

Old Bridge 1984

letter to Judge + motion for an accelerated ordinance revision
process

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FILE NO.

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THOMAS F. CARROLL
JANE S. KELSEYHonorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
Toms River, New Jersey 08753Re: Urban League of Greater New Brunswick, et. al. v. Borough of
Carteret, et al. (Old Bridge Township), C-4122-73
O&Y Old Bridge Development Corp. v. Township of Old Bridge,
C-009837-84.

Dear Judge Serpentelli:

Your Honor has advised the parties to this litigation that, should Defendant Old Bridge Township fail to draft an acceptable ordinance revision by October 30, 1984, a master would be appointed upon submission of an order by the Urban League. It is our understanding that Urban League has submitted such an order. We support Urban League's action, and request, through this motion that this court take specific actions in order to accelerate the progress of this case.

We have been concerned, since Your Honor's Order of July 13, 1984, that the Township would not make the kind of substantive revisions in its land development process we thought necessary to actually provide realistic opportunities for the construction of lower income housing, partially because of the inherent difficulty in the process and partially because the Township lacked the incentive to go forward in a timely manner, particularly since it had no obligation to take the concerns of the developers into consideration. (See copy of Your Honor's Order of July 13, 1984, attached hereto as Exhibit "A," permitting the Township to settle with the sole consent of Plaintiff Urban League).

We have now received a copy of the Township's latest Resolution, provided to us under letter dated October 30, 1984, and find that the Township has again—despite our earlier critique—failed to recognize the inequities of their original proposal and apparently continues to believe that it can place the entire obligation for the production of lower income housing on the larger developers and thereby provide realistic opportunities for the production of lower income housing. (Copy of Resolution and cover letter attached hereto as Exhibit "B").

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The purpose of this letter is to set forth, in narrative fashion, some of our concerns with respect to the pace of this litigation, our understanding of the roles of the parties, and a request, in the form of a motion, for an accelerated Ordinance revision process with the full participation of all of the parties, including Olympia and York (hereinafter "O&Y").

With respect to consolidation of these actions, Your Honor has already ruled that these matters are consolidated for purposes of (1) plaintiffs' participation in the ordinance revision process and (2) plaintiffs' right to assert their entitlement to a builder's remedy. (Copy of Your Honor's August 3, 1984, Consolidation Order attached as Exhibit "C"). It is O &Y's position, that with the appointment of the Master, these cases are now fully consolidated and the Township should now enter into full negotiations with O &Y. It is our understanding that the "priority" which was accorded to the Urban League as a result of the July order no longer pertains, now that a Master has been requested.

We wish to set out, in some detail, why we have been concerned that the July order may have encouraged the Township not to discuss substantive issues with O &Y, and why it is our contention that the interests of justice are served if these cases are considered fully consolidated, with all parties having the right to receive all correspondence, attempt to attend and participate in all settlement discussions, submit suggestions to the Township and the Master, which may include suggestions for revisions to the land development approval process, and attempt to settle any or all issues with the Township.

First, as will be more fully discussed *infra*, O&Y contends that, by virtue of its prosecution of this action, O&Y has acquired certain rights. Those rights include the right to attempt to achieve a settlement with the Township and the concomittant right to effectively negotiate with the Township.

Second, the Township of Old Bridge has, for the past twelve years or so, demonstrated a remarkable ability to achieve judicially mandated rezonings and "settlements" which have resulted in nothing more than the "paper compliance" criticized by the Court in Southern Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II"). As will be more fully developed, the present exclusion of O&Y from the settlement process, in O&Y's opinion, greatly increases the likelihood that the Township's rezoning will result in yet another example of paper compliance.

Third, and in a related vein, O&Y must stress the obvious fact that any settlement of this case will be meaningless if actual construction of lower income housing does not ultimately take place in Old Bridge. O&Y has a direct financial interest in ensuring that any rezoning will accomodate the actual construction of such housing. The Court in Mount Laurel II recognized this incentive when it pronounced the liberality with which builders' remedies are to be awarded.

O&Y holds 2,500 acres of land in the Township. O&Y has also expanded vast sums of money in studying the Township's ordinances and the somewhat unusual market conditions in the Township. O&Y believes that, for a variety of reasons, effective implementation of the Mount Laurel doctrine will not occur in Old Bridge if O&Y is not a fully effective party to this litigation. As the matter stood prior to the appointment of the Master, O & Y's position more nearly resembled that of a helpless bystander than it did an effective party.

Set forth below is a brief procedural history which we think will convince the Court that: (1) O&Y is legally entitled to attempt to enter into a settlement with the Township and; (2) the Township's past elusive conduct indicates that further negotiations without the effective participation of O&Y will result in no more than a needless expenditure of time.

Plaintiff Urban League originally filed an exclusionary zoning suit against the Township of Madison (now Township of Old Bridge) in 1972. Following our Supreme Court's pronouncements in Southern Burlington Cty. N.A.A.C.P. v. Tp. of Mount Laurel, 67 N.J. 151 (1975), the Urban League "settled" with the Township via a Consent Judgment dated July 9, 1976. This Consent Judgment was executed by the Honorable David D. Furman, J.S.C. The Urban League suit, and the Consent Judgment entered therein, involved 23 Middlesex County municipalities.

Pursuant to said Consent Judgment the Township was ordered to revise its zoning ordinance so as to comply with its fair share obligation as calculated in 1976. (See para 15 of July 9, 1976, Consent Judgment a copy of which is attached as Exhibit "D") See also Urban League, et. al. v. Carteret, 142 N.J. Super. 11, 38 (Ch. Div. 1976). The Township was given 90 days in which to rezone. (See para. 16 of said Judgment). Judge Furman retained jurisdiction for the purpose of supervising full compliance with the Judgment. (Para. 17 of said Judgment).

Some 11 Middlesex municipalities appealed Judge Furman's rulings with respect to noncompliance and fair share allocation. Urban League, et al v. Carteret, 170 N.J. Super 461 (App. Div. 1979). The Township of Old Bridge did not appeal. Id. at 467.

In the interim, the Township ordinance had again been held invalid in Oakwood at Madison, Inc. v. Tp. of Madison, 72 N.J. 481 (1977), an action brought by a developer. The Oakwood at Madison Court upheld Judge Furman's findings of the invalidity of the 1973 Ordinance in Oakwood at Madison, Inc. v. Tp. of Madison, 128 N.J. Super 438 (Law Div. 1974). Parenthetically, it should be noted that Judge Furman had also found the Township's 1970 Ordinance invalid in Oakwood at Madison, Inc. v. Tp. of Madison, 117 N.J. Super. 11, 21 (Law Div. 1971).

Subsequent to Oakwood at Madison, the Appellate Division opinion in the Urban League action was reviewed by our Court in Mount Laurel II, 92 N.J. 158, 339. Again, the Township of Old Bridge was not a party to this appeal since, as perceived by the Court, the trial court "effectively settled the matter as to 11 of the municipalities [of which Old Bridge was one] that have apparently satisfactorily modified their ordinances to comply with Mount Laurel." 92 N.J. at 340.

In further discussing Old Bridge and the other conditionally - dismissed municipalities, the Court said:

We have decided not to rejoin the conditionally-dismissed municipalities since they must soon (if they have not done so already) amend their land use regulations anyway, pursuant to N.J.S.A. 40:55D-89,¹ and will obviously be required to take their fair share obligations into account at that time.
Id. at 349, n. 78.

If the foregoing presents a confusing picture as to validity of the Township's ordinance over the years, such confusion is unavoidable. Through numerous rezonings, subsequent holdings of invalidity and "settlements," it is indeed difficult to ascertain how many times the Township's ordinance has been held to be invalid. Specifically, since Judge Furman's July 9, 1976, Consent Judgment, the legal status of the Township's ordinances and the relative rights of various litigants are all but clear.

For example, the 1976 Consent Judgment directed Old Bridge to rezone within 90 days with Judge Furman retaining jurisdiction. It appears that Judge Furman never again ruled on the validity of the Old Bridge ordinance. In Oakwood at Madison, however, decided the following year, the Court invalidated the Township ordinance and remanded to the trial court for judicially supervised rezoning. 72 N.J. at 552-554. As Your Honor is aware, Urban League's motion to modify and enforce Judge Furman's 1976 Consent Judgment was granted by Your Honor and an Order to that effect was executed January 26, 1984 (Copy of Order is annexed hereto as Exhibit "E").

There has arisen a dispute as to which plaintiff has priority in prosecuting this action, *i.e.* which plaintiff was "first". For reasons more fully described *supra*, there is some doubt as to whether Judge Furman's 1976 Consent Judgment is indeed capable of enforcement. Specifically, it is not clear that Judge Furman's Consent Judgment survived the Supreme Court's holding with respect to noncompliance in Oakwood at Madison. Since Old Bridge did not

¹ N.J.S.A. 40:55D-89 provides that all municipalities must reexamine their master plan, regulations and ordinances every six years.

participate in appeals taken in the Urban League case, neither the Appellate Division ruling nor Mount Laurel II directly affected the viability of Judge Furman's Judgment.

In any event, assuming that Judge Furman's Consent Judgment was capable of modification and enforcement, whether the Urban League was "first" in prosecuting the instant action is still not entirely clear. Your Honor's Order modifying and enforcing said Judgment was executed January 26, 1984. O&Y's most recent Complaint against Old Bridge was filed February 14, 1984. Obviously, your Honor's Order predated O&Y's Complaint by some 19 days. O&Y submits however that this fact alone does not tell the whole story.

Unfortunately, O&Y must once again digress into the history of this action in order to illustrate the position of O&Y. Briefly described, O&Y filed its first suit on February 18, 1981. For well over two years, O&Y engaged in intermittent negotiations with Old Bridge which were punctuated by periods of active litigation. Numerous times O&Y was under the impression that the action was settled only to be ultimately frustrated by the intransigence of the municipal governing body and planning board (See Exhibit "F", attached hereto, for a more detailed outline of the chronology of this action).

In December of 1983, O&Y was once again under the impression that its dispute with Old Bridge was settled. Much to O&Y's chagrin, the Township Planning Board insisted that planning board review be adjourned until January of 1984 at which time the Planning Board would be wholly reconstituted and, since the voters had chosen both a new form of government and had shifted control to a different political party, O & Y would have to deal with a completely new Board. Having been faced with years of negotiations, breakdowns, more negotiations, presentations, litigation and the attendant expenses thereof, O&Y was essentially being asked to start the process all over again. O&Y found this Township demand to be intolerable and was forced to attempt to reinstate its 1981 lawsuit, placed on the inactive list due to O&Y's hope of a settlement, to the active list. (See copy of Judge Harding's Order of March 2, 1983, placing the matter on the inactive list, attached hereto as Exhibit "G").

O&Y's attempt to reinstate its 1981 lawsuit met the same obstinacy characteristic of the Township throughout the years. Since the Township ordinance had been amended subsequent to the filing of the 1981 suit, O&Y sought to reinstate its 1981 lawsuit and amend its complaint so as to reflect the latest revisions to the ordinance. In January of this year, the Township insisted that the 1981 Complaint could not be amended and that the 1981 suit must be dismissed and a new lawsuit filed. (See January 17, 1984 letter from a Township attorney to Judge Harding, attached hereto as Exhibit "H").

It must be recalled that, at the time O&Y sought to reinstate and amend its Complaint, neither Urban League nor any other plaintiff had a Mount Laurel lawsuit pending against Old Bridge. Unknown to O&Y, there existed

Judge Furman's long dormant Consent Judgment of July 9, 1976, the vitality and enforceability of which was (and is) open to question.

Subsequently, Urban League filed its motion to modify and enforce Judge Furman's Judgment. Since O&Y was not a party to the Urban League action, O&Y was not served with copies of said motion papers.

Seeing no procedural significance, O&Y eventually agreed to dismiss its 1981 action and file a new lawsuit.²

This decision to honor Old Bridge's request to file a new complaint, coupled with the motion to enforce the 1976 Judgment brought by the Urban League (known to Old Bridge but not to O&Y) has now resulted in a situation whereby Urban League was put into a position to settle the litigation with Old Bridge without the consent of O&Y, and with the Township willing to address those issues of concern to Urban League while ignoring the concerns expressed by O & Y.

O&Y submits that the question of which plaintiff was "first" could be pondered long into the night, and, except for the expenditure of millions of dollars on the part of O&Y, such pondering could be mostly of use to scholars of civil procedure. In this case, however, there are some real costs attached to procedural issues. O&Y has expended years and literally millions of dollars in an attempt to construct lower income housing in the Township of Old Bridge. (See affidavit of David Listokin submitted in support of this motion, attached hereto as Exhibit "J"). Whether or not O&Y was "first," O&Y's essential position is quite clear.

O&Y attempted to file its most recent Complaint at a time when it was not apparent that there was no Mount Laurel litigation pending against Old Bridge.

O&Y has "carried the ball" for a number of years. With the assistance of a court-appointed Master to ensure that the process would be likely to bear real fruit, O&Y would again appreciate the opportunity to negotiate a settlement with the Township.

The decision to grant Urban League some sort of priority in this case, and vesting in them the right to negotiate a settlement with Old Bridge without the consent of O & Y, and to deny to O&Y the right to attempt a settlement, may have been a result of Your Honor's belief that negotiation with a single party would be more likely to bring about a successful result than negotiation

² Actually, Judge Harding's Order, dismissing the 1981 action was not executed until February 22, 1984. (Copy of order attached hereto as Exhibit "F").

with a multiplicity of parties. However Your Honor reached your earlier conclusion, we must respectfully and sadly point to the result achieved thus far: the passage of additional time; no real progress, no housing under construction.

As previously indicated, O&Y has endured years of litigation and expended substantial sums of money in an effort to construct needed new housing in Old Bridge. Neither O & Y, nor any other developer who has articulated the rights of lower income households through the litigation process (vide Oakwood at Madison, a developer whose rights are now extinguished) has yet been successful. Moreover, it now appears that by entering the litigation process, O & Y has incurred perhaps more risks that it might have if it had stayed on the sidelines. One of our fears— hopefully eliminated now that a Master has been requested — was that O & Y would be "just another developer" in Old Bridge. For example, a developer which decides to present a Mount Laurel proposal to Old Bridge today could, presumably, have submitted its proposal to Old Bridge on the same terms as those which governed O&Y's participation. Or, as will be noted below, the Township might well have decided to "settle" with Urban League on terms and conditions which appear to be attractive to Urban League but which would have harmed O & Y substantially. O&Y submits that the inequities which would have resulted are apparent. O&Y further submits that such a result is contrary to the Court's holding in Mount Laurel II.

While O&Y does not wish to belabor the point, O&Y must stress that the primary reason for granting a builder's remedy is to encourage the actual construction of housing.⁹² N.J. at 279-280, 309 n.58. O&Y acknowledges that it could object to a "settlement" reached by Old Bridge and the Urban League. It is possible, however, that such a settlement could potentially accommodate the fair share obligation while side-stepping the developer which brought the lawsuit at the outset. Conceivably, a settlement could be achieved through the use of tracts belonging to developers foreign to the lawsuit. What then would be O&Y's burden in having the settlement rejected? Must O&Y demonstrate that its property is free of planing or environmental constraints and should therefore have been rezoned? Would it be left with some sort of "second-tier" builder's remedy? Would it be able to re-litigate any issues, given the possibility of having a judgment of compliance entered on behalf of Old Bridge, even if that judgment cut against O & Y 's attempts to construct lower income housing?

O&Y contends that it has the status of a plaintiff - developer which filed suit when there existed no apparent Mount Laurel litigation against the Township. O&Y believes that this status entitles O&Y to a builder's remedy unless the Township can prove that O&Y's site suffers from planning or environmental constraints.

With this understanding, we think it appropriate to note, once again, our problems with the substantive offers made by the Township on September 4, 1984 and again by Resolution sent to us by Mr. Convery on October 30, 1984. We think these offers are, unfortunately, further examples of "paper compliance" with the constitutional mandate to provide lower income housing in Old Bridge.

As previously indicated, Old Bridge has on numerous occasions rezoned and/or "settled" exclusionary zoning actions directed against the Township. These rezonings and settlements have resulted in no more than the "paper compliance" criticized by the Court in Mount Laurel II. 92 N.J. at 198-204.

Briefly described, the proposed new ordinance distinguishes between tracts of less than 300 acres (PD I) and tracts of greater than 300 acres (PD II). PD II developers must set aside 20% of their development for lower income housing. PD I developers have no such obligation. That PD II developers would be placed at a significant economic disadvantage is apparent. While O&Y feels that such an ordinance would guarantee that no lower income housing is built in Old Bridge, the offer might have been facially attractive to anyone not thoroughly familiar with the nuances of the Old Bridge Ordinance. We submitted a critique of the earlier proposal outlined in Mr. Convery's letter of September 4th in a letter with an enclosed memorandum dated September 19th, which clearly indicated the defects in the Township's proposal. It is a measure of how little weight Old Bridge gave O & Y's concerns that the Resolution adopted by the Council and enclosed in Mr. Convery's October 30th letter contained no substantive changes in the proposed settlement offer.

The Resolution, moreover, evinces total disregard for the necessity to provide realistic opportunities for the construction of lower income housing and disregards the concerns, expressed by O & Y in a detailed memorandum provided the Township in August, for true procedural reform.

It is essential to note the realities of the situation. The Urban League has many Middlesex County cases pending and, unfortunately, the Urban League suffers from limited resources. On the other hand, O&Y has expended considerable time and resources in an attempt to fully analyze the housing market of the Old Bridge community and the various ordinances revisions proposed by the Township. For this reason O&Y has developed an expertise in the area which O&Y believes is second to none.

The effective utilization of this expertise will be invaluable, even with the assistance of the Master, since the existing Ordinance is complex and the proposals submitted by the Township demonstrate that the Township is not making a good faith effort to enact a compliant ordinance. In addition, satisfaction of the Township's Mount Laurel obligation is complicated by the peculiar housing market conditions existing in Old Bridge. O&Y is in possession of comprehensive studies which indicate that the local housing market will not support the higher-priced housing which typically allows developers to recoup their losses on the lower income units. These market conditions indicate that conventional municipal concessions, e.g. density bonuses, will not necessarily allow for complete satisfaction of the Township's Mount Laurel obligation.

To summarize our legal position, it is clear that the 45 day period specified in the July Order has expired, and that, with the appointment of the Master, O&Y believes that the cases are now fully consolidated and the

settlement process should include O&Y as well as the Urban League. It is obvious that "settlement" of this litigation will be meaningless if construction of lower income housing does not result from an ordinance revision. O&Y submits that Mount Laurel II grants to O&Y the right to a builder's remedy unless the Township can show that O&Y's proposal is unsound. The Township has made no such showing. O&Y further submits that the Township cannot meet its fair share without the participation of O&Y and that the procedural and other concerns expressed by O & Y in its previous communications to the Court and the parties ought to be considered by the Master and the Township.

With respect to the appointment of the Master, O&Y requests that an accelerated time schedule for ordinance revision be set forth by the Court. As indicated, Old Bridge Township has time and time again failed to comply with judicially imposed mandates to adopt a compliant ordinance. Most recently, on July 13, 1984, Your Honor granted the Township 45 days with which to negotiate an agreement with Urban League. Over 100 days have now passed and the Township has still not proposed anything approaching a good faith attempt to comply with the Township's Mount Laurel obligation. While the Township engages in what O&Y believes to be yet another stalling strategem, the passage of time works a substantial hardship on the plaintiffs in this action. In particular, each passing day results in an additional expense to O&Y of over \$18,000 (See affidavit of Listokin, Exhibit "J").

O&Y submits that the lack of good faith on the part of the Township is apparent. O&Y further submits that it is likewise apparent that actual construction of lower income housing is rendered less feasible with each passing day. O&Y therefore suggests that an accelerated schedule for rezoning is justified under the circumstances of this case. O&Y further suggests that the Master be given a period of 20 days in which to review this litigation and the attendant ordinances in question. In light of the fact that the Township has already been reviewing its ordinance for a considerable period of time (not only the past several years, but, as a result of the decision by the Township in July to admit that they had a non-conforming Ordinance, at least intensively for the past 3 months) O&Y requests that the Court order the Township to rezone within the 45 days period following review by the Master. O&Y submits that, if the Township truly desires to comply with Your Honor's directive to rezone, a total of 65 days should be more than sufficient. O & Y has already provided Old Bridge with suggestions as to what items need be changed in order to accomodate its interests, and would be willing to work with the Township to prepare an effective Ordinance which would result in the actual construction of housing.

Finally, O&Y requests that Your Honor order that, should the Township fail to submit a compliant ordinance within the time set forth by this Court, O&Y may move for sanctions including those set forth in Mount Laurel II, 92 N.J. at 285-286. It is O&Y's belief that despite Your Honor's directive, the Township has not yet elected to pursue in good faith its obligation to enact an ordinance which meets constitutional standards. O&Y further believes that

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specifying the remedies available to O&Y upon a showing of non-compliance will aid in convincing the Township that its obligation is to be taken seriously.

For the foregoing reasons, O&Y requests that the Court:

- (1) direct that the matters are now fully consolidated and that O&Y is hereinafter entitled to (a) receive copies of all correspondence circulated in this litigation; (b) attend and actively participate in all meetings and discussions concerning this litigation; (c) submit suggestions including suggested ordinance revisions and; (d) attempt to enter into a settlement with the Township;
- (2) set forth an accelerated time schedule in which the Township must rezone and;
- (3) direct that O&Y may move for sanctions including those provided for in Mount Laurel II, should the Township fail to submit a compliant ordinance within the time period allotted by this Court.

O&Y sincerely appreciates Your Honor's attention in this matter.

Very truly yours,
BRENER, WALLACK & HILL

By: 

Thomas J. Hall

TJH/TFC/sp

cc: All Counsel of Record