IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GALLENTHIN REALTY DEVELOPMENT, INC., et al.	:	CIVIL ACTION
v.	:	No. 04-4849
BP PRODUCTS OF NORTH AMERICA, et al.	:	

MEMORANDUM

February 18, 2005 Ludwig, J.

This action arises from plaintiffs' contemplated redevelopment of their real estate located in the Borough of Paulsboro, Gloucester County, New Jersey.[1] The complaint purports to aver claims for declaratory judgment (Count I), fraud (Count II), and unjust enrichment (Count III), based on the following facts: Plaintiffs own a 63-acre parcel of land with frontage on the Delaware River - currently operated as a disposal facility.[2] Complaint, ¶¶ 17, 18. Since 1996, plaintiffs have taken steps in anticipation of a complete redevelopment of the site, Complaint, ¶ 18, including attempting to purchase two contiguous properties - a 130-acre parcel owned by defendant BP and a 60-acre parcel owned by defendant Dow. In July 2003, they submitted a "Waterfront Development Permit Application" to the New Jersey Department of Environmental Protection. Complaint, ¶¶ 18(t), (v).

[1] Plaintiffs are Gallenthin Realty Development, Inc., and its owners, LTC George A. Gallenthin, III and Cynthia L. Gallenthin, husband and wife. Defendants are BP Products of North America, Inc, Essex Chemical Corporation, Dow Chemical Corporation, Commerce Bank/Harrisburg National Association, Triad Advisory Services, Inc., URS Corporation, Parker, McCay & Criscuolo, P.A., Gloucester County Improvement Authority, and the Borough of Paulsboro.

[2] The property receives material discharged by the United States Army Corps of Engineers, which periodically dredges the Delaware River for navigation and other purposes. Plaintiffs propose to use the property to accept and process dredge material for reclamation of mines, "portfields," and "brownfields." Complaint, ¶¶ 17, 18(i), (n). Plaintiff would develop "commercial, light industrial and waterfront-related commercial uses" on the property. Complaint, ¶ 18(h).

Beginning March 2002, defendants are alleged to have devised a scheme to thwart the proposed redevelopment and thereby deprive plaintiffs of their property rights. Complaint, ¶ 26. In May 2003, defendant Borough of Paulsboro adopted an ordinance approving a "Redevelopment Plan" under the Local Housing and Redevelopment Law, *N.J.S.A.* 40A:12A-7, and designated plaintiffs' property, among others, as an "area in need of redevelopment."[3] Complaint, ¶¶ 29, 20. Its doing so is alleged to have benefitted defendants, and harmed plaintiffs.[4]

All defendants move to dismiss the complaint, asserting (1) lack of subject matter jurisdiction; (2) lack of ripeness; (3) abstention doctrine dictates; and (4) lack of a claim upon which relief can be granted. Because subject matter jurisdiction has not been substantiated, the motions were granted by order dated February 15, 2005.[5]

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[3] Plaintiffs thereupon filed a "Complaint in Lieu of Prerogative Writ" in New Jersey Superior Court, Gloucester County, Law Division, against the Borough of Paulsboro and others challenging the validity of the ordinance. On July 7, 2004, following a hearing on June 25, 2004, the complaint was dismissed. Plaintiffs' appeal to the Appellate Division is pending. See Exhibits "A" (complaint in lieu of prerogative writ), "B" (transcript of June 25, 2004 hearing before the Honorable George H. Stanger, Jr.), "C" (July 7, 2004 order), and "D" (notice of appeal) to the "Brief of Defendant Commerce Bank/Harrisburg National Association in Support of Motion to Dismiss Complaint." These records, though not described in or attached to the complaint, may be considered in deciding a motion to dismiss. See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping, Ltd., 181 F.3d 410, 426 (3d Cir. 1999).

[4] Recently, Gloucester County publicly gave notice that it will construct an overpass across a portion of plaintiffs' property, linking Interstate 295 with a "proposed deepwater port facility" to be constructed on BP's 130 acres. Adam Fifield, County Announces a Deal to Build an I-295 Overpass, PHILADELPHIA INQUIRER, Feb. 3, 2005, at B1. Furthermore, "there [will] be negotiations with Gallenthin over the use of a portion of his land for the overpass and . . . if negotiations fail[ ], 'eminent domain [will] be engaged.'" Id., quoting John Burzichelli, Mayor of Paulsboro.

[5] Plaintiffs' motion to amend was also denied, given the lack of ripeness and the obligation to abstain from deciding a matter more properly considered by the New Jersey state court. Amendment would appear to be futile. Infra, at 4-5. For these reasons, the complaint was not assessed under Fed. R. Civ. P. 12(b)(6).

The complaint premises itself on federal question jurisdiction, 28 U.S.C. § 1331, and asserts violations of both the River and Harbor Improvement Act, 33 U.S.C. § 540, and the Commerce Clause of the United States Constitution, Article I, Section 8.[6] Complaint, ¶¶ 2-4. However, the River and Harbor Improvement Act has been dispositively held not to embody a private right of action. California v. Sierra Club, 451 U.S. 287, 297-98 (1981); Boatowners and Tenants Assoc., Inc. v. Port of Seattle, 716 F.2d 669, 673-74 (9th Cir 1983). It, therefore, cannot afford plaintiffs a predicate for jurisdiction, regardless whether the alleged violations have occurred.

Moreover, with respect to the Commerce Clause, which gives Congress exclusive power to regulate interstate commerce, no facts are alleged to suggest that the Borough of Paulsboro's designation of plaintiffs' property as an "area in need of redevelopment" materially affects such commerce. State municipalities may incidentally burden interstate commerce in the regulation of local domestic commerce. See Harvey & Harvey, Inc. v. City of Chester, 68 F.3d 788, 797 (3d Cir. 1995), quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (statute that affects interstate commerce "will be upheld unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'") See also Elberton Southern Ry. Co. v. State Highway Dept., 89 S.E.2d 645, 649 (Ga. 1955) ("[A] State may exercise the power of eminent domain although interstate commerce may be indirectly or incidentally involved."). In short, "[t]he purpose of the Commerce Clause is not to protect individual firms." Harvey, 68 F.3d at 799. Accordingly, the Commerce Clause does not offer grounds for the exercise of subject matter jurisdiction in this case.

[6] There is no basis for diversity jurisdiction, inasmuch as all plaintiffs and some defendants are citizens of Pennsylvania. Complaint, ¶¶ 7-16.

Plaintiffs' "Motion to Dismiss or Otherwise Grant Leave to Amend the Complaint," filed in response to defendants' motions to dismiss, implicates federal jurisdiction under various Acts of Congress: the Sherman Act, 15 U.S.C. § 2; the Federal Coastal Zone Management Act, 16 U.S.C. § 1451; the Hobbs Act, 18 U.S.C. § 1951; the Declaratory Judgment Act, 28 U.S.C. § 2201; the Federal Water Pollution Act, 33 U.S.C. § 401 and § 1251; and the Civil Rights Act, 42 U.S.C. § 1983. With the exception of the Declaratory Judgment Act, which cannot be an independent source of jurisdiction, see Terra Nova Ins Co. v. 900 Bar, Inc., 887 F.2d 1213, 1218 n.2 (3d Cir. 1989), none of these Congressional statutes is mentioned or adverted in the complaint.

"Under the well-pleaded complaint rule, a cause of action 'arises under' federal law . . . only if a federal question is presented on the face of the plaintiff's properly pleaded complaint." Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 353 (3d Cir. 1995). When jurisdiction is challenged, it is plaintiff's burden to establish that jurisdiction exists. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). Here, plaintiffs have not done so. The factual allegations in the complaint, taken as true, are a private individual's challenge to the exercise by a municipality of its power to enact local land use law; no more. Without a sound basis for the exercise of federal jurisdiction, this action must be dismissed.

Plaintiffs request leave to amend. Axiomatically, leave to amend, "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), unless the amendment would be futile.[7] Here, even if the

[7] Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. . . . In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of amendment, futility of amendment, etc. - the leave should, as the rules require, 'be freely given.'" Foman v. Davis, 371 U.S. 178, 182 (1962). See also Jablonski v. Pan Am World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988)

amended complaint proposed a good basis for federal jurisdiction,[8] dismissal would be required because the claims are not ripe[9] and because abstention doctrine would not permit the exercise of jurisdiction.[10]

BY THE COURT:

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Edmund V. Ludwig, J.

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[8] In this instance, the lack of the proffer of the proposed amended complaint is sufficient to deny the request. See Cureton v. National Collegiate Athletic Ass'n, 252 F.3d 267, 273 (3d Cir. 2001).

[9] "[A] court has no alternative but to dismiss an unripe action." Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 535 (1st Cir. 1995). Here, though plaintiff's property has been designated an "area in need of redevelopment," no declaration of taking has been filed by the Borough. Until plaintiffs' property is condemned, and the condemnation approved by the New Jersey courts, it is unlikely that a controversy exists. See Eddystone Equip. and Rental Corp. v. Redevelopment Auth. of Cty. of Delaware, Civ. A. No. 87-8246, 1998 WL 52082, at *2 (E.D. Pa., May 17, 1988). See also Patel v. City of Chicago, 383 F.3d 569, 573 (7th Cir. 2004) (where ordinance identified potential targets for acquisition, but no condemnation had been taken place, no injury had occurred and civil rights case filed by plaintiffs was not ripe). A de facto condemnation is not alleged. See complaint.

[10] See Younger v. Harris, 401 U.S. 37, 46 (1971); Gwynedd Properties, Inc. v. Lower Gwynedd Township, 970 F.2d 1195, 1199 (3d Cir. 1992) (abstention doctrine reflects a "strong federal policy against federal court interference with pending judicial proceedings absent extraordinary circumstances"). Younger abstention is appropriate where (1) there are ongoing state proceedings that are judicial in nature; (2) the proceedings involve state interests; and (3) the state proceedings offer adequate opportunity to litigate any federal claims. Id. at 1200. As noted, plaintiffs' appeal in their state case is pending. Further, the legality of a local land use ordinance entails special state interests. New Jersey law sets forth a mechanism for condemnees to challenge any aspect of a condemnation in state court. See N.J.S.A. 20:3-5. Abstention is also appropriate under Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (abstention appropriate to avoid disrupting state's effort to "establish a coherent policy with respect to a matter of substantial public concern). See Coles v. Street, 38 Fed. Appx. 829, 831 (3d. Cir. 2002) (affirming district court decision to abstain in eminent domain case because "questions of state law concerning a state's desire to establish a coherent policy with respect to a matter of substantial public concern, such as eminent domain, abstention is proper.")