N.J. Alliance v. N.J. Sports & Exposition Auth.

Superior Court of New Jersey, Appellate Division

October 3, 2016, Decided

DOCKET NO. A-0052-16T4

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NEW JERSEY ALLIANCE FOR FISCAL INTEGRITY, LLC, Appellant, v. NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, Respondent. AMEREAM LLC, Intervenor-Respondent.

Core Terms

bonds, financing, resolutions, pledge, negotiated, bondholders, issuance, redevelopment, proceeds, series, contract bond, private sale, requirements, collateral, materially, documents, contends, provides, issuing, backed, issuer, funds

Opinion

[*1]

Submitted September 23, 2016 - Decided

Before Judges Reisner, Rothstadt, and Sumners.

On appeal from the New Jersey Sports and Exposition Authority.

Calcagni & Kanefsky, LLP, attorneys for appellant (Kevin J. Musiakiewicz, of counsel and on the brief; Thomas R. Calcagni and Samuel Scott Cornish, on the brief).

Gibbons, P.C., and Eckert Seamans Cherin & Mellott, LLC, attorneys for respondent (Frederick W. Alworth, Kevin R. Reich, Jonathan S. Liss, and Robert I. Tuteur, on the joint brief).

Genova Burns LLC and McManimon, Scotland & Baumann, LLC, attorneys for intervenor-respondent (Angelo J. Genova, Kathleen Barnett Einhorn, Rajiv D. Parikh, Glenn F. Scotland, and Jennifer L. Credidio, on the joint brief).

Christopher S. Porrino, Attorney General, attorney for amici curiae New Jersey Economic Development Authority and Local Finance Board (Melissa H. Raksa, Assistant Attorney General, of counsel; Elizabeth A. Renaud, Senior Deputy Attorney General, and Susan M. Scott, Deputy Attorney General, on the brief).

PER CURIAM

The ***New Jersey Alliance*** for Fiscal Integrity LLC, (NJAFI or appellant) appeals from four Resolutions issued by the New Jersey Sports and Exposition Authority (NJSEA or **[*2]** New Jersey Authority): Resolution 2016-37 and Resolution 2016-38, issued on August 25, 2016; and Resolution 2016-46 and Resolution 2016-47, both issued on September 15, 2016.[1] The appeals concern the issuance of bonds to provide a portion of the financing for the American Dream development in the Meadowlands, to be built by intervenor Ameream LLC. For the reasons that follow, we affirm.

I.

Our review of these Resolutions is limited. "'[C]ourts are not free to substitute their judgment as to the wisdom of a particular administrative action for that of the agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.'" *In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 642-43 (App. Div.)*, certif. denied, *197 N.J. 260 (2008)* (quoting *Newark v. Natural Res. Council in Dep't of Envtl. Prot., 82 N.J. 530, 539 (1980)*). Further, "'[a] strong presumption of reasonableness accompanies an administrative agency's exercise of statutorily-delegated responsibility.'" *Id. at 632* (quoting *Gloucester Cnty. Welfare Bd. v. State Civil Serv. Comm'n, 93 N.J. 384, 390 (1983)*). We have considered

the record, and the parties' arguments, with those standards in mind.

II.

In summary, the NJSEA plans to issue two types of limited obligation bonds, which will be backed exclusively by two revenue sources: redevelopment area bonds (RAB bonds), backed by payments in lieu of taxes (PILOTs) which Ameream will **[*3]** begin paying once it completes the project; and Economic Redevelopment Grant revenue bonds (ERG bonds), backed by an Economic Redevelopment Grant which the Economic Development Authority (EDA) has awarded to Ameream and the proceeds of which Ameream will in turn sell to the NJSEA.[2] Once the RAB and ERG bonds are sold, the PILOTs and ERG grant money, respectively, will provide the sole source of funding to pay the bondholders a return on their investment.[3]

It is clear from all of the financing documents that the bonds will be non-recourse bonds which are not backed by the full faith and credit of the State or any of its instrumentalities. The NJSEA bond sale terms will put the buyer clearly on notice that these are non-recourse bonds, not backed by the full faith and credit of the State, and the bondholder takes the sole risk of non-payment on its investment, if for any reason the NJSEA does not receive either the ERG grant money or the PILOTs. In fact the bond documents provide that NJSEA's failure to pay the bondholders, if the ERG grant money or PILOTs do not materialize, will neither constitute an event of default nor grounds to accelerate the bond debt.

The NJSEA will sell **[*4]** both the RAB bonds and the ERG bonds to one buyer - the Wisconsin Public Finance Authority (PFA or Wisconsin PFA) - in a negotiated sale. The financing documents anticipate that the PFA will pay the NJSEA approximately $300 million for the ERG bonds and $800 million for the RAB bonds. The PFA will obtain the purchase money by issuing and selling its own bonds (PFA bonds) to the public, in Wisconsin. The PFA intends to use the revenue it earns from the RAB and ERG bonds to pay the debt service on the PFA bonds. However, each State's agency is issuing its own bonds. Nothing in the NJSEA bond documents obligates the NJSEA to guarantee or pay the PFA's debt service on the PFA's bonds.

III.

On this appeal, NJAFI raises a series of arguments challenging the issuance of both bonds.[4] It contends that the NJSEA'a actions are ultra vires, violate "legislative policies," and are arbitrary (Point I); the RAB bond resolutions unlawfully pledge the PILOTs as "collateral for another state's debt issue" (Point II); the NJSEA cannot issue the ERG bonds because it cannot issue the RAB bonds (Point III); the Stimulus Act does not permit the securitization of ERG grant payments (Point IV); issuance **[*5]** of the ERG bonds violates the Debt Limitation Clause unless approved by the voters (Point V); the NJSEA lacks statutory authority to issue the ERG bonds (Point VI); the NJSEA Resolutions violate Executive Order 26 because they contemplate a private sale of the bonds to one buyer (Point VII); and the RAB bond resolutions differ materially from the financial transaction approved by the Local Finance Board (LFB) (Point VIII).

After reviewing the briefs and the record submitted on this appeal, we conclude that those arguments are without merit.[5] Appellant relies heavily on policy arguments concerning the wisdom of the financing involved here. However, it is not our role to pass upon the wisdom of actions taken by the Executive and Legislative Branches of government. We concern ourselves only with the legality of those actions. See *Xanadu, supra, 402 N.J. Super. at 642-43*.

Appellant's arguments also depend to a great extent on mischaracterizations of the financing. In particular, appellant insists that because the Wisconsin PFA will use the proceeds from the New Jersey bonds to pay the Wisconsin PFA bondholders a return on their investment, this means that the NJSEA is "in effect" pledging the PILOTs as collateral for the Wisconsin PFA bonds. **[*6]** In turn, appellant's argument continues, this is illegal because by statute, N.J.S.A. 40A:12A-67(a)-(c), PILOTs can only be pledged as collateral for bonds issued by New Jersey state and local agencies.

We cannot agree with that chain of reasoning. The fact that a purchaser of NJSEA bonds intends to use those bonds as collateral for some economic project of its own does not transform the NJSEA into the issuer or guarantor of the bond purchaser's financial project. It makes no difference whether the bond purchaser's project consists of issuing its own bonds, obtaining a construction loan collateralized by the anticipated bond proceeds, or some other financial transaction. Appellant has not cited to any statute or case on point supporting its argument that, absent an agreement by the bond issuer, a bondholder can somehow transform the bond issuer into a guarantor of the bondholder's financial

commitments to a third party.

Moreover, not only do the NJSEA Resolutions not state any financial commitment by the NJSEA to the Wisconsin PFA bondholders, but they make clear that NJSEA makes no such commitment and undertakes no such obligation. NJSEA's sole obligation is to its bondholders, and that obligation is limited **[*7]** to paying the debt service on its own bonds (the RAB and ERG bonds), when and if it receives the ERG grant proceeds and the PILOTs.

Specifically, the August 25, 2016 ERG and RAB bond resolutions each state that "[t]he State of New Jersey is not obligated to pay, and neither the faith and credit nor taxing power of the State of New Jersey is pledged to the payment of the principal of or interest on the [b]onds." The resolutions further provide that "[t]he [b]onds shall not be a debt or liability of the State of New Jersey" and "[t]he issuance of the [b]onds shall not directly or indirectly or contingently obligate the State of New Jersey or any political subdivision thereof to levy or pledge any form of taxation whatever therefor."

The September 15, 2016 resolutions are equally, if not more, specific on these points. Resolution 2016-46 states that the NJSEA will pay the principal and interest for the ERG bonds solely from the ERG grant revenue it receives, that the grant revenue is the only security for the bonds, that the grant revenue will not be pledged for any other purpose, and that the grant revenue will not be pledged as security for the bonds issued by the Wisconsin PFA. Neither **[*8]** the State nor any political subdivision is obligated to pay principal of or interest on the bonds and if the grant revenue is insufficient to cover the debt service, there is no default under the bonds. The Resolution further states that the bonds are being issued pursuant to authority set forth in the New Jersey Sports and Exposition Authority Law (NJSEA Law), *N.J.S.A. 5:10-1 to -38*.

Similarly, Resolution 2016-47 explains that the NJSEA will pay the principal and interest for the RAB bonds solely from PILOTs and the Enforcement Revenues,[6] that the PILOTs will be pledged by the NJSEA as security for the bonds, and that the PILOTs will not be pledged for any other purpose including as security for the bonds to be sold by the Wisconsin PFA. The Resolution further provides that neither the State nor any political subdivision is obligated to pay principal of or interest on the bonds and if the PILOTs are insufficient to cover the debt service, there is no default under the bonds. In light of those assurances, we find no merit in appellant's contentions that the RAB bonds are ultra vires.

IV.

Appellant's constitutional argument suffers from similar weaknesses because it rests on inaccurate characterizations **[*9]** of the ERG bond transaction. Appellant contends that a 2008 amendment to *Article VIII, section II, paragraph 3, of the New Jersey Constitution* prohibits the NJSEA from issuing contract bonds without voter approval. NJAFI contends that the ERG bonds are State contract bonds because the grant revenues "are subject to appropriation[] and [are] pledged and used to pay the principal and interest owed under the [b]onds."

The pertinent amendment to *Article VIII, section II, paragraph 3 of the New Jersey Constitution* provides that:

b. On or after the date on which this subparagraph b. becomes part of the Constitution, the Legislature shall not enact any law that . . . creates or authorizes the creation of a debt or liability of an autonomous public corporate entity, established either as an instrumentality of the State or otherwise exercising public and essential governmental functions, which debt or liability has a pledge of an annual appropriation as the ways and means to pay the interest of such debt or liability as it falls due and pay and discharge the principal of such debt . . . .

Thus, the amendment prohibits the Legislature from enacting any new law authorizing contract debt. However, putting aside the issue of whether a "new law" is involved here, appellant's argument is misguided. We agree with respondents that because **[*10]** the ERG bonds are secured solely by the ERG grant revenue and the bondholders have no recourse against the State, the bonds are not "contract bonds" and their issuance would not violate the Debt Limitation Clause.

Contract bonds are "bonds issued by an independent state authority on a contract between the State Treasurer and the authority stating that payment on the bonds by the State is subject to legislative appropriations." *Lonegan v. State, 174 N.J. 435, 439 n.1 (2002)*. The NJSEA is authorized to issue contract bonds pursuant to *N.J.S.A. 5:10-14.3*. *Id. at 441 n.3*. In this case, there is no agreement between the State Treasurer and the NJSEA to issue the ERG bonds, *N.J.S.A. 5:10-14.3 (b)(1)*, or to pay into a special fund,

as required by the statute, "amounts from the General Fund as shall be necessary to pay the principal and interest on [the] bonds." N.J.S.A. 5:10-14.3 (a). Accordingly, we reject appellant's argument premised on the Debt Limitation Clause.

Appellant's related statutory challenge to the ERG bond resolutions fares no better. NJAFI argues that N.J.S.A. 5:10-10 (a) does not authorize the issuance of the ERG bonds because "[b]onds under that provision are limited to 'general obligations payable out of revenues or funds of the [NJSEA],' not appropriations of the State." Appellant recognizes that N.J.S.A. 5:10-14.3 permits the **[*11]** NJSEA to issue contract bonds but argues that the statute does not permit the proceeds to be used to finance new facilities such as the American Dream project. It also contends that the NJSEA has not complied with the procedural requirements of N.J.S.A. 5:10-14.3 including entering into a "credit agreement with the State Treasurer approved 'by the presiding officers of both houses of the Legislature,'" obtaining a "certification from the State Treasurer concerning the sufficiency of revenues to pay the bonds," and "obtaining the written consent of certain State Officers."

However, as previously discussed, the ERG bonds are not State contract bonds. Rather, we agree with respondents that the ERG bonds will be issued pursuant to the NJSEA Law, N.J.S.A. 5:10-10, which authorizes the NJSEA to issue bonds or notes for any of its corporate purposes, N.J.S.A. 5:10-10(a). Those purposes include those set forth in N.J.S.A. 5:10-6(a)(4), which encompasses this redevelopment project.

The NJSEA Law gives the NJSEA broad authority to issue bonds. Under N.J.S.A. 5:10-10(a), it has "the power . . . to issue its bonds or notes in such principal amounts as in the opinion of the [NJSEA] shall be necessary to provide sufficient funds for any of its corporate purposes." Although NJAFI contends **[*12]** the bonds must be general obligations payable from the revenues or funds of the NJSEA, the statute provides that is so "except as may be otherwise expressly provided in the act or by the [NJSEA]." N.J.S.A. 5:10-10(b). The NJSEA "may issue such types [of] bonds or notes as it may determine" and the debt

> may be additionally secured by a pledge of any grant, subsidy or contribution from . . . the State or any agency, instrumentality or political subdivision thereof, or any person, firm or corporation, a pledge of any income or revenues, funds or moneys of the [NJSEA] from any source whatsoever or from the proceeds of any credit agreement.
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> [Ibid.]

In addition, the NJSEA's bonds "may be sold at public or private sale at such price or prices and in such manner as the authority shall determine." N.J.S.A. 5:10-10(e).

As previously noted, N.J.S.A. 52:27D-489i(g)(1) permits Ameream to "pledge, assign, transfer, or sell any or all of its right, title and interest in" the proceeds of the ERG grant. Given that Ameream is permitted to sell the grant revenue to the NJSEA, and in light of the broad powers of the NJSEA to issue bonds and secure those bonds, we conclude that the issuance of the ERG bonds is authorized by the NJSEA Law.

V.

Appellant's point concerning **[*13]** Executive Order 26 requires little discussion. The Executive Order, issued by Governor Whitman, expresses a preference for the sale of bonds through competitive bidding but permits negotiated sales in appropriate circumstances. It provides in pertinent part:

> 1. . . . . In certain circumstances, however, where it is determined that a negotiated sale would better serve the requirements of a particular financing, negotiated sales may be conducted, if otherwise permitted by law. The circumstances under which a negotiated bond sale shall be permitted shall include the following:
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> a. Sale of complex or poor credits;
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> b. Sale of a complex financing structure, including those that involve the simultaneous sale of more than one series with each series structured differently;
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> c. Volatile market conditions;
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> d. Large issue size;
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> e. Programs or financial techniques that are new to investors; and
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> f. Variable rate transactions.
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> . . . .
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> 3. Any decision of an issuer regarding the method of sale for a bond issue shall be made by resolution which shall be available to the public. . . . When an issuer determines that the sale of bonds should be negotiated with an underwriter based on the standards enumerated in section 1 of this **[*14]** Order, justification in support of

such a decision should not be stated in general terms, but should be specific to the particular bond sale. Such findings shall be filed with the Treasurer within five (5) days of the decision.

NJAFI argues that NJSEA's method of sale is not a "negotiated sale" but rather a private sale to a single purchaser which is not permitted under Executive Order 26. NJAFI also argues that the NJSEA violated the Executive Order's procedural requirements because it did not file with the Treasurer within five days of the August 25, 2016 resolutions its justification for conducting a negotiated sale and because its justification was not "specific to the particular bond sale."

Private sales are expressly authorized by *N.J.S.A. 5:10-10(e)*. However, because the parties assumed the applicability of the Executive Order here, we address the issue as they presented it to us. We conclude that, even if the sale of bonds to the Wisconsin PFA can be considered a negotiated sale, the sale meets the criteria under which a negotiated sale is permitted by the Executive Order. The sale involves a complex financing structure, including two series of bonds secured by different projected streams of revenue and financing **[*15]** committed by a private lending syndicate that must close simultaneously with the issuance of the NJSEA bonds. The NJSEA resolutions state that the "financing structure . . . is new to investors" and the $1.15 billion in bonds is a large issue size.

NJSEA also complied with the requirements of the Executive Order by including its rationale for conducting a negotiated sale in the resolutions and forwarding to the Acting State Treasurer, by letter dated September 15, 2016, a copy of the resolutions and its justification for conducting what it refers to as a negotiated private sale. The documents were filed within five days of the September 15, 2016 resolutions. Accordingly, we find no merit in appellant's arguments premised on Executive Order 26.

VI.

Finally, we find no merit in appellant's argument that the NJSEA's resolutions are materially different from the proposals the agency submitted to the Local Finance Board and which the LFB approved. By way of background N.J.S.A. 40A:12A-67(g) provides that:

A financial instrument . . . that is secured in whole or in part by [PILOTs] shall be subject to the review and approval of the [Local Finance Board]. That review and approval shall be made prior to approval of . . . a resolution. **[*16]** . . . As part of its review, the board shall specifically solicit comments from the Office of State Planning and the New Jersey Economic Development Authority in addition to comments from the public. . . . As part of the board's review and approval, it shall consider the comments submitted and whether the issuance of the redevelopment area bond will adversely impact the financial stability of the municipality or service area of the authority.

On this record, we conclude that the NJSEA and the LFB complied with the statute. The LFB has appeared as amicus in this case and has not so much as suggested that the NJSEA departed materially from the terms of its approval. Moreover, based on our review of the LFB application and the transcript of the LFB hearing, we are satisfied that the LFB understood this financial transaction and that the bond issue described in the Resolutions was not materially different from that which the LFB approved. In particular, contrary to appellant's argument on this point, the Wisconsin bonds will not be secured by the PILOTs, and the LFB was aware that the RAB bonds, secured by the PILOTs, will be sold to the Wisconsin PFA.

To the extent not specifically addressed **[*17]** herein, appellant's additional arguments are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Affirmed.

[1] The bonds which will be issued pursuant to the Resolutions are part of a very large, very complex series of financial transactions which will permit a major redevelopment project in the Meadowlands to go forward. Respondents have produced legally competent evidence that a decision of this appeal is needed by September 30, 2016 to permit the financing to take place. In light of the emergent nature of this appeal, we first issued our decision by order dated September 27, 2016. We are now issuing the same decision in this opinion.

[2] Ameream's receipt of the ERG grant money is contingent on its completion of the project - a series of amusement parks and a shopping mall - and generation of sales taxes from the project.

[3] By statute, a municipality may issue RAB bonds secured by PILOTs itself or request that an authority,

such as the NJSEA, issue the bonds. N.J.S.A. 40A:12A-67(a). In furtherance of such a bond issue a municipality or the NJSEA may assign PILOTs as security for the bonds. N.J.S.A. 40A:12A-67(c). By resolution adopted on May 17, 2016, the Borough of East Rutherford requested that the **[*18]** NJSEA issue RAB bonds in connection with the American Dream project. Further, a redeveloper such as Ameream may, with the consent of the EDA and the State Treasurer, pledge or sell the proceeds of an ERG incentive grant. N.J.S.A. 52:27D-489i(g)(1). In its amicus brief, the EDA advises that both the EDA and the Treasurer have approved Ameream's sale of the ERG grant revenue to the NJSEA.

[4] Appellant's statement of facts inappropriately contains legal arguments. See R. 2:6-2(4), -2(5). Those arguments are not properly presented, and we decline to consider them. We will only consider legal arguments set forth in the argument portion of a brief and raised in point headings. See *Almog v. Israel Travel Advisory Serv., Inc., 298 N.J. Super. 145, 155 (App. Div. 1997)*, appeal dismissed, *152 N.J. 361 (1998)*. Appellant has not appealed from the decisions of the Local Finance Board and the Economic Development Authority, which reviewed and approved the NJSEA's financing proposals. The EDA and LFB have submitted an amicus curiae brief, but the validity of their decisions is not at issue on this appeal.

[5] Points III and IV, each of which constitutes a paragraph or two, are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

[6] The Resolution defines "Enforcement Revenues" as "revenues resulting from the enforcement **[*19]** of the obligation to pay such PILOTs."

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