Odd Bridge (1987)

Rpy Letter Brief for Odd Bridge

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August 12, 1987

Mr. C. Roy Epps, President
Civic League of Greater New Brunswick
47-49 Throop Avenue
New Brunswick, NJ 08901

Dear Roy:

Enclosed please find, for your review, Reply Letter Briefs filed by the Township of Old Bridge and the Planning Board.

The judge has adjourned the motion to vacate until September 14, 1987 at 1:30 p.m.

Sincerely,

encls

cc/Payne, Neisser,
Pat, Diane, Barbara (w/o exhibits)

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

TOWNSHIP OF OLD BRIDGE

August 11, 1987

Honorable Eugene D. Serpentelli, A.J.S.C.
Ocean County Court House
CN 2191
Toms River, NJ 08754

Re: Urban League, et al
v. Carteret, et al
Woodhaven Village Inc./ O & Y
vs. Old Bridge
Docket No. C 4122-73

Dear Judge Serpentelli:

Please accept this letter in lieu of Reply Brief to the documents recently filed on behalf of the Urban League, O & Y and Woodhaven Village.

POINT I

THE MAGNITUDE OF THE WETLANDS IN THIS CASE PROVIDES A BASIS FOR VACATING THE JUDGMENT UNDER R. 4:50

The Plaintiffs in this case all argue that the "mechanism" set forth in the settlement provides a basis for continuing with the settlement, and that the plans submitted are subject to review, negotiation, and resolution by the Master or the Court. What the Plaintiffs ignore is the magnitude of the wetlands in this case, and resulting impact of these vast wetlands on development of these environmentally sensitive lands. The fact is that O & Y has approximately 54% percent wetlands; Woodhaven has approximaely 30% wetlands. Certainly this Motion to vacate would not have been forthcoming if the developers each had 10% wetlands, but this Motion to Vacate is necessary and proper because the extent of the wetlnds indicates a "material mistake of fact", "constitutes newly discovered evidence", and renders enforcement of the original settlement and judgment to be "impossible". When the Township of Old Bridge entered into the settlement in question, it

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

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did assume that the developers could in fact provide the number of residential units stated in the settlement, the amount and type of commercial development stated in the settlement, and could produce the number of low or moderate income homes stated in the settlement, pursuant to the reduced 10% set aside. As indicated in the Certification of Council President Eugene Dunlop, the commercial development and the 10% set aside were important considerations to the Township Council in deciding to enter into the settlement. The Plaintiffs can not now ignore the fact that commercial development was an integral part of the settlement; otherwise why would it have been incorporated into the settlement documents, including a provision that commercial development be staged with residential development. The various aspects of the settlement were and are clearly interrelated and the Township of Old Bridge will be prejudiced by the enforcement of this judgment, since it is clear that the wetlands prevent the developers from performing as agreed regarding commercial development, and the production of the number of low and moderate income units agreed upon.

Whereas the Plaintiffs attempt to compare the magnitude of the wetlands with changes in the economy, regarding its effect on the settlement, the analogy is not appropriate. Whereas, changes in the economy might hasten or slow the implementation of the settlement, the extent of the wetlands in this case renders the enforcement and implementation of the settlement impossible. Whereas changes in the economy might mean that the developer could not build and sell both the residential and commercial units as quickly, the developers would, over time, be able to perform. The extent of the wetlands, however, is now a fact having been delineated by the Army Corps of Engineers, and it is obvious that the developers must greatly scale down their developments, and can not provide the commercial properties agreed upon. It is submitted that the magnitude of the wetlands does constitute "newly discovered evidence", which would probably change the result if this case were to be tried before the Court. Certainly the amount of low and moderate income units that Old Bridge should provide is directly related to the amount of developable land that O & Y and Woodhaven have, and would probably change the percentage of the Set Aside Ordinance in this case.

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

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It is respectfully submitted that the wetlands delineation has clearly shown that the amount of wetlands in this case constitutes "extraordinary circumstances", and that it would be a"manifest injustice" to require the Township of Old Bridge to proceed with the judgment in this case. As indicated above, a wetlands delineation of 10% would allow for the proposed settlement mechanism to work, and, in all probability, there would be a consensus that the development could be built consistent with good planning objectives. The main point here is that the extent of the wetlands clearly indicate that we are dealing with environmentally sensitive land, and that it would be a manifest injustice to force the Township of Old Bridge, and its residents, to accept development which would negatively impact on the land in question, and constitute extremely poor planning.

The Civic League claims that the mechanism provides procedural flexibility and that the Plaintiffs are willing to adhere to the mechanism. The Civic League argues that the key concept is proportionality and that the settlement carefully links the amount of commercial development at any one time to the amount of residential development. However, if the present settlement is enforced under the terms as written, O & Y would be permitted to build 50% of its dwelling units before it provided any ratables, pursuant to Section V-C.6. Since O & Y now proposes to build approximately 5,000 dwelling units, it would be able to avoid any commercial development under the Staging Performance Schedule Outline. Obviously, the key concept of proportionality has been lost, and the Staging Performance Schedule agreed upon by the Township of Old Bridge certainly is prejudicial to its interest. This is a clear cut example of the "mechanism" not working because the extent of the wetlands has destroyed the relationship between various aspects of the settlement. Clearly the Township of Old Bridge will no longer get what it bargained for in the Settlement Agreement.

The mutual mistake in this case relates to a material fact, i.e. the amount of wetlands on the developer's property, and, in this case, dictates that the judgment and settlement must be set aside. The Motion to Set Aside the Judgment is not based upon any opinion respecting future conditions on the part of the Township of Old Bridge, such as market conditions or expectations about what the developers would, in fact, build, but is clearly based upon the material fact that the extent of the wetlands prevent the developers from performing as agreed in the Judgment. The Township of Old Bridge does not rely upon its expectations as to what the developers would produce; the Township of

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

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Old Bridge relies upon the fact that the land in question can not support the residential or commercial development, or the number of affordable housing units, that the developers, in fact, agreed to build. For that reason, the Judgment must be set aside.

JEROME J. CONVERY
TOWNSHIP ATTORNEY

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POINT II

THE MOTION TO TRANSFER THIS MATTER TO COAH SHOULD BE GRANTED

It is the position of the Township of Old Bridge that this matter should be transferred to COAH because the extent of the wetlands renders performance impossible, and demands that the judgment be set aside. Certainly, if this Court were to determine that the judgment must be set aside, the matter of a transfer to COAH would be ripe for determination.

A. Transfer of this matter to COAH would be consistenet with the Fair Housing Act.

It is my understanding that Thomas Norman, Attorney to the Old Bridge Township Planning Board, did formerly advise COAH of the intent to participate on the part of Old Bridge Township. Furthermore, Mr. Norman has advised COAH that the Township is prepared to file its Housing Element and Fair Share Ordinance implementing same, pursuant to the Fair Housing Act, in the event that the Motion to Transfer is granted. It is submitted that the Township of Old Bridge would be ready, willing and able to meet the requirements of the Fair Housing Act, as well as the regulations promulgated by COAH immediately upon the transfer of this matter.

While a review of the transcript of the proceedings before the Court, concerning the judgment and settlement, make it clear that the case was settled at that time, obviously, the Township believes that that settlement and judgment should be set aside based upon the facts discussed above. There is therefor no basis to the claim of the Civic League that Old Bridge relinquished its right to seek a transfer since the issue of a transfer would no longer be moot. As the Township Attorney for the Township of Old Bridge, I acknowledged on January 24, 1986 that the matter had been settled, and that it was therefor no longer in litigation. However, if the Court sets aside the judgment and settlement, the matter will again be "in litigation" and a Motion to transfer the case to the COAH would be appropriate.

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

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B. The Township of Old Bridge never agreed that this Court would retain jurisdiction in the event that the judgment was set aside.

The settlement documents are clear that the Reopener Clause (Section III.A-3) provided that this Court would continue jurisdiction over this matter in the event that the judgment were to be reopened. The key word here is "reopened". A distinction must be made between a Motion to Set Aside the judgment and a Motion to Reopen the judgment pursuant to the Reopener Clause. When the Court approved the settlement and judgment, on January 24, 1986, it also denied Old Bridge Township's Motion to Transfer "with prejudice", but clearly set forth the circumstances under which another application for a transfer to COAH would be considered:

> "Thirdly, I think it is fair to say, and Mr. Convery has been very candid about it, that the Town does intend this to be a complete and final settlement of all litigation which in and of itself would render a transfer moot, because there would be nothing to litigate before the Housing Council. For those reasons, I think it is appropriate to deny the Motion because of the remoteness, rather than the merits of any right to transfer and that the Motion should be denied, with prejudice, it being understood that what I've said before need not be incorporated in the Order. but is incorporated in the record and, that is, that the Court understands the denial of the Motion is based on mootness and that mootness may, if I can put it that way, disappear if anyone sought to change the terms of the settlement. Therefor, if there is an application to suddenly modify the terms of the agreement as opposed to enforce it, the Township would not be precluded from countering with a Motion to transfer. So the prejudice is for - - the denial, rather, with the prejudice is with respect to the present mootness of the case." (T 80-11 to T 81-8)

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

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It is the position of the Township of Old Bridge that the Court recognized at that time that a modification of the terms of the Agreement could trigger a Motion to Transfer by the Township of Old Bridge. The Civic League, for some reason which is inexplicable, argues that an application for modification would have had to have been brought by one of the Plaintiffs. Is there any real difference between a "applciation for the modification of the terms of the Agreement", and the fact that O & Y, having over 50% wetlands on their property, now intends to modify the Agreement to provide one-half of the residential units proposed, one-half of the Affordable Housing units proposed, and a mere shadow of the commercial properties incorporated into the Agreement? It is submitted that the Township of Old Bridge has proceeded in this matter in good faith and has lived up to its agreement concerning adoption of Ordinances, creation of an Affordable Housing Agency, the later creation of a Housing Authority, and the enforcement of its Ordinances concerning the Affordable Housing Trust Fund. However, where the extent of the wetlands now requires such a drastic modification of the terms of the Agreement, the Township should not be precluded from countering with a Motion to Transfer. It is clear that Judge Serpentelli contemplated that the Township could and would file a Motion to Transfer, in the event that the terms of the Agreement were to be modified. Judge Serpentelli, in fact, made a distinction between a modification of the terms of the Agreement as opposed to enforcing the Agreement. In this case, there is no way that the Township of Old Bridge can enforce the Agreement concerning the construction of the commercial shopping center, or the production of 1,056 low or moderate income units, since the extent of the wetlands renders it impossible for O & Y to meet the requirements of the Settlement Agreement.

It is respectfully submitted that the foundation upon which the Settlement Agreement was reached no longer exists; that there no longer is a meeting of the minds of the parties in this case concerning the Settlement, and that the so called mechanism is no longer viable in this case due to the extent of the wetlands. Whereas the Civic League argues that none of the Plaintiffs have attempted to repudiate the judgment, the Plaintiffs ignore the fact that the extent of the wetlands

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

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has itself repudiated the judgment and rendered performance impossible. Since it is clear that there is no agreement at this point, the Township of Old Bridge should have the right to address this Court and to seek a transfer to COAH. (See transcript of Court proceeding T 73-7 to T75-2)

In determining whether or not a transfer to COAH is warranted in this case, this Court should consider the fact that a new Master has been appointed at the request of the developers, but, in fact, has not met with the parties concerning this matter. Once the judgment is set aside, the parties will, in fact, begin anew concerning the relationship between the developers, the Township of Old Bridge, the Township of Old Bridge Planning Board, the Civic League, and the Affordable Housing obligation of the Township of Old Bridge. Pursuant to the Fair Housing Act, the appropriate forum for determination of these issues would be the COAH. It is respectfully submitted therefor, that the Motion to Transfer to COAH should be granted at this time.

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

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POINT III

EQUITABLE AND PUBLIC POLICY REASONS STRONGLY ARGUE IN FAVOR OF THIS JUDGMENT BEING SET ASIDE

As a result of the Settlement, dated January 24, 1986, the Township of Old Bridge enacted certain Ordinances set forth as Appendix F of the Settlement, which established a Housing Agency and implemented a 10% Set Aside Ordinance for residential development. Contrary to the assertions of the attorneys for Olympia & York, the Township of Old Bridge has made every attempt to require developers to meet the set aside requirements. Other than the failure of the Building Department to collect the sum of $3,000.00 from five separate single-family home builders, the Township has consistently enforced its Ordinances to require either the building of Mount Laurel Units, or the payment of the appropriate sum into the Affordable Housing Trust Fund. Whereas the attorneys for O & Y have included an Exhibit indicating a political argument over the possibility of $90,000.00 going uncollected, the fact is that the sum of $15,000.00 remained uncollected by the Township of Old Bridge, and the Township Council and the Affordable Housing Agency have voted to institute suit to collect said sums from these developers. It would appear, however, that the Affordable Housing Trust Fund may be jeopardy of legal action, since a similar mechanism has been declared to be unconstitutional by Judge Robert P. Figarotta of the Superior Court, Law Division, Middlesex County, concerning South Brunswick Township. The Township of Old Bridge has therefor held off concerning this litigation pending review of the South Brunswick case, and, further, pending the outcome of the within Motion.

It is a well settled principle that "he who seeks equity must do equity". It is interesting that the attorneys for Olympia & York now claim that the Township has not diligently enforced its Affordable Housing Ordinances, when those same attorneys are aware of the fact that the Township of Old Bridge has proceeded with Olympia & York in seeking to meet the requirements of the New Jersey Housing And Mortgage Finance Agency concerning the construction of a Senior Citizen Building. Those same attorneys are well aware of the fact that Hyman Babchin, Executive Director of the Affordable Housing Agency, and the Township

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

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Attorney, have attended many of those same meetings as the O & Y principals and attorneys concerning these efforts.

One of the attorneys for Olympia & York appeared with representatives of Old Bridge Township before the Local Finance Board, when the Township went forward with a proposal to form a Housing Authority so that that Agency could oversee the development of the 150 unit Senior Citizen Housing Project which is part of the Settlement Agreement. If one carefully reads the Olympia & York Answering Brief, one will note that Olympia & York has secured minor subdivision approval regarding the property upon which the 150 unit Senior Citizen Housing is to be constructed. This approval was granted by the Planning Board of the Township of Old Bridge on September 16, 1986, long after the Township had become aware of the wetlands problem.

It would appear that O & Y now wishes to argue that the Township is unwilling to perform its obligations, in effect, alledging bad faith on the part of the Township of Old Bridge, even though the representatives of O & Y know that the Township has, in every way, sought to enforce its Affordable Housing obligations while legitimately litigating the issue of whether or not the Settlement should be set aside. Certainly the Town should not be criticized or faulted for filing a Motion pursuant to Rule 4:50, which seeks to protect the legal interest of its residents. A review of the transcript of the Settlement referred to above, clearly indicates that Judge Serpentelli was aware that the Township could seek a transfer of its case to the COAH if there were a modification of the Settlement Agreement. The representatives of O & Y should not confuse protecting ones legal interest and seeking appropriate remedies, from a claim of bad faith.

O & Y now argues that the wetlands issue is simply a lever to attempt to reopen this case; O & Y conveniently ignores the fact that over 50% of its land constitutes wetlands and that O & Y is the party that can not perform as agreed in the Settlement documents.

JEROME J. CONVERY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

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The Township of Old Bridge is not seeking another bite at the apple. The Township of Old Bridge is attempting to meet its Mount Laurel II obligation, yet, at the same time, see to it that there is orderly and proper growth within the Township of Old Bridge, without devastating effects upon its environment. Whereas public policy normally would dictate that judgments should not be set aside, obviously Rule 4:50 is available for the Court to set aside those judgments which have been the result of such a substantial mistake of fact that the parties should not be held to the original Agreement. For the reasons stated above, it is clear that the extent of wetlands in this case warrants the setting aside of the judgment. The certification of Carl Hintz and the report prepared by him, indicate that it is in the best interest of the residents of the Township of Old Bridge that this particular settlement be set aside.

Therefor, it is the request of the Township of Old Bridge that this Court grant the Township's Motion to declare the judgment of January 24, 1986 to be set aside, and to further order that the within case be transferred to the COAH.

Respectfully submitted,

Jerome J. Convery,
Township Attorney

JJC/jd
cc: All Counsel

NORMAN AND KINGSBURY
ATTORNEYS AT LAW
JACKSON COMMONS
SUITE A-2
30 JACKSON ROAD
MEDFORD, NEW JERSEY 08055

A31L87

THOMAS NORMAN
ROBERT E. KINGSBURY

T. N. (609)654-5220
R. E. K. (609)654-1778

August 11, 1987

Honorable Eugene D. Serpentelli, A.J.S.C.
Ocean County Superior Court
Court House
Toms River, New Jersey 08754

RE: Urban League et al vs. Township of Old Bridge, et al Docket No. C-4122-73

Dear Judge Serpentelli:

Please accept this letter in reply to the answering briefs of Olympia & York, Woodhaven Village, and the Urban League.

All Plantiffs argue that Old Bridge Township had plenty of time and the option of conducting their own studies or continuing negotiations until an acceptable delineation of wetlands was available. This argument is totally unrealistic. The combined parcels of Olympia & York and Woodhaven Village exceeds 4,000 acres in size. It is clear that delineation of wetlands is at best a difficult task. However, the mistake which was not discoverable without an indepth on-site investigation of 4,000 acres lies in the actual delineation process. The Fish and Wildlife maps of the Department of Interior which are intended to red flag wetland areas, identified less than 400 acres of wetlands on the O&Y site and less than 200 acres of wetlands on the Woodhaven site. Actual delineation by O&Y and Woodhaven Village required sixteen months and Woodhaven Village is not yet complete. The on-site investigation by Olympia & York and Woodhaven Village identifies 1940 acres of wetlands plus an additional 300-500 acres of uplands on the Olympia & York site which are scattered and inaccessible. These latter sites are not developable. At this point in time the number of upland areas on the Woodhaven Village site which are not developable because of isolated locations are not known. Again, Olympia & York required approximately sixteen months of intensive analysis to delineate the wetlands on its parcel. Woodhaven Village after fifteen months has not year had its wetlands delineation certified by the Army Corps of Engineers.

In this setting it is ridiculous to charge that Old Bridge Township was negligent or remiss in not identifying areas of wetlands prior to the court settlement. Only an on-site investigation could have revealed the extensive areas of wetlands.

Plantiffs argued during negotiations that delineation of wetlands was not a problem because O&Y had long been aware of the wetlands problem and had addressed it in the preparation of its plans which were set forth in Plats A & A-1 of the settlement agreement. See, Exhibit A, attached hereto, including Transcript of Planning Board, March 18, 1986, pages 6-13, Introduction of Thomas Hall, Esq.; and testimony of Andrew Sullivan, pages 37-53 and see, for Woodhaven site, Exhibit B, testimony of Woodhaven Expert.

Additionally, plantiffs argue that Rule 4:50-1 does not apply based upon reported case law. However, all of the decisions cited by the plantiffs are clearly distinguishable on the facts. The cases involved negligence actions and contract disputes between private parties. This matter involves the general welfare of the Township of Old Bridge. It involves, specifically, sound planning and environmental protection, two areas recognized by the Mount Laurel II Court as validate defenses against builders remedies.

The Planning Board recognizes the importance of the doctrine of finality. However, this must be balanced against the public interest in sound planning and environmental protection and the general Welfare of Old Bridge Township.

Lastly, Old Bridge Township is painted as an exclusionary community ready to fight at any length to prohibit the construction of low and moderate income housing. This is untrue. COAH requirements mandate approxmiately 800 units of low and moderate income housing for Old Bridge Township. However, COAH also credits Old Bridge with approximately 400 units of low and moderate income housing. This includes one of the only senior citizen retirement complexes in the suburban Middlesex County which is restricted by income to low and moderate income households. Also, the 1979 Land Development Ordinance under which Olympia & York originally submitted an application permitted a bonus density in return for the provision of low or moderate income housing. This provision was adopted prior to the decision in Mt. Laurel II.

Throughout all the negotiations and even after the discovery of the wetlands problem, the Old Bridge Planning Board continued to hold public hearings and granted the applicants every benefit of the doubt until it became painfully obvious that the amount of wetlands and non-buildable lands were far is excess of any wildest

expectations. It was not until this point that the Township decided to reconsider its position in light of sound planning & environmental concerns.

For the above reasons, the Township respectively requests that its motion to set aside the judgement pursuant to Rule 450-1 be granted and the matter transferred to the Council on Affordable Housing.

Respectively submitted;

THOMAS NORMAN, ESQ.
Planning Board for
Township of Old Bridge

TN:cg

CC: Jerome J. Convery, Esq.
Thomas Hall, Esq.
Barbara Stark, Esq.
Dean Gaver, Esq.