UL v. Cortese (Old Bridge) (1985)

Alan Malach's affidavit

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs vs. THE MAYOR and COUNCIL of the BOROUGH OF CARTERET, et al., Defendants	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY Docket No. C-4122-73
O&Y OLD BRIDGE DEVELOPMENT CORPORATION, Plaintiff vs. THE TOWNSHIP OF OLD BRIDGE, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE and the PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY Docket No. L-009837-84 P.W.
WOODHAVEN VILLAGE, INC., Plaintiff vs. THE TOWNSHIP OF OLD BRIDGE, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE and the PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY Docket No. L-036734-84 P.W.
OAKWOOD AT MADISON, INC., Plaintiff vs. THE TOWNSHIP OF MADISON and THE STATE OF NEW JERSEY, Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY Docket No. L-7502-70 P.W.

AFFIDAVIT

STATE OF NEW JERSEY)
: ss.:
COUNTY OF MIDDLESEX)

ALAN MALLACH, of full age, being duly sworn according to law, deposes and says:

1. I am a housing and development consultant retained by the Urban League plaintiffs to consult on issues related to the above-captioned litigation, which issues include methods of compliance with the fair share obligation of defendant Townships. I make this affidavit in support of the Urban League plaintiffs' motion for consolidation or intervention, and for temporary restraints against the development of Oakwood at Madison in the absence of assurances that that development will provide 20 percent of its units as low and moderate income housing within the meaning of the Supreme Court opinions in both Oakwood at Madison and Mount Laurel II.

2. I have reviewed the Supreme Court decision in Oakwood at Madison v. Township of Madison, 72 N.J. 481 (1977), the Stipulation of Settlement filed in the Superior Court in that case on May 31, 1977, the resolution of preliminary approval by the Old Bridge Planning Board dated June 30, 1978, the resolution of final approval dated August 23, 1979, and the Supreme Court decision in Mount Laurel II. The Supreme Court's opinion and the Stipulation in Oakwood at Madison expressly provide that 20 percent of the total number of units to be built were to be affordable by "low and moderate income" families. In providing

that Oakwood at Madison be given a builder's remedy subject to that condition, the Supreme Court expressly referred in footnote 49 of its opinion to the Statewide Housing Allocation Plan for New Jersey for definition of those terms. It is clear that the terms "low and moderate income" as used in Oakwood at Madison and in Mount Laurel II are so close in meaning as to have no substantive difference. In each case, "low income" means no more than 50 percent of the median income and "moderate" means between 50 and 80 percent of the median income. Nevertheless, I have been informed that Oakwood at Madison is proposing to provide, in place of such units, housing that does not meet those standards, that there are no provisions to insure that the lower income units would be re-sold or re-rented only to qualified households, and that there is no provision for phasing construction of the lower income units with the market units. Indeed, I understand that Oakwood at Madison may soon be obtaining permission to construct the first 120 market units without any requirement that it include 20 percent low and moderate income units.

3. If Oakwood at Madison were to be allowed to develop 1400 market units without any lower income units, or without those units meeting the Oakwood-Mount Laure II standards, it would create a severe competitive disadvantage for plaintiffs O&Y Old Bridge Development Corp. (hereafter O&Y) and Woodhaven Village and would seriously undermine the realistic possibility that Old Bridge's 1990 fair share of the regional low and moderate income need, defined by this Court's Order of July 13, 1984

as 2135 units, would be constructed. This is true for several reasons.

4. First, if Oakwood at Madison's development did not have to bear any or the full subsidy needed to construct most low and moderate income units, Oakwood at Madison could sell its market units at a significantly lower price than either O&Y and Woodhaven, both of whom would be producing substantially identical market units, but which would have to bear the subsidy cost of including genuine Mount Laurel units.

5. Second, on information and belief, Oakwood would have substantially lower infrastructure costs. Oakwood's land is closer to existing developments and to the center of town, and its development is substantially smaller than either O&Y's or Woodhaven's. Even its off-site water related improvements would be less substantial than those necessary for development by O&Y or Woodhaven. Thus, Oakwood's per unit infrastructure cost will be less than the other two developers' costs, quite apart from the absence of a Mount Laurel subsidy.

6. These competitive advantages are particularly important in the context of the Old Bridge housing market. Old Bridge is, first of all, perceived as a less attractive location for high-priced market housing than many of the adjacent or nearby towns. Moreover, Old Bridge is located in a housing market area in which massive number of units have been or will shortly be approved

within similar planned developments, incorporating inclusionary set-asides. Largely as a result of Mount Laurel litigation, roughly 40,000 such units are planned or expected in the western Monmouth and Southern Middlesex area, in communities such as South Brunswick, North Brunswick, Cranbury, Manalapan, and East Brunswick. In addition, Monroe, Freehold, Colts Neck, Howell, Holmdel and Marlboro are now in various stages of Mt. Laurel litigation, that can be anticipated to result in still further massive rezoning. Demand in any housing market is necessarily finite. The perception that Old Bridge is a less attractive location than other communities means that the market units must be priced lower than elsewhere to compete. Developers in Old Bridge thus have little flexibility in the pricing of their units. The cost advantages that Oakwood at Madison would reap by being allowed to build only market units or units affordable to households with more than 80 percent of median income would seriously undermine if not destroy the opportunity for O&Y and Woodhaven to sell comparable market units from a truly inclusionary housing development.

7. Finally, even if the competitive advantage would not render it impossible for the other developers to proceed, it would make it very probable that O&Y and Woodhaven would delay substantial construction until Oakwood is largely built-out. The market can only absorb so many units per year. If Oakwood is

allowed to proceed with building 300 to 400 units per year in Old Bridge, there is a substantial likelihood that little or no development with a true Mount Laurel set-aside will occur until 1990 or later. Thus, permitting the construction of Oakwood at Madison would effectively eliminate the realistic opportunity for construction of any substantial amount of Old Bridge's fair share of 2135 lower income units by 1990, an opportunity secured by the Urban League only after 11 years of hard-fought litigation.

8. For these reasons, it is my opinion that permitting Oakwood at Madison to proceed with its development, without requiring construction of low and moderate income units as defined in both the Oakwood at Madison and Mount Laurel II decisions, would effectively eliminate the realistic opportunity for construction of Old Bridge's judicially determined fair share of lower income housing.

ALAN MALLACH

SWORN TO and SUBSCRIBED
before me this 29th day
of March, 1985.

John M. Payne
Attorney at Law, State of New Jersey