

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

THE FALLS GROUP, LLC t/a THE FUNPLEX,	:	SUPERIOR COURT OF NEW JERSEY
	:	BURLINGTON COUNTY
	:	LAW DIVISION
Plaintiff,	:	
	:	
v.	:	DOCKET NO.: BUR-L-4250-09
	:	
TOWNSHIP OF MOUNT LAUREL.,	:	
	:	OPINION
Defendants.	:	

Decided: March 2, 2010

Stephen Hankin, Esquire for the plaintiff (Hankin, Sandman & Palladino).

Christopher J. Norman, Esquire, for the defendants (Law Offices of Christopher J. Norman).

HOGAN, P.J.Ch.

In this matter, the plaintiff, The Falls Group, LLC t/a The Funplex (hereafter "Funplex"), by verified complaint and order to show cause for prerogative writs, declaratory judgment and relief under 42 U.S.C. §1983, seeks redress against the Township of Mount Laurel (hereafter "Township").

The scope of this decision addresses the prerogative writ and declaratory judgment issues. Those issues have been briefed and oral argument conducted. The second count of the complaint, the civil rights count, will not be addressed.

In this application plaintiff specifically seeks a judgment against the Township declaring as applicable N.J.S.A. 5:8-100 to -130, The Amusement Games Licensing Law (hereafter "Act"), and particularly N.J.S.A. 5: 8-104 of the Act as being fully operative

and effective in Mt. Laurel. Plaintiff contends there is no need for any further ordinance implementation by the Township and requests the court to otherwise compel the Township to adopt such ordinance, and to provide a hearing as required under the statute.

According to its complaint, Funplex is seeking to replace existing indoor arcade amusement devices that award fixed merchandise redemption prizes, regardless of outcome, with games that award prizes dependent solely upon outcome. As described in a footnote in plaintiff's brief, Funplex states that "[s]kill and chance based redemption games are competitive devices that usually issue tickets which are exchanged for prizes" (citations omitted). In addition to state licensure, the company requires municipal licenses under N.J.S.A. 5:8-100 to -130 to implement these changes. Funplex points out that the new games will not exceed the number of games they are replacing, and in most cases require only a modification of software.

The principle opposition posited by the Township is that rules promulgated pursuant to N.J.S.A. 5:8-101 mandate that before a municipality issues a license it must first exercise its "legislative discretion and prerogative" and adopt an ordinance. The regulation provides that the municipality adopt an ordinance "[d]eclaring that a recognized amusement park exists in the municipality or that the municipality is a seashore or other resort containing an amusement or entertainment area according to the customary understanding of such terms in the municipality. . . ." N.J.A.C. 13:3-1.5. In other words, the Township argues that the statutory authority, "authorizing the conducting, operating and play of certain amusement games" as voted for by the voters of Mount Laurel, does not become effective until the regulatory requirement of a local ordinance is adopted. This ordinance is described by the Township as an enabling ordinance.¹

¹ Township's counsel, in its brief of January 18, 2010, argued that Funplex's request for a hearing had to be denied in the "absence of a statutorily required municipal enabling ordinance recognizing amusement park licensure" [emphasis added]. This is incorrect on two bases. First, the ordinance language is regulatory and is not contained in the statute, and secondly, the regulatory language does not require an ordinance that recognizes "amusement park licensure" as a concept and process, but instead requires that the Township only acknowledge the existence of a "recognized amusement park." N.J.A.C. 13:3-1.5.

The Township further argues that it is in the absolute discretion and prerogative of the Township Council as to whether it wishes to adopt such an ordinance. In this case, that position has the effect of preventing an existing amusement park from availing itself of the licensing process. This includes having a hearing if the license is denied before the town council, as authorized by the statute. N.J.S.A. 5:8-104.

Additionally, on multiple occasions the Township has rejected the Funplex requests. The Township has construed its zoning ordinances in such a manner to consider Funplex a non-conforming use; as a result, games of chance are an unlawful activity under its zoning code.

Third, the Township argues that, since the Township has refused to grant a hearing on the license, Funplex must appeal not to the Superior Court, but to the Amusement Games Control Commissioner under N.J.A.C. 13:3-6.1; Funplex challenges, among other things, the Township's refusal to adopt the required ordinance and provide a hearing. On this point, several legal questions are not under the jurisdiction of the Commissioner, such as those involving interpretation of the statute and rules under the Declaratory Judgment Act, and thus this case is properly before the court.

If the Township is correct in saying that it has no authority to issue a license because it has not passed an ordinance, the Commissioner would have no jurisdiction. The Commissioner's jurisdiction, using the Township's argument, arises if a municipal governing body refuses to issue a license after it has denied an applicant a statutory hearing. This assumes that the Township has the authority to issue a license, which in this case the Township argues that it does not.

Factually, there is no meritorious dispute that Funplex operates an amusement park within the boundaries of Mt. Laurel. The property comprises approximately 25 acres, including both indoor and outdoor amusements. Outdoors there are food concessions, a tee driving range, batting cages, a swimming pool and eight amusement

rides. Indoors there about fifty video and other “mechanical redemptions games of chance which are not dependent upon result,” a bowling alley and six amusement rides.

All of the Funplex amusement rides are licensed by the New Jersey Department of Community Affairs under N.J.S.A. 5:3-31 to -59, the Carnival Amusement Rides Act (“CARSA”). This statute requires State licensure for amusement rides located in an “amusement area or park” N.J.S.A. 5:3-32(a). Funplex appropriately alleges that, because of these licenses, the Department of Community Affairs has determined its facility is an amusement park. This is not an illogical conclusion.

In addition, the Superior Court has recognized the Funplex facility as an amusement park in a case involving the same parties. In The Falls Group v. Mount Laurel Twp., L-1503-03 (Law Div. June 20, 2003), Judge Sweeney granted judgment to the plaintiffs. That case involved the issue of whether CARSA preempted Mount Laurel’s site plan jurisdiction in the regulation of ride safety. In his findings, Judge Sweeney found that the Funplex facility was an amusement park.

Even counsel for the Township does not argue that the facility is not an amusement park. His argument is that Funplex is not a “recognized” amusement park as required under the regulations. All of the uncontested exhibits, including an aerial photograph attached to the Funplex brief, compounded with a lack of any demonstrable evidence to the contrary, clearly establish there is no material dispute that Funplex is an amusement park. As a result, no further evidentiary hearing is required. The Township relies on its interpretation of the regulations as its substantive defense supported by its claim of “legislative prerogative” for not issuing the appropriate license.

N.J.S.A. 5:8-99 provides that the Act would not become operative unless it was approved “by a majority of the legally qualified voters of the State voting on the question of such approval at the general election.” On November 3, 1959, at a state referendum, a majority of voters statewide, including a majority of voters in Mount Laurel, approved the referendum question, using the exact language provided for in the statute. N.J.S.A.

5:8-116. With the 1959 vote, the Township met the voter criteria for the licensing law to become operative within the Township. N.J.S.A. 5:8-115. This provision in relevant part provides:

If, in the municipality, a majority of the votes cast therein upon the question of whether this act shall be adopted is in the affirmative, such action by the voters of the said municipality shall be deemed to be an approval of the authority to the municipality to grant licenses under this act and such approval shall continue unless this act shall become inoperative in the municipality upon a referendum to the voters of the municipality as provided in this act.

N.J.S.A. 5:8-115 [emphasis added].

The Township does not contest the fact that the voters approved the licensing act in the state-wide referendum, and it has not provided evidence or even argued that the voters since disapproved the licensing authority at a subsequent referendum.

The following provision demonstrates further evidence of the legislative intent that municipalities could have the authority to issue such licenses: “[i]f at such election a majority of all the votes cast both for and against the approval of this act shall be cast in favor of the approval thereof, then all of its provisions shall forthwith take effect. N.J.S.A. 5:8-119.

The statute does provide a limitation on the authority to issue such game licenses. That limitation grants licensing authority “provided that [authorized games] are to be held and operated at a recognized amusement park or at a seashore or other resort in that part thereof customarily constituting an amusement or entertainment area according to the customary understanding of said terms in the community...” N.J.S.A. 5:8-101.

Under the Act, the ballot question, once approved, gives operative and effective meaning to the statute. There is no provision in the statute which gives a municipality

any legislative discretion to decide whether it wishes to participate in the game licensing process, or as the Township refers, "game licensure," once the referendum is approved.

A municipality is a subdivision of the state, and as such only has the power, authority and discretion given to it by the legislature. It has no independent power or authority, other than what it is given from the legislature. It is well established that municipalities are "creatures of the state." Inst. for Evaluation and Planning, Inc v. Bd. of Adjustment, 270 N.J. Super. 396, 400 (Law Div. 1993), citing Becker v. Adams, 37 N.J. 337 (1962).

In the Act, the legislature provided the municipality the power and mandate to make an investigation of the qualifications of each applicant, and to consider the merits of each application, with due expedition after the filing of the application. The statute provides the parameters of the municipality's authority under the statute and the regulations promulgated by the State Amusement Games Control Commissioner. N.J.S.A. 5:8-103.

Under the Act, a municipal game license covered by this statute is also subject to a state license and under "such conditions and regulations for the supervision and conduct thereof as shall be prescribed by rules and regulations duly adopted from time to time by the Amusement Games Control Commissioner, not inconsistent the provisions of this act" N.J.S.A. 5:8-101 [emphasis added].

It is under these regulations that the Township has attempted to shield itself from having to participate in the process of issuing the games license.

In nearly every respect the adopted regulations reflect, if not mirror, the authorizing statute. The regulations provide direction for licensing of such games and their supervision and conduct. For example, while not defined in the statute, the term "recognized amusement park" is broadly defined in the regulations as a "commercially operated permanent business, open to the public at least 31 consecutive days annually,

whose acreage is designed and themed for the primary purpose of providing participatory amusement incorporating rides or water slides licensed in accordance with N.J.S.A. 5:3-31 [to -59.], and food and merchandise concessions in permanent structures.” N.J.A.C. 13:3-1.1(a). The Township, in its opposition, does not challenge the proposition that the Funplex business fits this definition.

Section (b) of the regulation closely follows the statute and requires in relevant part that no amusement game license shall be issued in any municipality unless:

1. Such municipality has authorized the licensing of amusement games by referendum either in the 1959 election or subsequent referendum pursuant to P.L. 1959, c. 109; and
2. The premises to be licensed are situated at:
 - i. A recognized amusement park

N.J.A.C. 13:3-1.1(b).

This provision demonstrates that the Commissioner recognizes that the statute authorizes municipal licensing where the voters have approved such by referendum. As previously stated, Mount Laurel was so authorized by the 1959 referendum.

The regulation entitled ‘Requisites for municipal license’, N.J.A.C. 13:3-1.5 states:

(a) No license shall be issued in any municipality unless and until an ordinance shall have been adopted by the municipal governing body:

1. Declaring that a recognized amusement park exists in the municipality or that the municipality is a seashore or other resort containing an amusement or entertainment area according to the customary understanding of such terms in the municipality

N.J.A.C. 13:3-1.5 (emphasis added).

The regulation at section 2 provides that the ordinance would fix fees for such license. The municipality also would fix the hours or days of operation by ordinance. N.J.A.C. 13:3-1.6.

Thus, the specific issue, under the undisputed facts of this case, is whether a reasonable reading of this regulation permits the Township the “legislative prerogative” to avoid adopting the regulatory required ordinance in the face of overwhelming evidence that Funplex is a recognized amusement park as defined in the regulations and recognized by the court and the township administration itself. In other words, may the Township ignore the authorizing statute which was adopted by the legislature and which became effective and operative on the township by virtue of the statute’s approval by a majority of voters of the township?

Reviewing the statutory scheme, it is clear that the legislature intended that a municipality is mandated to participate in the licensing process as outlined in the statute, where there is a recognized amusement park, and where the voters in such a town voted for the legislation. The Township Council can not take the position that they have any discretion to decide whether they wish to adopt an ordinance “recognizing amusement licensure where in fact such an amusement park exists.”² The voters of the township have, by authorized referendum, made that policy decision. There is no language in the authorizing law that states or could be construed to state that the governing body has a prerogative to not participate in the licensing process, including adopting an ordinance and considering an application for a license.

Relying on the regulations is not sufficient. N.J.A.C. 13:3-1.5 only requires that the municipality adopt an ordinance that a “recognized amusement park exists”; the municipality has no discretion whether to recognize the amusement licensure process generally.

² As late as January 22, 2010, the Township municipal clerk wrote to counsel stating “As you are aware, Mount Laurel has not adopted an Ordinance recognizing amusement licensure, which is a prerequisite for the issuance of any license for skill based redemption.”

In construing the rules promulgated by the Commissioner, the entire regulation must be considered together with the enabling statute. While many statutes require regulatory agencies to draft interpretative (and often highly technical) rules construing a general statutory direction, some statutes, such as N.J.S.A. 5:8-100 to -130, require an agency to draft legislative rules, effectively filling in the process gaps and detail left open by the legislative process. Administrative agencies only have the powers expressly granted to them by the legislature, and any incidental powers reasonably necessary or appropriate to effectuate the granted powers. N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978). Directory intent, as opposed to mandatory intent, may be implied either from the language used or inferred on the grounds of policy or reasonableness. Harvey v. Bd. of Chosen Freeholders, 30 N.J. 381, 391-392 (1959). The rule makers must balance their task against modifying the goals and intent of the legislation. That balance requirement is demonstrated in these licensing rules and dictated by the authority to make rules that are not inconsistent with the legislation. N.J.S.A. 5:8-101.

The statutory language charges the Commissioner with supervising and conducting the licensing process and the license itself through the regulatory process. The section of the statute in which this direction is given states, in its opening sentence:

It shall be lawful for the governing body of any municipality, at any time after this act shall become operative and except when prohibited by this act, to license the owner and operator of any amusement game or games... (thereafter described), provided that the same are to be held and operated at a recognized amusement park. . .

N.J.S.A. 5:8-101.

It would be improper to interpret the regulatory requirement for the municipality to adopt an ordinance as an “enabling” regulation, because such an interpretation would effectively be inconsistent with (1) the Commissioner’s supervision and conduct

responsibility, and with (2) with the grant of lawful authority to the township to issue municipal licenses by virtue of the referendum and the resulting operative statute.

A more reasonable interpretation, and the one to which the court subscribes, is that the statute gives the municipal government certain responsibilities; for example, conducting investigations, determining qualifications of the proposed licensee, setting hours of operation, and setting fees. The regulations provide direction and a mechanism to undertake those responsibilities. The regulations recognize that the mechanism for undertaking those responsibilities is to require a municipal ordinance to implement them. In other words, the regulation is filling in those details not included in the statute. Furthermore, since the state, in addition to the municipality, issues a license, the Commissioner needs to know that in fact that municipality has determined that an applicant for a license is a "recognized amusement park" as the rules define. The rule requirement that the municipality adopt an ordinance stating that "a recognized amusement park exists" is intended to aid the commissioner in his supervisory role, as he has no authority to issue a state's license that is inconsistent with the legislation. Such an ordinance provides the state agency with the affirmation that the applicant is in fact a recognized amusement park. Any limitations on the Township's underlying authority must come through the legislature, not from a regulatory rulemaking, such as N.J.A.C. 13:3-1 to -7. Any interpretations of the regulations to the contrary would have the effect of frustrating not only the intent of the legislature, but the will of the voters as well.

The ordinance requirement under the regulation is a directory requirement to recognize the factual existence of an amusement park. Neither the regulation nor the statute grants the authority to the Township to circumvent the authority granting power of the statute or the voters of Mount Laurel. In this case, there is no dispute or issue of fact that Funplex operates an amusement park that has been recognized by the State, the court in previous litigation, and by the Township itself (though not its council by ordinance). Therefore, the language of the regulation is directory, and like the statute, offers no discretion to the township to opt out of the licensing process.

Finally, with regard to the zoning issues raised by the township, whether the amusement park is a conforming or non conforming use has no bearing on the fundamental question in this case. The primary issue is whether Funplex has the right to have its request for a license under the Act considered and whether the Township must participate in that licensing process exercising the limited discretion that the Act gives to the Township. Zoning issues are separate and apart from the licensing authority under the Act, as a license can only be issued to a recognized amusement park.

The remedy

The court finds, as a matter of law, that N.J.S.A. 5:8-100 to -130 is applicable to the Township. The court further finds that the requirement set forth in N.J.A.C. 13:3-1.5, that a municipality, before it issues a license, shall adopt an ordinance “declaring that a recognized amusement park exists in the municipality” is directory where there is no issue as to the existence of such an amusement park (as is the case in this matter) and the municipality is required to recognize such a fact by ordinance when an application for a license is applied for. The court thus grants judgment to the plaintiff under The Declaratory Judgment Act, N.J.S.A. 2A:16-52 to -62.

Because the authorizing statute, N.J.S.A. 5:8-100 to -130, became effective in Mount Laurel over fifty years ago, and the regulations and statute have apparently never been interpreted with regard to these issues, the court refrains at this time from a finding that the Township has acted arbitrarily, unreasonably and capriciously, the standard for actions in lieu of prerogative writs. Rather, it is more appropriate to remand the matter back to the Township, directing it to adopt the appropriate ordinance in accordance with the statute and the rules, and in accordance with this decision. This remand will provide the Township with the opportunity to exercise what limited discretion is provided under the statute and the accompanying regulatory scheme. The Township shall adopt such an ordinance within 60 days from the date of the judgment. Thereafter, Funplex shall apply for its license.

Counsel for the plaintiff shall submit an appropriate Judgment with 10 days.