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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Maureen **NEVIN,** Patrick Schiavino and Patrick Fasano, Plaintiffs-Appellants,
v.
ASBURY PARK CITY COUNCIL, Mayor Kevin Sanders, Terence J. Reidy and **Asbury** Partners, Defendants-Respondents.

Submitted Sept. 21, 2005.
Decided Nov. 1, 2005.

SYNOPSIS
On appeal from Superior Court of New Jersey, Law Division, Monmouth County, L-3886-04.

Jules L. Rossi, attorney for appellants.

Ansell Zaro Grimm & Aaron, attorneys for respondents Asbury Park City Council, Mayor Kevin Sanders and Terence J. Reidy (Barry M. Capp, on the brief).

Becker Meisell, attorneys for respondent Asbury Partners, (Martin L. Borosko and Amanda L. Schultz, on the brief).

Before Judges CONLEY and WEISSBARD.

PER CURIAM.

***1** Plaintiffs Maureen Nevin, Patrick Schiavino and Patrick Fasano appeal from an order of November 22, 2004, dismissing their complaint in lieu of prerogative writs which named as defendants the Asbury Park City Council, Asbury Park Mayor Kevin Sanders, City Manager Terence J. Reidy (collectively the City), and Asbury Partners, the master developer for the City's Waterfront Redevelopment Project. We affirm.

Plaintiffs' complaint alleged that the City's August 4, 2004 adoption of Ordinance 2700, which amended that portion of the City's October 22, 2002 Agreement with the redeveloper dealing with tax abatements, violated the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-12. More specifically, plaintiffs alleged that at City Council meetings on July 15, 21, and August 4, 2004, the Council met in executive sessions to discuss the proposed Ordinance and that, in violation of OPMA, the redeveloper was permitted to attend the executive sessions and participate in the discussions of the proposed ordinance.

After answers were filed, the City and Asbury Partners moved to dismiss the complaint pursuant to *R.* 4:6-2(e). The City's motion was supported by a certification of Frederick C. Raffetto, the City Attorney, who attended the July 15, 21, and August 4, 2004 council meetings, as well as the executive sessions on those dates, explaining in detail what took place on each occasion. Plaintiffs cross-moved for summary judgment. After briefs were submitted and oral argument conducted, the judge, in a written decision of October 22, 2004, elected to treat defendants' motions as being for summary judgment, since they relied on facts outside the pleadings; the judge thereupon dismissed the complaint.

On appeal, plaintiffs argue that the judge erred as a matter of law in holding: (1) that *N.J.S.A.* 10:4-12(b)(7) permits a non-governmental party to attend an executive session to negotiate a contract with the municipality, and (2) that an OPMA violation could be cured by subsequently bringing the matter before the public.

Before the trial judge, and on appeal, defendants argue that any executive sessions at which Asbury Partners were present came within the OPMA exception for contract negotiations, which reads in pertinent part:

> b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> * * *
>
> (7) Any pending or anticipated litigation or contract negotiation other than in subsection b(4) herein in which the public body is, or may become

a party.

[*N.J.S.A.* 10:4-12b(7).]

The reference to subsection b(4), concerning discussions of collective bargaining matters, is not applicable here. Defendants' position is that any limited discussions between Asbury Partners and the City in the closed sessions fell within the exemption for "contract negotiations," since they stemmed from the City's Agreement with the redeveloper. Plaintiffs argued "that the statute only permits members of the Council to have a closed meeting to discuss strategy in anticipation of contract negotiations." The judge agreed with defendants, but we agree with plaintiffs.

***2** In our view, exception b(7) does not relate to contract negotiations with the opposing party but only, as plaintiffs contend, to discussions *about* contract negotiations by the public body. The inclusion of "pending or anticipated litigation" in the same subsection strongly supports this conclusion. *See* *Gandolfi v. Town of Hammonton*, 367 *N.J.Super.* 527, 539 (App.Div.2004) (propriety of adverse attorney being present in closed meeting "may be in doubt" in light of statements by the Court in *Payton v. New Jersey Tpk. Auth.*, 148 *N.J.* 524, 558 (1997)). In both instances, the public body would not want to expose its litigation or negotiation strategy in an open session to which the opposing party would be privy. *Caldwell v. Lambrou*, 161 *N.J.Super.* 284, 288-89 (Law Div.1978). Indeed, this conclusion is made almost inescapable by subsection b(4), which expressly allows the opposing party to a collective bargaining agreement to be present in a non-public session. No such language appears in b(7) which itself exempts collective bargaining discussions from the general rubric of contract negotiations. We agree with the observations of one commentator:

> The second aspect of Exception (7) deals with "contract negotiations." It is noted that this section explicitly excludes any contract which falls under the language of the collective bargaining section. Is this section to be read as superseding any part of the Local Public Contracts Law? Almost certainly not.
>
> The intent of this entire exception is open to question. For example, can a municipal governing body go into executive session with a landlord group to negotiate a rent level for the coming year in a rent-controlled community? Can a plaintiff suing a governing body go into executive session with the governing body to discuss settlement of the suit? Can the governing body go into executive session with a major landowner whose taxes are delinquent to discuss repayment of delinquent taxes over time? Although there has been no case law squarely dealing with this subject, it is difficult to imagine that an affirmative answer in any of the above cases would be consistent with the purposes of the Act. If the governing body could enter into secret negotiations in all of the above cases, who then would be ignorant of the proceedings? Only the public. In other words, granting a meeting in executive session under these circumstances would in point of fact achieve exactly the opposite result from that intended by the Act as a whole. A reading of this section in pari materia with Exception (4) above would seem to confirm this fact in that whereas Exception (4) specifically allows employees or employee representatives to meet in executive session with the public body, there is no similar language in the contract negotiations of Exception (7). It would therefore seem that the maxim "inclusio unius est exclusio alterius" would apply here. It may be assumed that the purpose of the first two parts of Exception (7) is simply to allow the governing body the opportunity to develop a negotiating position among themselves in order to be able to communicate same to their negotiators and staff for later communication to the adverse party.
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> ***3** [Pane, 34 *New Jersey Practice, Local Government Law*, § 5.7, p. 154 (3d ed.1999).]

The trial judge's reliance on *Hartz Mountain Indus., Inc. v. New Jersey Sports & Exposition Auth.*, 369 *N.J.Super.* 175 (App.Div .2004) was misplaced. That case involved a challenge to the award of a contract by the New Jersey Sports & Exposition Authority (NJSEA), after bidding, for the construction of "a massive multi-use development, denominated the Meadowlands Xanadu, to be constructed and operated at and around the Continental Arena site in the Hackensack Meadowlands." *Id.* at 179. Two unsuccessful bidders, as well as a taxpayer, challenged the award to two successful bidders. Most of the opinion deals with issues arising under the Open Public Re-

cords Act (OPRA), *N.J.S.A.* 47:1A-1 to -13. *Id.* at 181-86. However, the appeal also challenged action taken by NJSEA at an executive session. The court concluded that the executive session fell within the exceptions for real estate/public funds and contract negotiation in *N.J.S.A.* 10:4-12(b)(4) and (7). [FN1] *Id.* at 186. The court then continued as follows:

> FN1. We agree with the parties, and the trial judge, that the reference to exception b(5) in the opinion, *id.* at 186, must be a typographical error. The reference to the contract negotiation exception makes clear that the citation should have been to subsection b(7).

> The executive session here challenged was held in accordance with the recommendation of the NJSEA president to initiate contract negotiations with redevelopers who had responded to the RFP and had proposed a contract including a land lease. We have reviewed the minutes of that executive session. We recognize that the reported discussion was expansive respecting the bidders' general compliance with the basic redevelopment criteria of economics, land use, transportation and environmental impact and that at least some of that discussion could possibly have taken place in public without compromising the confidentiality necessary for contract negotiations and disposition of real estate. Nevertheless, we are satisfied that the import of the discussion related sufficiently to contract negotiation issues and real estate disposition as to qualify it for a closed executive session. We are also satisfied that the straw vote taken at the executive session did not vitiate that qualification. *See, e.g., In re Cole*, 194 *N.J.Super.* 237, 247 (App.Div.1984).
>
> [*Id.* at 186-87.]

The judge read this portion of the opinion to mean that the developers, who were the opposing parties in the contract negotiations with NJSEA, were present and participated in the discussions at the executive session. But we are not convinced that the developers were present. Indeed, the City concedes that the opinion is not clear on that critical point but asserts that the decision "does not hint" that the outcome would have been any different if the developer were present. We disagree. The presence of the opposing party is critical. Clearly the b(7) exception permits the public body to discuss contract negotiations in executive session, but, as we have stated earlier, it does not permit negotiations with the opposing party to take place in executive session, and *Hartz Mountain* does not say so.

***4** Further, although not relied upon by plaintiffs, *N.J.S.A.* 10:4-13 provides that the public may not be excluded:

> from any meeting to discuss any matter described in [*N.J.S.A.* 10:4-12b] until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted: (a) [s]tating the general nature of the subject to be discussed; and (b) [s]tating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

See Caldwell v. Lambrou, supra, 161 *N.J.Super.* at 289; *Council of N.J. State Coll. Locals v. Trenton State Coll. Bd. of Trs.*, 284 *N.J.Super.* 108, 113- 15 (Law Div.1995). There is nothing in the record to suggest that the City complied with this provision before going into executive session on July 15, 21, or August 4, 2004.

The judge was also mistaken in his reading of *N.J.S.A.* 10:4-15(a), which provides that "[a]ny action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court...." The judge found that since no "action" was taken by the City in its closed session, there was nothing to be voided. "Although the tax abatement ordinance was discussed, it was not voted upon during the closed sessions. Rather, the ordinance was presented to the public and voted on in the presence of the public." We disagree with this view of the statute. Referring to August 4, 2004, the meeting which is the subject of the statute is the entire council meeting on that date, not just the closed session. We believe that is the only sensible construction of the statute. The executive session was part of the meeting. Since that session was improperly conducted in private, the "action taken" at the public portion of the meeting, the passage of Ordinance 2700, was voidable.

Notwithstanding, the "action taken," in this case the passage of Ordinance 2700, is only to be voided if the subject of that Ordinance was discussed in executive session at which Asbury Partners was present preceding passage of the Ordinance. *Lambrou, supra*, 161 *N.J.Super.* at 291-92. Here, the trial judge found that the Ordinance was discussed at the closed session. We agree with that portion of his ruling. Indeed, the City Attorney's certification confirms that finding. With respect to the meeting of July 15, 2004, he states that the Council engaged in contract negotiations with Asbury Partners in Executive session "in accordance with *N.J.S.A.* 10:4-12b(7)." As we have discussed earlier, we do not agree that the statutory exception covers contract negotiations with the opposing party. However, since no action was taken at that meeting, the violation of OPMA becomes meaningless. On July 21, 2004, the same scenario took place. Although there was discussion with Asbury Partners in closed session, nothing happened at the public session related to those discussions. Not so on August 4, 2004. On that date, the one-hour closed session with Asbury Partners included, as usual, discussions concerning "the rights and responsibilities of the partners under the Redeveloper's Agreement." However, that "discussion" included "the proposed Ordinance and Tax Agreement with the Council and Asbury Partners." Following that closed session, the council moved to a "Public Workshop Session" at which the Ordinance was further discussed and then a "Regular Session" at which the Ordinance was introduced. Although this constituted "action taken" at the meeting, the Ordinance was not passed on that date.

***5** The City Attorney's certification explained what happened after August 4, 2004:

> 11. Following the introduction of the Ordinance, the City Clerk caused a notice to be published in *The Asbury Park Press* on August 9, 2004, providing notice to the public, in accordance with *N.J.S.A.* 10:4-6, *et seq.*, that a public hearing and second reading would be held on the Ordinance and Tax Agreement on August 18, 2004. The notice was in accordance with the requirements of the Open Public Meetings Act.
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> 12. On August 18, 2004, which was the next regularly scheduled City Council Meeting, the Ordinance Approving a Standard form Tax Abatement Agreement (Ordinance No. 2700) was listed on the agenda for public hearing and second reading as part of the Regular Public portion of the meeting, commencing at 7:00 p.m. The matter was not listed on any other agenda, nor discussed at any other session of the Council, Workshop or Executive, held that evening. When the Council reached the matter, as part of its regular agenda, Mr. Hastie again engaged in a *detailed presentation* regarding the proposed Ordinance and Tax Agreement. This presentation included large charts that were exhibited for the benefit of the Council and all members of the public who were in attendance. The Council members engaged in a *lengthy* discussion with Mr. Hastie regarding the contents of the Ordinance and the Tax Agreement, including the implications and ramifications of same. Such discussion endured for a *substantial* period of time. The Council then opened up the public hearing, and *many* members of the public availed themselves of the opportunity to question Mr. Hastie, the Council and/or the City Manager, regarding the Ordinance and the proposed Tax Agreement. Discussion, debate, questioning and answering ensued for a period in excess of *two hours* on this topic, all of which was completely within the full view of, and included participation of the public. At the conclusion of the public hearing and discussion, the Council voted to adopt the Ordinance on second reading, and the Ordinance was successfully adopted on that date. The Ordinance was *not* adopted on August 4, 2004, as erroneously referenced in the First Count of the Plaintiffs' Complaint.

There is no dispute that no closed session was conducted on August 18, 2004, and a full public discussion took place on that date. The question, then, is whether the improper meeting of August 4, at which the Ordinance was introduced, must result in voiding the action taken at the subsequent meeting at which no violation occurred. Although the issue is not free from doubt, we conclude that the action taken at the August 18 meeting was not tainted by the earlier OPMA violation on August 4 when the Ordinance was introduced. The full public discussion and vote on August 18 sufficed as "corrective or remedial action" within the purview of OPMA. *N.J.S.A.*

10:4-15a. *See* *Gandolfi, supra*, 367 *N.J.Super.* at 527, 540; *Council of N.J. State Coll. Locals, supra*, 284 *N.J.Super.* at 115-16 and cases cited therein. The August 18 action was not a "mere confirming vote." Pane, *supra*, § 5.11 at p. 167. As the Court said in *Polillo v. Deane*, 74 *N.J* . 562, 579 (1977), the remedial section of OPMA "contemplate[s] maximum flexibility in rectifying governmental action which falls short of the standards of openness prescribed for the conduct of official business." Viewed in light of this standard of "maximum flexibility," the final passage of Ordinance 2700 on August 18, 2004, was in compliance with OPMA. As a result, while we do not agree with the trial judge's analysis, we ultimately reach the same conclusion.

***6** Affirmed.

Not Reported in A.2d, 2005 WL 2847974 (N.J.Super.A.D.)

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