U.L. v. Cateret, Monroe Twp 12/4 1985

- Cover letter to Judge re enclosed copy of letter-brief re Monroe's Transfer motion

Attch: letter Brief

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December 4, 1985

Honorable Eugene D. Serpentelli
Assignment Judge, Superior Court
Court House
CN 2191
Toms River, New Jersey 08154

Re: Lori Associates, et al. v.
Monroe Township

Dear Judge Serpentelli:

Enclosed is an informational copy of the Letter-Brief we have filed with the Superior Court regarding Monroe's transfer motion.

Respectfully,

Arnold K. Mytelka

/atd
Enclosure
cc: Mario Apuzzo, Esq.
Carl S. Bisgaier, Esq.
Stewart M. Hutt, Esq.
Eric Neisser, Esq.
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December 3, 1985

Honorable Chief Justice and Justices
of the Supreme Court of New Jersey
Hughes Justice Complex
CN-970
Trenton, New Jersey 08625

Re: Urban League of New Brunswick v. Carteret (Monroe) and Lori Associates and HABD Associates, plaintiffs-respondents v. Monroe Township, defendant-appellant (consolidated cases), Docket No. A-127 (#24,785), on appeal to the Supreme Court from an order of the Superior Court of New Jersey, Chancery Division (Middlesex/Ocean) (Mount Laurel), Docket No. C-4122-73, entered by Honorable Eugene D. Serpentelli, on October 11, 1985.

Your Honors:

This letter-brief is submitted on behalf of Lori Associates and HABD Associates ("Lori and HABD"), landowner-plaintiffs seeking Mount Laurel relief against Monroe Township ("Monroe"). The brief responds to Monroe's appeal from Judge Serpentelli's order denying transfer of this eleven year old case to the newly established Council on Affordable Housing pursuant to L. 1985, c. 222, §16. The order, entered October 11, 1985, is reproduced at pages 66-67 of Monroe's appendix to its motion

for leave to appeal to the Appellate Division (Da 66-67). The findings supporting the order are set forth in Judge Serpentelli's transcribed oral opinion, rendered October 2, 1985 (Da 24-65).

The thrust of this brief is that Judge Serpentelli's denial of transfer here is eminently correct (B, _infra_). As he said (Da 55:24 to 56:1): "If manifest injustice is to be found in any transfer motions before this Court, it must include all five here today." We also deal briefly with the issues posed by this Court (Mr. Townsend's letter to counsel of November 15, 1985), though some are not pertinent to our clients' cause (C, _infra_). It is appropriate to begin with procedural and factual references (A, _infra_).

A

This exclusionary zoning litigation commenced in 1974, and has already been tried twice, adjudicated on appeal in the Appellate Division and in this Court, and is here again for determination of whether Monroe should be permitted to start again from scratch before a new administrative agency. In _Mount Laurel II_, this Court summarized the procedural history and facts of this case, 92 N.J. at 339-350, observed that plain-

tiff Urban League had "proved a pattern of exclusionary zoning that was clear," 92 N.J. at 339, and stated:

> "As far as the municipalities [including Monroe] are concerned, the lesson of all of this litigation is that the Mount Laurel obligation is a matter between them and their conscience.
>
> "If, after eight years [now eleven], the judiciary is powerless to do anything to encourage lower income housing in this protracted litigation because of the rules we have devised, then either those rules should be changed or enforcement of the obligation abandoned." 92 N.J. at 341.

On remand, several landowner and developer entities, including Lori and HABD, joined the Monroe litigation. A trial and judgment in 1984 established Monroe's fair share at 774 low and moderate income units. A master was appointed, proceedings toward compliance began, and Monroe demonstrated its supreme contempt for Mount Laurel and our judicial system (see Da 48-50). Little is now left to be done: "a relatively short compliance hearing" followed by zoning revisions which Judge Serpentelli anticipates "could be accomplished in three to four months" (Da 50: 16-24).

It is in this context that Monroe seeks a transfer of its case to the Council on Affordable Housing and argues without even a blush that no "manifest injustice" will result.

B

It is perfectly plain that the Legislature did not intend to transfer all Mount Laurel litigation to the new Council on Affordable Housing, but only those cases which the judiciary determined could be transferred without "manifest injustice to any party to the litigation." L. 1985, c. 222, §16. As the minority on the Assembly Committee complained:

> "This bill does not prevent the courts from continuing in their current direction. Pending Mount Laurel cases may continue to be litigated...." Assembly Municipal Government Committee Statement to Senate Bill No. 2046, 2334 (Senate Committee substitute), Minority Statement.

But the test for distinguishing those cases which should be transferred from those which should not -- the "manifest injustice" standard -- is no real test at all. The term itself -- the denotation of which is "obvious" "wrong", American Heritage Dictionary 662, 763 (2d College ed. 1982) -- is as pellucid and precise as "due process of law." There is neither statutory definition nor articulation of factors to be evaluated, and the legislative history does not help.

To Judge Serpentelli, "manifest injustice" is "fact-specific....to paraphrase Justice Stewart, you should be able to

know it when you see it" (Da 32:3, 14-16). To Judge Skillman, the term "does not have a single, constant meaning. Rather, its meaning varies with the context in which it is used." Morris County Fair Housing Council v. Boonton Township, Docket No. L-6001-78 P.W., Opinion rendered October 28, 1985 ("Morris County opinion") at 45:14-16. For completeness sake, Judge Serpentelli lists all the factors suggested by counsel (Da 54:10 to 55:15), though he is "not sure that I share the fact that they have any relevance, at least with respect to these cases" (Da 54:14-16). Judge Skillman refers to the use of "manifest injustice" or similar phrases in various areas of adjective law (Morris County opinion at 44:16 to 47:13), appropriately settling on the exhaustion doctrine and R. 4:69-5. But the phrase in that Rule -- "where it is manifest that the interest of justice requires otherwise" -- while explained to some extent, e.g., Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 141 (1962), is almost as subjective with its judicial explanation as Section 16 of the Fair Housing Act is without explanation.

The bottom line is that the Legislature passed the buck, conferring broad discretion on the judiciary to ascertain when a transfer to the Council on Affordable Housing would be obviously wrong to a litigant. Nevertheless, there appears to

be almost universal acceptance of one test of "manifest injustice", to wit: "the relative delay and expense" arising from a transfer. See Roadway Express, Inc. v. Kingsley, supra, 37 N.J. at 141, quoted by Judge Skillman in Morris County opinion at 46:27. This standard was applied by Judge Skillman, e.g., Id. at 51:4-13, and by Judge Serpentelli, e.g., Da 56:25 to 57:17. As Judge Serpentelli put it:

> "Delay equates to postponing the day that the realistic opportunity is afforded and housing is built." (Da 57:12-14).

And Monroe itself, in its trial brief (at the eleventh page), concurred:

> "This Honorable Court should focus on what will allow for the quickest and best planned construction of low and moderate income housing in the Township."

Applying this standard to the Monroe case is rather simple. After eleven years of litigation, the matter is on the eve of final judgment (Da 50:11-24). In the trial court, three to four months is necessary to finish the job (Da 50:22-24). A transfer to the Council would cause a delay of about two years in the opinions of both Judge Serpentelli (Da 57:10-11) and Judge Skillman (Morris County opinion at 17:7-9). As Judge Serpentelli held, characterizing the Monroe transfer motion and those of four other municipalities as "at the one

extreme of the transfer spectrum":

> "If manifest injustice is to be found in any transfer motions before this Court, it must include all five here today....The mere recitation of the procedural history of these cases compels that conclusion....They have been in the system a long time, particularly, of course, the four Urban League cases [including Monroe Township], which are nearly teenagers. They have been arduous, they have been complex, they have taxed the resources of all of the parties involved....
>
> To repeat even a portion of the process before the Council [on Affordable Housing] seems unnecessarily burdensome and unfair to all of the parties...." (Da 55-56).

As we said in our trial brief:

> "Where litigants have labored for more than eleven years to achieve a result that simple morality should have compelled at the outset, where hundreds of hours of trial and appellate time have been expended on essentially frivolous defenses, where a recalcitrant municipality has used every conceivable means (including the present motion) to dodge and deflect its clear legal obligations, where final judgment day at last appears to be in sight, it is patently absurd to claim that plaintiffs herein will not sustain 'manifest injustice' if the case is transferred to a brand new, as yet unorganized agency for a proceeding that is likely to start from scratch."

Judge Serpentelli has correctly exercised the discretion conferred upon him by Section 16 of the Fair Housing Act. His reasoning makes sense. There was no abuse of discretion. Cf.

Civic Southern Factors v. Bonat, 65 N.J. 329, 333 (1974) (abuse of discretion standard in forum non conveniens case); State v. Collins, 2 N.J. 406, 411 (1949) (abuse of discretion standard in change of venue case). His decision to deny Monroe's application for transfer should be sustained.

C

The issues posed by this Court at points 1(b) and (c) of the "Issues To Be Addressed" do not relate to the Monroe case. If for some reason the Section 28 moratorium is held to be constitutional, but see Fischer v. Twp. of Bedminster, 5 N.J. 534, 541 (1950), it is unlikely to be applied to this ancient case because of the statutory time limit. The section only applies to exclusionary zoning litigation "filed on or after January 20, 1983..." L. 1985, c. 222, §28. In the event this Court sustains the section, it should be given its narrowest construction and certainly should not be applied to general Mount Laurel rezoning, rather than only to preferential rezoning for a particular plaintiff. Compare Mount Laurel II, 92 N.J. at 279-281 with Id. at 281-290; see also Morris County opinion at 22, n. 10, second paragraph.

As to point 1(c), no plaintiff in Monroe has filed within the 60 day period. In any event, it would appear that all

litigants in a single case should be treated the same to avoid inconsistent results and generalized confusion. Thus, to avoid possibly unconstitutional unfairness to one litigant, transfer should be denied to another who has filed within 60 days. Sections 16(a) and (b) should be read together to avoid unfairness.

Judge Serpentelli's decision denying Monroe's transfer motion should be sustained. This case must be brought to an end now.

Respectfully submitted,

CLAPP & EISENBERG
A Professional Corporation
Attorneys for Lori Associates
and HABD Associates

By: Arnold K. Mytelka
Arnold K. Mytelka