, I know Mr. Peck expressed
18 a litany of frustrations but to my knowledge my
19 communication with him is limited to my July 16th
20 letter and the letter he sent me previously. And maybe
21 we've had one conversation since then, but that has not
22 been a thing of me saying, get X and I get X. And then
23 I come back and say, get Y and get Y. I mean that's
24 not the way it has all happened.

25 MR. PECK: It did not. If it came across

Kennedy/argument

20

1 that way, I apologize.
2 MR. KENNEDY: No.
3 MR. PECK: It did not. Kevin, we went over
4 the list of those items and we agreed and my client
5 submitted all of those, yes.
6 MR. KENNEDY: With regard to this --
7 MR. PECK: The incomplete came from someone
8 else.
9 MR. KENNEDY: -- survey being less than 12
10 months old, I agree with him. I would imagine you just
11 ask for a waiver like you would any other waiver. With
12 regard to the traffic impact analysis, I take
13 exception. If there was not one previously submitted,
14 there should have been. And if there wasn't I don't
15 know why there wasn't.
16 But if there wasn't one previously submitted,
17 I don't think if there was an error on someone's end to
18 begin with, that we should continue it just because
19 that's the way it happened four years ago.
20 MR. PECK: But the law says --
21 THE COURT: But Mr. Kennedy, see the problem
22 is, I'm trying to save you and Mr. Peck a lot of time.
23 MR. KENNEDY: Sure.
24 THE COURT: Because you know where you're
25 supposed to be. You're supposed to be at the App.

Decision

21

1 Div.. And you know what the App. Div. is going to tell
2 you? You got about 30 seconds to give Mr. Peck his
3 hearing and I don't want to hear anything about
4 anything.
5 You open up your file, you tell your people
6 down there to do whatever they got to do to give him a
7 hearing. When the Appellate Division tells me to do
8 something, if I don't like it, the law says now go back
9 to the Appellate Division.
10 You can't make up any plans, any problems,
11 any deficiencies. The Appellate Division says this
12 goes back for a hearing. That's all the responsibility
13 you have is a hearing.
14 That's all. No checklist, no nothing. You
15 open up your files, you get the copies, you do what you
16 have to do and you have a file. You want to go to the
17 Appellate Division for them to tell you this? Or do
18 you want to follow my advice?
19 MR. KENNEDY: Your advice.
20 THE COURT: Okay. You got to give him a
21 hearing. Because in the case law -- we go back as far
22 as 1954, IN RE: PLAINFIELD UNION WATER COMPANY, "The
23 mandate is a judicial precept that must be enforced as
24 written. You read from its directions, even though
25 manifestly erroneous, can be had only in the Appellate

1 Court whose judgment it is." Isn't this the Appellate
2 Court's judgment?

3 MR. KENNEDY: It is.

4 THE COURT: And it if you had a question and
5 you wanted to be -- you're saying they got to do X, Y
6 and Z, you got to go back to the App. Div..

7 MR. PECK: And I agree.

8 THE COURT: And if you don't go back to the
9 App. Div., you got to give Mr. Peck his hearing. And
10 your people got to go through their file and put it
11 back on. Okay?

12 MR. KENNEDY: And could I ask a question?

13 THE COURT: Sure, go ahead.

14 MR. KENNEDY: What if there is no traffic
15 impact analysis?

16 THE COURT: If there's no traffic impact
17 analysis and that wasn't raised on appeal and it wasn't
18 in the Appellate transcript, it's over. And you can't
19 recreate, you can't put him in any worse position than
20 he was that the day that he had the hearing. And if
21 somebody blew it, they blew it. Because it wasn't
22 raised before me and it wasn't raised at the hearing.

23 MR. KENNEDY: Okay.

24 THE COURT: So, it was just something that
25 was blown. But he can't replace in a much harsher

1 position. It's just like if I sentence someone and the
2 Appellate Division sends it back, I can't give that
3 person a harsher sentence because I'm thinking you
4 know, I should have gave that guy the book. I can't
5 give him any worse than what he had. All I can do is
6 correct what they said I had to do.

7 And that's what you have to do with this
8 matter. If there's no impact statement, if there is no
9 other statement that was missing and somebody waived it
10 below, it's gone. And you just have to live with it.
11 But you have to go with the file back to where it was
12 and Ms. Nicosia cannot sit because that was the
13 Appellate Division's decision. Go back, redo it all
14 over again without Ms. Nicosia.

15 MR. HALL: Judge, I have a question to put
16 in.

17 THE COURT: Yes, sir.

18 MR. HALL: I understand the Court's ruling
19 and I understand I think what you're saying is the
20 Zoning Board has to basically rely on the record below.

21 THE COURT: No.

22 MR. HALL: What was originally in there.

23 THE COURT: No, no, it's no -- you only rely
24 on what has been submitted.

25 MR. HALL: Right.

1 THE COURT: But it's a new hearing.

2 MR. HALL: Right.

3 THE COURT: It's an all brand new hearing.
4 MR. Hall: But what's confusing me is the
5 fact that the applicant has submitted a new engineering
6 plan. So, that's a change in circumstance. Now, it's
7 my understanding that this new engineering plan is
8 similar, but it's different. And it's different, as I
9 understand it, in terms of the drainage.

10 Now, I know in talking to the engineer, one
11 of the problems he had was there was no -- he wanted a
12 soil test. Now, as I understand it the drainage is
13 relying upon seepage. The drainage plan. The engineer
14 said to me, look, you know, if you're going to rely on
15 seepage you got to know what kind of soil is in there.
16 Now, the applicant at this point or this
17 applicant's new engineer doesn't have the drainage
18 plan. I mean, the soil test. Now, is this new
19 engineer relying on the old soil test? Is he somehow
20 incorporating this by reference? That's the question
21 we have here.

22 Now, I don't know legally if the engineer can
23 or you know, ethically even under the engineering
24 regulations, can he rely on this soil test performed by
25 another? I mean, that's up to Mr. Peck I think. I

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1 don't think it's up to -- it's the Borough's obligation
2 to do his application for him. Hold on, Mr. Peck.

3 See, what I see here, Judge, is that there is
4 a change in circumstances, albeit slight. And I don't
5 know how that gets resolved when that change of
6 circumstances has come from the applicant. And I think
7 it's -- we're talking about a lot of little technical
8 stuff here that could be resolved quickly.

9 THE COURT: What I see and I hear you saying
10 is that, number one, the Appellate Division said it
11 goes back for a hearing.

12 MR. HALL: Right.

13 THE COURT: Now, during the hearing if there
14 is a question that comes up about the engineering
15 report that's when it's raised. Right then and there.
16 That may be a basis for the Board to deny it, if they
17 have a question, okay? He has to put forth his case.
18 He has to make out his case but he has to have a
19 hearing.

20 And you can't say that his application is
21 incomplete because his application was complete under
22 the standards. So, it goes right back to the same
23 position that he was. Now, if he's changed some and
24 tweaked some things, you got to have a new hearing all
25 over again.

Decision

1 And then if you raise something that Mr. Peck
2 doesn't like and there's an exception and he loses, he
3 comes back here on appeal. Or if something happens and
4 you want to take an appeal, you come up here. But he
5 has a right to have his application. And whatever you
6 see, any questions, deficiencies, seepage, anything
7 that you want, that's when you do it. But you got to
8 give him his hearing.

9 MR. HALL: That's fine.

10 THE COURT: You got to start the process.
11 You can't say this is not here, this is not here. He
12 goes right back to the same position as if the night it
13 was that Ms. Nicosia was sitting, and you start from
14 that point on absent Ms. Nicosia. Then whatever proofs
15 he puts in the Board deals with.

16 MR. HALL: Okay.

17 THE COURT: That's it. I'm not ruling on and
18 I can't rule on the engineering report, what's the
19 seepage or the changes that the plot this way or
20 changes of the building that way. He has to make his
21 case. All the Appellate Division is doing is giving
22 him a new hearing.

23 MR. HALL: Okay.

24 THE COURT: And he has to make his case. And
25 you still have your members, because there's new

Decision

1 members, you still have the same right and privilege to
2 raise whatever you have to raise.

3 MR. HALL: Very good.

4 THE COURT: Any questions?

5 MR. HALL: No.

6 THE COURT: Yes, sir?

7 MR. KENNEDY: Yes, just because the Board's
8 agenda is rather intense and I will speak with them,
9 should I say we should schedule a hearing within 60
10 days or -- I mean, certainly --

11 MR. PECK: Post-haste.

12 MR. KENNEDY: Excuse me?

13 MR. PECK: The first agenda you can get me
14 on, Kevin. I'm not asking you to bounce people off. I
15 didn't submit anything asking the Judge to put a
16 specific date in.

17 MR. KENNEDY: Okay.

18 THE COURT: Can you do it 60 days?

19 Mr. Peck: That will be great.

20 MR. KENNEDY: I'll speak to the Board --

21 MR. PECK: Call me.

22 MR. KENNEDY: -- and then if there's a

23 problem, I'll deal with Mr. Peck.

24 MR. PECK: If Kevin calls me, we'll work a
25 date out, Judge.

Kevin E. Kennedy, Esq.

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December 13, 2006

Hon. Lawrence M. Lawson, A.J.S.C.
Courthouse
71 Monument Park
PO Box 1266
Freehold, NJ 07728-1266

RE: RB Monmouth, LLC vs. Zoning Board of Adjust of Borough of Red Bank
Docket No.: MON-L-5378-06

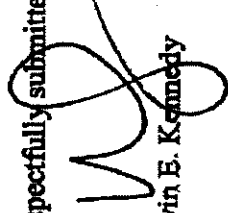
Dear Judge Lawson:

Please be advised that I am writing to you on behalf of the Red Bank Zoning Board of Adjustment, Defendant in the above - referenced matter. In that regard, I would respectfully ask that you please note the following:

1. Please note that pursuant to your Honor's recent ruling, the Red Bank Zoning Board Secretary has scheduled the above - referenced matter to be heard during the first week of February, 2007.
2. I have taken the liberty of slightly modifying the proposed Form of Order (as submitted by Wayne J. Peck, Esq.) so as to address potentially snow-related adjournments, and the obligation for the Plaintiff to notice / advertise the Hearing in accordance with New Jersey Law.
3. By copy of this letter, I am advising my Adversaries of the proposed modifications as well.

If you have any questions or comments regarding this matter, please feel free to contact me at the office.

Respectfully submitted,



Kevin E. Kennedy

WAYNE J. PECK
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ATTORNEY FOR

Plaintiff(s)

R B MONMOUTH, L.L.C., a New Jersey
Limited Liability Company and R B WEST,
L.L.C., a New Jersey Limited Liability Company:

VS.

Defendant(s)

ZONING BOARD OF ADJUSTMENT OF THE
BOROUGH OF RED BANK and BOROUGH
OF RED BANK, a municipal corporation
located in Monmouth County

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MONMOUTH COUNTY

DOCKET NO.: **MOU-1-5378-06**

CIVIL ACTION

FINAL ORDER OF JUDGMENT

This matter having been brought before the Court on an emergent basis by Wayne J. Peck Attorney at Law, L.L.C. by Wayne J. Peck, Esq., appearing, attorney for plaintiff, and Kevin E. Kennedy, Esq., attorney for defendant Zoning Board of Adjustment of the Borough of Red Bank and Thomas Hall, Esq., of Pringle, Quinn & Anzano, P.C., attorney for the Borough of Red Bank appearing and the Court having considered the supporting papers and Verified Complaint filed in this matter, having heard argument of counsel and for good cause shown,

IT IS this day of December, 2006

ORDERED THAT the defendants Borough of Red Bank and the Zoning Board of Adjustment ~~immediately~~ schedule a hearing before the Zoning Board of Adjustment of the

KEV

YES LB MOUNTAIN, LLC

YES WEATHER PERMITTING

Borough of Red Bank on the ~~long pending~~ application relative to Lots 19 & 20 In Block 42, Red Bank and for Lots 1, 2, 2.01, 3 and 4 in Block 42, Red Bank, and that said hearing date shall ~~be~~

COMPLETED not later than 60 days from the date of this Order; and it is

PLAINTIFF TO NOTICE FOR THE SAID HEARING IN ACCORDANCE WITH N.J. LAW.

FURTHER ORDERED THAT the application of plaintiff is determined to be complete and the time for the rendering of a decision pursuant to N.J.S.A. 40:55D-73 shall commence as of the date of this Order; and it is

FURTHER ORDERED THAT this is an Order of Final Judgment completing this matter, that the Court does not retain jurisdiction and that the matter is concluded without costs to any party; and it is

FURTHER ORDERED THAT a copy of this Order be served upon counsel for defendants within _____ days of the date hereof.

Lawrence M. Lawson, A.J.S.C.

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December 15, 2006

File No.: 3625

Honorable Lawrence M. Lawson, A.J.S.C.
Monmouth County Court House
71 Monument Street
PO Box 1266
Freehold NJ 07728

Re: R B Monmouth, L.L.C. Zoning Bd. of Adj. of Boro. of Red Bank
Docket No.: MON-L-5378-06

Dear Judge Lawson:

I am in receipt of the letter from Kevin E. Kennedy, Esq., objecting to the proposed form of Order I submitted to the Court pursuant to what I perceived have been Your Honor's decision on December 6, 2006. Enclosed please find a revised form of Order in reply to that letter.

I have added language requiring that notice be provided pursuant to statute. I object to the inclusion of the proposed language "weather permitting" in the Order. The Municipal Land Use, in a number of sections, imposes upon the municipality times within which actions are to occur. None of those sections includes the language "weather permitting." Therefore, I do not agree that the defendant should obtain automatic postponements of a hearing date Ordered by the Court that do not occur in statute.

By copy of this letter I am providing all counsel with the proposed revised form of Order. In the event the Court deems it necessary, I am prepared to appear before Your Honor to discuss the language of the Order.

Respectfully yours,

WJP/msw
cc: RB Monmouth, L.L.C.
Kevin E. Kennedy, Esq.
Thomas Hall, Esq.

WAYNE J. PECK
Managing Member