

U.L. v. Carter North Brunswick

June 19, 1984

Transcript of Motion

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CA0004415

*file*  
SUPERIOR COURT OF NEW JERSEY  
MIDDLESEX COUNTY - CHANCERY DIVISION  
DOCKET NO. C-4122-73

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URBAN LEAGUE OF )  
GREATER NEW BRUNSWICK, )  
Plaintiff, )  
-v- )  
BOROUGH OF CARTERET, )  
Defendant. )  
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Transcript  
of  
Motion

B E F O R E:

HON. EUGENE D. SERPENTELLI, J.S.C.  
Ocean County Courthouse  
Toms River, N.J.

June 19, 1984.

A P P E A R A N C E S:

TODD M. SAHNER, ESQ.,  
For O&Y Old Bridge Dev. Corp.

STEWART M. HUTT, ESQ.,  
For Woodhaven Village  
and Brunswick Manor Assoc.

BRUCE GELBER, ESQ., and  
ERIC NEISSER, ESQ.,  
For U.L.

THOMAS NORMAN, ESQ.,  
For Old Br. Twp. Plan. Bd.

JEROME CONVERY, ESQ.,  
For Old Br. Twp. Plan. Bd.

LESLIE S. LEFKOWITZ, ESQ.,  
For Twp. of North Brunswick.

ROBERT J. LECKY, ESQ.,  
For Twp. of North Brunswick Plan Bd.

THOMAS J. HALL, ESQ.,  
For Olympia & York Old Bridge.

HENRY HILL, ESQ.,  
For For Olympia and York.

DAYETTE J. ZAMPOLIN, C.S.R.  
Official Court Reporter  
Ocean County Courthouse  
Toms River, N.J.

1 THE COURT: Prior to the start of the  
2 pretrial -- I think it would be best to dispose  
3 of the issue of the status of the three additional  
4 complaints which have been filed concerning Old  
5 Bridge or North Brunswick; and in particular, the  
6 complaint of O and Y Old Bridge versus Old Bridge,  
7 Woodhaven Village versus Old Bridge and Brunswick  
8 Associates versus Old Bridge.

9 MR. HUTT: You said Old Bridge. You mean  
10 North Brunswick.

11 THE COURT: Oh, North Brunswick.

12 I'd first like to get the position of the  
13 defendants with respect to the issue of  
14 consolidation of these actions with the case that's  
15 going to be tried on July 2d.

16 All right.

17 MR. CONVERY: May it please the Court,  
18 Jerome J. Convery on behalf of Old Bridge Township.

19 Your Honor, Old Bridge strongly opposes  
20 consolidation of O&Y and Woodhaven, because I think  
21 it would lead to some delay. I think it would  
22 extend the trial, and I think it no doubt would  
23 lead to other issues during the trial that really  
24 haven't been the subject matter of discovery.

25 Now, in regard to O&Y, as you've indicated,

1 we've just been served with a notice of motion  
2 today in an attempt to bring in the Municipal  
3 Utilities Authority and the Sewerage Authority.

4 I think this is an indication of the problem  
5 that would lie with the Court if you consolidate  
6 O&Y. I think that they'd be bringing in other  
7 issues at a late date without full discovery. It  
8 will require additional attorneys to come in on  
9 behalf of the Municipal Utilities Authority and the  
10 Sewerage Authority.

11 Also, my understanding has been that there's  
12 no formal consolidation order. I know that Mr.  
13 Hill has been a party to various conferences and  
14 motions, and I thought that that was being done as  
15 a courtesy to him, so that he would be informed as  
16 to the nature of the proceedings. It was never my  
17 understanding that O&Y would be consolidated for  
18 the trial of this matter, especially in regard to  
19 fair share.

20 Now, in regard to Woodhaven, I believe that  
21 the complaint was served on the Township of Old  
22 Bridge approximately ten days ago. No answer has  
23 yet been prepared. Again, we're dealing with the  
24 situation where there's been really no  
25 communication between the attorneys. There's been

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no discovery, and I think it's obvious that this is going to lead to a delay.

Mr. Hutt indicates he does not believe it will lead to a delay, but I am sure that issues are going to rise during the trial, affecting his client, that will lead to extended cross-examination, that will lead to other issues that the parties have not prepared for. And for that reason we strongly oppose consolidation. Thank you.

THE COURT: Let me be clear that any consolidation is only at this point being addressed on the issue of fair share. Because the initial aspect of the trial, I am going to bifurcate totally the builder's remedy aspect.

I can -- I have not done that in the previous two trials, but there is -- two reasons I'm doing it in this trial; and that is, number one, I think the magnitude of the O&Y project is such that it requires a separate consideration. And I think it requires consideration by a master, if we reach that stage, even before we touch it. And Mr. Hutt's project is substantial, as well.

Secondly, we have a little over a month left before the vacation period, and I have this case

1 and another one to complete. I think that it would  
2 make sense to -- to strictly limit this to fair  
3 share. And I have some feeling that by virtue of  
4 the opinion I may issue, that there will be at  
5 least some clarification as to some of the Court's  
6 views, and those might be issues which can be  
7 zeroed in on by the parties.

8 All right.

9 MR. LECKY: My name is Robert Lecky, I'm the  
10 attorney for the Planning Board of North Brunswick.  
11 I join with Mr. Convery and rereiterate his  
12 objections; I don't want to reiterate them at  
13 length.

14 Also, I've been served with those papers  
15 last week, and I accepted service for the Planning  
16 Board.

17 The position I'm in is, I can't consent to  
18 anything for the Board because I have not had an  
19 opportunity to consult with my Board to receive any  
20 indication from them, which way to go, whether to  
21 object totally, or to go along with this suit.

22 As an attorney, I would object to it on the  
23 basis of the extension of the trial, and that there  
24 may be other issues that we just haven't an  
25 opportunity to fully explore and to discover.

1                   And we have a trial that's two weeks away,  
2                   and I'm served with a ten-page-complaint. I have  
3                   had hardly the time to draft an answer, no less  
4                   being able to ask fair questions during the course  
5                   of the trial, if I have to. I don't know if I have  
6                   to, I don't know what I have to do, and to be given  
7                   two weeks to do it with a case of this magnitude  
8                   creates a problem.

9                   THE COURT: All right. The Urban League.

10                  MR. LEFKOWITZ: Oh, if your Honor please, on  
11                  behalf of the Township --

12                  THE COURT: I thought you were covering --

13                  MR. LEFKOWITZ: No. Lecky represents the  
14                  Planning Board. On behalf of the Township of North  
15                  Brunswick, the problem that arises by allowing --  
16                  another problem that arises by allowing Mr. Hutt of  
17                  New Brunswick Manor to join in this case at this  
18                  late stage, is that Mr. Lecky has been here. The  
19                  Township has authorized him in an advisory  
20                  capacity - he's not really trial counsel in the  
21                  matter - to join in Mr. Hutt's matter at this  
22                  point, forces Mr. Lecky to take an active part on a  
23                  daily basis in the trial, because the Planning  
24                  Board is a direct party.

25                  It's an extra expense, it's an extra time

1 delay for the Court, because there will be at least  
2 one more attorney doing cross-examination. I join  
3 in all the other objections of co-counsel on behalf  
4 of the Township, and I would seek to have New  
5 Brunswick Manor barred from, in any participation,  
6 from this -- from even the fair share hearing.

7 THE COURT: Mr. Gelber?

8 MR. GELBER: Your Honor, on behalf of the  
9 Urban League, the Urban League takes the position  
10 that consolidation should be granted. It would be,  
11 I believe, the most efficient course, because ~~it~~  
12 would allow one trial rather than two or three.

13 On the question of prejudice, I don't  
14 believe there would be any prejudice to either  
15 party. Discovery has hardly begun in this case.  
16 We expect to have it concluded within the next two  
17 weeks, but no depositions have been taken.

18 We've only received our first batch of  
19 documents within the last week. This is a  
20 different situation than that which presented --  
21 faced the Court in the other Urban League case with  
22 respect to Toll Brothers, Great Meadows, and the  
23 other late filing developers. Depositions --

24 THE COURT: Let me understand what you're  
25 saying.





1 related to the Sewerage Authority, obviously, that  
2 will have to be heard at another time. We are not  
3 suggesting consolidation on all issues and all  
4 matters. I agree with Mr. Convery in that form.  
5 But I believe in the limited questions of fair  
6 share, and in one respect, compliance, the case can  
7 go forward with all parties. I believe that  
8 would be the most efficient course.

9 If I may, your Honor, on the question of --  
10 if the Court anticipates issuing a decision in the  
11 Urban League case on fair share, it would also be  
12 our position that that decision would be  
13 presumptively valid with respect to these  
14 Townships.

15 THE COURT: It is not the Urban League case.  
16 It's the Warren Township case.

17 MR. GELBER: Then that would have to depend  
18 on what the Court does in that decision.

19 Thank you, your Honor.

20 THE COURT: And I honestly do not think I'll  
21 have the Urban League case before that date,  
22 although maybe . . .

23 We're producing Mount Laurel II and a half.

24 MR. HILL: On behalf of Olympia and York,  
25 Henry Hill. We also filed a motion for summary

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judgment. We'd like -- frankly, we think compliance in Old Bridge's cases is a very easy issue, and --

THE COURT: You think in every case.

MR. HILL: However, we are most anxious to handle the analysis of the zoning ordinances, and particularly, the remedial part of the case ourselves. We have put tremendous resources into the analysis of Old Bridge's ordinances, and we're prepared to carry that part of the case. And in fact we'd prefer to be responsible than to be linked with another case where the plaintiff is it really dilating their resources among ten or 15 different municipalities.

We think we're prepared to handle all the ordinance analysis issues connected with Old Bridge, and we would prefer the motion for summary judgment be heard before consolidation.

In fact, if it's granted, the compliance issue will be moot for all parties. And we have -- we'd like to see the fair share number. We have no objection to the master appointed by the Court being appointed to -- as to Old Bridge, but we wouldn't like to find ourselves in a trial before that motion for summary judgment was granted.

1                   And for that reason alone, before that  
2 motion for summary judgment was heard, and for that  
3 reason alone, we don't like the idea that a trial  
4 would start before the motion for summary judgment  
5 would be heard, because we think that we could save  
6 the -- considerable court time, and at least very  
7 definitely sharpen the issues if that motion could  
8 be heard first.

9                   THE COURT: I think you came in late. There  
10 is no Court-appointed expert in this case, just so  
11 you understand that. There was a request made by  
12 virtue of a case management conference that for the  
13 purposes of possible resolution we get an idea what  
14 the so-called consensus approach would be, and so  
15 that the defendants could take back to their  
16 respective municipalities that number, and they  
17 did, and we didn't.

18                   So, the case is not resolved. So that Ms.  
19 Lerman, if she is called, I suppose could be called  
20 by any party to merely indicate what the consensus  
21 approach would be.

22                   Frankly, I think the document is of such  
23 broad recognition at this point that it might very  
24 well be something that could be offered in evidence  
25 as a take-off point, so to speak.

1           It's something that an expert may have used,  
2           any of his experts, on behalf of any of the  
3           parties, may have been aware of and used in  
4           calculating. And I wouldn't be surprised if some  
5           of the defendant's testimony might deal with the  
6           defects of that report. So it may well be in  
7           evidence anyway.

8           MR. HILL: One other thing, your Honor,  
9           there's been references to the fact that the Sewer  
10          and Water Authority which we have by motions --  
11          we've moved by motion to join them as parties.--

12          It would not be necessary for them to be  
13          parties, in fact, for compliance, because  
14          compliance, as I understand it, has to do with  
15          whether the zoning is prima facie, valid or  
16          invalid. It is, I believe, important when you get  
17          into enforcement, if Old Bridge is found not to  
18          comply, that they be parties.

19          We think that we're -- they are reins which  
20          we wanted to put in this Court's hands. And  
21          holding that and the Municipality, you have all the  
22          means to allow all development to go through in Old  
23          Bridge without the Sewer Authority and Water  
24          Authority, separate bodies appointed by the counsel  
25          before your Honor. We thought you lacked the means

1 to grant specific corporate relief, or, in fact,  
2 give meaningful remedial relief at all.

3 And so -- but I don't think that their  
4 joinder or nonjoinder should affect the compliance  
5 part of the case at all, because, as I understand  
6 it, that has to do with zoning, and zoning only,  
7 and whether the ordinance can make realistically  
8 possible housing opportunities.

9 So, we brought them before the Court at this  
10 time, but I don't know that anything relevant to  
11 them would be reached in these formal proceedings  
12 to tell -- until a judgment of noncompliance were  
13 entered, and your Honor got into the remedial  
14 stage, and we started looking at infrastructure  
15 needed to allow housing.

16 THE COURT: Okay. Mr. Hutt.

17 MR. HUTT: Your Honor, the only -- as I  
18 said, the consolidation is only, as you stated,  
19 only for compliance, not for builder's remedy, or  
20 anything else. So I don't see all these  
21 complicated issues that some of these lawyers are  
22 talking about at this stage of the trial.

23 Later on, there could be a lot of  
24 complications, but the only reason that I mentioned  
25 it is that I was under the impression - and I think

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some of the other counsel were - apparently under the wrong impression that Mrs. Lerman was a Court-appointed expert.

We don't know what your decision is going to be in Warren. If your decision is in Warren that you would go along with that kind of consensus theory, that it would be important to have that kind of an expert appointed by the Court, or individually hiring her, or anybody else that would adopt that theory.

I understand Mr. Mallach's theory is a different theory, and if before the trial you come down with a decision that says you don't like Mr. Mallach's theory, you like Mrs. Lerman's theory, or buy the consensus theory, it would seem that it would behoove plaintiffs to have somebody that espouses that theory.

So that's why I said that we will not use a different theory. We will -- we will stay with a theory that's well known to all the attorneys, and Court -- and the Judge, which is the consensus theory, or the theory of Mr. Mallach. So, in no event will we offer any kind of independent theory that's going to confuse things.

THE COURT: Well, would it put your mind to

1 rest at all if Mr. Mallach's position was basically  
2 the consensus approach, and any modification would  
3 increase the number?

4 MR. HUTT: Well --

5 THE COURT: I would -- I think that --

6 MR. HUTT: I really haven't had a chance to  
7 look at his --

8 THE COURT: Well, if he is not inconsistent  
9 with his testimony in the other seven cases, that  
10 was his approach.

11 MR. HUTT: Then may it be fine just to use  
12 Mr. Mallach's testimony.

13 THE COURT: Am I properly categorizing,  
14 maybe a bit facetiously, but . . .

15 MR. HUTT: But we don't know what you are  
16 going to say, that's the problem.

17 THE COURT: Either do I.

18 Mr. Gelber, what will be Mr. Mallach's  
19 approach? Is he basically going to take the  
20 consensus approach and improve on it for the  
21 plaintiff's purposes?

22 MR. GELBER: Well, he'll -- I believe, your  
23 Honor, he'll take the same position he took in  
24 testimony at the original trial, which I believe  
25 was essentially that most portions of Miss Lerman's



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report were reasonable. In some respects he would have done some things differently. He thinks his approach might be somewhat more reasonable. Both approaches were acceptable.

THE COURT: Yeah. And I think my characterization is not incorrect.

MR. HUTT: All right. But bringing me to the real issue, which nobody seems to have addressed, and that's something that the Supreme Court did address. In all the pages of philosophy, in the hundreds of pages, they said one sentence that it struck me, and that said that nobody builds houses but builders. And it would seem poor judgment to exclude the actual builders in this town that are attempting to build these Mount Laurel houses from any trial at the outset of what's going to be a lengthy situation, assuming noncompliance.

And we get into what kind of restructuring of the ordinances, and what kind of things, and what kind of with -- maybe with this thing with the sewer and the water and so forth.

So, to leave the two main builders out of the town that want to build these Mount Laurel houses out of trial which involves them, would seem

1 to me against common sense; particularly, where  
2 we've represented -- at least I represent that I'm  
3 not going to delay. I'm not going to ask for any  
4 special privileges. I'm going to be bound by  
5 what's already taken place and not asking for any  
6 special favors. All we're asking for, as they say  
7 in law school, justice.

8 THE COURT: I have to agree with you, and I  
9 haven't missed that sentence. There's an ongoing  
10 dispute, one I think you can characterize it as a  
11 difference of opinion between the three Mount  
12 Laurel judges as to the importance of that aspect  
13 of the opinion. And there's more than that  
14 sentence in there.

15 One of the Mount Laurel judges has suggested  
16 that the so-called class action concept may be  
17 relevant in Mount Laurel litigation, so as to  
18 permit the Court to accept the settlement of a  
19 Mount Laurel case and bar other builders' remedies.

20 I don't think we're talking about that in  
21 this case. What we're talking about here is  
22 whether the builders will participate in the fair  
23 share aspect of it. There's no question in my mind  
24 that they should participate in the ordinance  
25 revision aspect of it, both from the standpoint of

1 efficiency.

2 There's no point in retrying the case. And  
3 from the standpoint of having before the Court  
4 those people who are ready, willing and able,  
5 presumably, to build, and I think that there's some  
6 very strong argument that as between the choice of  
7 two respective sites, if you know you have a  
8 builder there, that at least is one element which  
9 might go to the arbitrariness of excluding that  
10 builder.

11 THE COURT: All right. Off the record. →

12 (Off-the-record discussion.)

13 THE COURT: All right. The imminence of  
14 this trial date on July 2d, in my my view, dictates  
15 that these matters be consolidated, solely for the  
16 purposes of permitting the new plaintiffs to  
17 participate fully in any ordinance revision which  
18 may be ordered by the Court, and to assert a right  
19 of builder's remedy; but not to participate in the  
20 determination relating to fair share. And that  
21 will be the order of the Court.

22 I would ask each of the new plaintiffs to  
23 submit an order as it affects their respective  
24 parties, indicating that that is their rights,  
25 submit it under the five-day rule. I am fully

1 confident that the Urban League is not so diluted  
2 as to affect their ability to carry the ball with  
3 respect to fair share.

4 And based upon the representation which Mr.  
5 Gelber has made, the position of Mr. Mallach will  
6 be that which he took at the prior trial, which was  
7 essentially to discuss the Urban League Consensus  
8 Report, indicate that he felt it was overall  
9 reasonable approach -- identify those areas which  
10 he felt were more reasonable in his approach.

11 And if my recollection doesn't fail me, most  
12 of those areas would have had the impact of  
13 increasing the fair share number of the Urban  
14 League number. As a matter of fact, I think his  
15 final number is above the Urban League number, is  
16 it not?

17 MR. NEISSER: In one instance above, and one  
18 instance below.

19 THE COURT: One instance above, and one  
20 instance below. Not far below.

21 MR. NEISSER: No.

22 THE COURT: And I don't see any prejudice in  
23 that regard. Coming in this light, the parties  
24 will, clearly, least extend the length of this  
25 trial. I anticipate the trial could be done in a

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week, if -- two weeks at the outside, and I've allowed for that. I have a case immediately following it, involving Mercer County, and that case must be tried before the summer break.

So, I don't see any way that we could accommodate the request to be included, and I think there would be prejudice in terms of the plaintiff's approach -- I'm sorry, in terms of the defendants, as well.

Mr. Hill?

MR. HILL: Yes, two matters. One, I gather an Olympia and York will be classified as a late plaintiff, although technically we did sue Old Bridge before Urban League did. They tried to bring them in after they were a defendant in our case.

THE COURT: Late, in terms of its new complaint. I'm aware of the fact that you've been suing for a long time.

MR. HILL: No. Even the second complaint was before the motion to bring in Old Bridge was brought by Urban League, but being -- that's beside the point.

The point is: What about the motion for summary judgment which we have -- we have served

1 today? The motion for summary judgment as to Old  
2 Bridge, if it were granted, would make moot Old --  
3 the issue of Old Bridge's complying. It's a motion  
4 to hold Old Bridge not in compliance. Could we  
5 move that date up? Could we -- is there some way  
6 that motion could be heard in such a way so as not  
7 to waste the Court's time?

8 It was filed today. I believe it's  
9 returnable on the next motion date, which is July  
10 13th. We'll be glad to move it up. Our office is  
11 available, whenever Old Bridge is, to hear it. I  
12 think it analyzes the ordinance crisply.

13 THE COURT: It would have to be heard on  
14 June 29th, since this trial starts on the second.

15 MR. HILL: We are ready, willing and able,  
16 if Old Bridge is, to move that motion on that day.

17 THE COURT: Well, it's a two-edged sword.  
18 We better hear Mr. Gelber. It becomes the law of  
19 the case, even if the defendants were ready; or  
20 might become the law of the case, at least,  
21 depending on the ruling.

22 MR. GELBER: Well, your Honor, it's a very  
23 good question, it's one that we had, as well. It's  
24 unclear to us at this point whether or not your  
25 order contemplates that we go forward on July 2d

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with only fair share, or whether we also litigate the question of ordinance compliance as opposed to remedial compliance.

THE COURT: Both.

MR. GELBER: If it's with respect to both issues, then I think Mr. Hill's point is well taken. It seems inefficient to rule in a summary judgment - on the very same issues that we're going to be holding trial on - a week earlier. And I think the response of the Township would essentially have to be their case for trial. It might be sufficient to require that response on the papers and may actually limit the amount of trial time.

THE COURT: Of course, the motion for summary judgment may just get a ruling, if the plaintiff succeeded, of facial invalidity.

MR. HILL: That's all your Honor needs to appoint a master, and to begin a process which is less adversarial and which saves considerable amount of the Court's time. If they have an ordinance to propose, for instance, after such a ruling, your Honor can send it off for study and have a report, rather than have us try it. We're very aware of that, because of other summary

1 judgments pending before you, and ordinances which  
2 may or may not be enacted before they're heard.

3 THE COURT: Mr. Lefkowitz, we have a T.D.C.  
4 involved in this case?

5 MR. LEFKOWITZ: Yes, your Honor.

6 THE COURT: And there's a petition for  
7 certification to the Supreme Court on that, I  
8 understand.

9 MR. NORMAN: That's correct.

10 THE COURT: All right.

11 MR. CONVERY: Number one, we were just  
12 served with the papers, and I, in fact, have not  
13 had an opportunity to read them. I think it's  
14 extremely presumptuous of O&Y to ask this Court to  
15 hear a motion for summary judgment, prior to the  
16 trial which is involved in the Urban League, when  
17 we're here on the pre-trial to establish the  
18 issues, some of the matters for that trial.

19 The motion is returnable on July 13th, which  
20 is a date that's after the trial date. I think  
21 your Honor knows from conferences in this matter,  
22 and telephone motions regarding discovery, that all  
23 the efforts of the towns - I think I speak for  
24 North Brunswick, as well - in the last few weeks  
25 have been directed to discovery, have been directed



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to preparing for trial, and Old Bridge simply cannot respond to this motion on short notice and --

THE COURT: You have been preparing on the issue of ordinance compliance for the trial. That's an issue of the trial.

MR. CONVERY: It is an issue, but we're also talking about a trial date that's two weeks away. We're talking about taking depositions during the week of the 25th. My position is that Old Bridge did not respond to that motion on short notice, and that it's --

THE COURT: Suppose we did this: Suppose we make a motion returnable on July 6th, I don't have a calendar in front of me, but I guess that's the Friday. And that is during the trial. We would have spent the first few days on fair share.

July 4th's a holiday, that's Wednesday, and we would just about be moving along on the fair share aspect. We can determine on July 6th whether that was an issue that can be determined in summary judgment. You certainly should be ready by July 6th, because we may reach compliance by that stage.

MR. CONVERY: That's true, we may. But I think that the matter of preparing for trial has to

1 be utmost in the minds of the attorneys for Old  
2 Bridge, and I'm simply opposed to the concept of  
3 O&Y serving papers today on the Township to preempt  
4 something that we're preparing for. And for that  
5 reason, I'm opposed.

6 THE COURT: All right. I'm going to make  
7 the motion returnable July 6th, which seems to me  
8 not to place a burden beyond the defendants -- on  
9 the defendants beyond which they already have,  
10 because the issue of compliance could well be  
11 reached by that date.

12 It may be that the plaintiffs in this case  
13 would be satisfied to rest upon my fair share  
14 determination in the Warren case. I mean, that's  
15 possible. Or that they may wish to merely take  
16 issue with certain aspects of it, and it could be  
17 that the defendant, on the other hand, may try the  
18 case on that basis, too. I don't know.

19 So, fair share aspect is very short, and we  
20 may be ready for compliance by the time that we get  
21 to Friday, at any rate. And certainly, defendant  
22 should be ready on the issue of compliance by the  
23 date it would start, which would be by July 2.

24 So, we'll make the motion returnable for  
25 July 6th, and it may, in fact, save some trial

1 time. If it doesn't, it will clarify the issues  
2 with respect to the compliance question.

3 MR. NORMAN: Your Honor, one question. Some  
4 of us are not privy to the Warren case. Is that  
5 something that's been accomplished?

6 THE COURT: I'm sorry. I'm sorry. The  
7 Warren case was the first case fully tried before  
8 the Court, it preceded the Urban League trial. And  
9 I am in the process of writing a formal decision in  
10 that case, and I have every reason to believe that  
11 it would be available by July 2d, at least I'm  
12 aiming for that. And while it may not be  
13 presumptive, it certainly is going to express my  
14 views with respect to a fair share methodology.  
15 That much I can be sure of at this point.

16 MR. LEFKOWITZ: Not to be too presumptuous,  
17 is it possible to get on the mailing list?

18 THE COURT: Absolutely.

19 MR. LEFKOWITZ: Thank you, your Honor.

20 THE COURT: Anyone who's scheduled for trial  
21 during the balance of this period will receive a  
22 copy of it.

23 MR. GELBER: Judge, is it your intention to  
24 consolidate the matters with respect to the motion,  
25 as well?

1 THE COURT: Well, that's a compliance issue.

2 MR. GELBER: In other words, can Urban  
3 League participate -- respond to the motion and  
4 participate in argument?

5 THE COURT: The compliance question?

6 MR. GELBER: Yes --

7 THE COURT: Sure. Of course. And so can  
8 Mr. Hill's clients.

9 MR. HILL: So, technically, maybe it would  
10 be good that if the ordinance said that for the  
11 purpose --

12 THE COURT: The order said that for the  
13 purposes of the motion filed with respect to  
14 partial summary judgment, you consolidate for that,  
15 as well.

16 MR. HILL: Good.

17 THE COURT: Okay. Any other preliminary  
18 matters before with get going? Before we switch to  
19 the typewriter?

20 MR. GELBER: Your Honor, is there a due date  
21 on the response to the motion?

22 THE COURT: Well, it's cutting it tight for  
23 everyone here. I don't see any reason why we can't  
24 make the trial date, the first trial date, July 2d,  
25 as the date for responses. That gives almost a

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full two weeks, which would be in accordance with the Rules anyhow.

MR. HUTT: Just for clarity, Judge, in your original order, did you say we're consolidated for everything other than fair share?

THE COURT: No. You give an inch, they take a yard.

MR. NORMAN: Your Honor, would you please clarify that?

THE COURT: I said you are consolidated for the purposes of participating in the ordinance-, revision process, and it should be ordered, and to assert the right for builder's remedy. I think that's about it.

MR. HUTT: Well, what about compliance?

THE COURT: There's two issues of compliance, compliance of the ordinance, no. With respect to revision, yes. I don't call the second stage compliance, I call that revision, because there's two compliance stages.

There's the question of whether the ordinance is presently complying, and a question of whether the new ordinance would be revised as complying. I know you get compliance. Just to avoid confusion, I say, you participate in the

1 revision stage. I did then amend it on Mr. Hill's  
2 request that with respect to the summary judgment  
3 issue on compliance you can be heard.

4 MR. HUTT: That's why I was a little  
5 confused on summary judgment. You can be heard,  
6 but not on the trial stage.

7 THE COURT: That's right. If that motion is  
8 denied, then it's up to the Urban League to pursue  
9 it.

10 Okay. Anything else?

11 MR. NEISSER: There's one matter left with  
12 regard to discovery. I don't know if you want to  
13 handle it now or as part of the pre-trial.

14 THE COURT: Yeah -- let's do it now.

15 MR. NEISSER: Okay. We've received, as far  
16 as we can tell, at this point, as of yesterday,  
17 albeit late, all of the matters that we were  
18 supposed to, but with one important exception.

19 At the last -- at the hearing of the motion,  
20 which is about two weeks ago, May 30th, I believe,  
21 your Honor indicated that Old Bridge's consultant,  
22 Mr. Hintz, was to file the preliminary report of  
23 the methodology, and what he was hoping to use by  
24 the 16th, and then a final report by last Friday.

25 Last week, during the week, I received a

1 one-page letter outlining his calculations. We've  
2 now received, as of yesterday, a report which does  
3 include a lot of calculations. It also indicates  
4 his approach towards vacant developable land.

5 However, the data is not there. The report,  
6 starting on page seven, indicates that he -- or his  
7 staff has been in contact with a variety of  
8 counties, five counties, apparently, that he  
9 considers part of the commuter shed region,  
10 including Ocean, Somerset, Monmouth, Middlesex and  
11 Union; and indicates that, at best, they would be  
12 ascertaining the availability of data from Union  
13 County; and sometime in the next week, that means  
14 presumably this week.

15 The problem with that is, as your Honor  
16 knows, all of the experts, including our expert,  
17 obviously, would like to have consistent, reliable  
18 data on vacant developable land throughout whatever  
19 the developable region or regions are.

20 The problem, as the consensus discussions  
21 indicated, it's fairly difficult to obtain this  
22 quickly. If it was readily obtainable, presumably,  
23 we would have had it months ago. We're concerned  
24 about -- in light of that, we're concerned about  
25 the reliability and consistency among -- between

1 counties in approach in measuring the various  
2 subject areas.

3 We're particularly concerned that the  
4 problem of time, that is to say, how we will have  
5 time to analyze the methodology, understand what  
6 Mr. Hintz is using, how he's using it, and whether  
7 it's a viable measure of the subject factor that we  
8 all agree on, from this point: Mr. Hintz's  
9 deposition is scheduled for next Monday, the 25th,  
10 at 1:00 P.M.. If at the best hope all of the data  
11 is available then, which I personally doubt, but  
12 then we would have less than a week for us to do  
13 independent analysis by contacting and perhaps even  
14 deposing four or five county planners to find out  
15 how they went about the about getting this data.

16 So, we, at this point, renew our motion to  
17 exclude any testimony from Mr. Hintz or any other  
18 consultant for Old Bridge with regard to a  
19 modification of his report based on measurement of  
20 vacant developable land in that region.

21 MR. CONVERY: We're opposed to that motion.  
22 Obviously, this is an important aspect of the case  
23 for Old Bridge. Every effort is being made to  
24 accumulate this data. I think Old Bridge should be  
25 given every opportunity to defend and to provide



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data to the Court which is relevant.

The fact that we're having difficulty obtaining the data in regard to one county should not lead to exclusion. I think that the deposition is set for next Monday. I think Mr. Hintz should be given an opportunity to provide that data by next Monday. He can be deposed at that time, based upon the data.

I think that, as far as exclusion goes, if there's some question as to the reliability, that goes to the weight of the data. I don't think it goes to exclusion.

Furthermore, if the Urban League feels that they need additional time, then the proper remedy for the Urban League is to request an extension of time to review the data. I don't think we should be excluded from producing this extremely important data regarding vacant land at this time.

I believe, also, the motion's premature. I think that we should be given at least until the date of the deposition, on the 25th, before the Court consider this motion to exclude.

Thank you.

THE COURT: Of course, all this information is due now, so I can hardly say it's premature.

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You have four of the five counties? Is that right?

MR. CONVERY: Yes. We're having difficulty with Union County getting the data, but, basically, we have four of the five.

THE COURT: Could you produce the four counties immediately, and then produce the fifth county by Monday?

MR. CONVERY: Four of the counties have represented that they have the data, and we're awaiting that data. As far as getting it to the Urban League, I think that we would need until, Thursday, at the earliest, to provide it.

THE COURT: All right. I'm going to direct that you produce it by Thursday, and produce the fifth county by Monday. And at that time, I'll permit the Urban League to renew their motion, if, in their judgment, they've been prejudiced by the delay.

It is important, and it's a type of refinement that is rather desperately needed in this setting. Everybody recognizes the inaccuracy of the figures. On the other hand, the Urban League is -- has been expeditious in pursuing their discovery, and there has been a deadline set.

And if they settle to get a wealth of data

1 which they question, it's not enough to say that it  
2 will be an issue of weight, because they're not  
3 going to be able to put the weight in question.

4 So, I'll permit, on Monday following the  
5 depositions, Mr. Neisser to contact me by phone,  
6 indicate whether or not he wants to renew his  
7 motion; and if so, we'll set up a short date for  
8 that purpose.

9 MR. NEISSER: Could we just have a  
10 clarification then? This time, the service will be  
11 in hand, rather than in the mail. -,

12 THE COURT: In hand, by Thursday.

13 MR. NEISSER: Thank you your Honor.

14 THE COURT: And then the balance in hand, by  
15 Monday.

16 MR. LEFKOWITZ: Just another discovery  
17 matter, your Honor, while we're cleaning up house.

18 THE COURT: Fine.

19 MR. LEFKOWITZ: The return date of the Urban  
20 League's motion, our telephone conference, the  
21 Township of North Brunswick agreed to supply  
22 certain information by June 15th. We did supply  
23 that information.

24 We further agreed by June 22nd to supply  
25 further answers to interrogatories with regard to

1 some issues with regard to sewer capacity. The  
2 position that the Township took and still takes is  
3 that we are not presenting the defense of lack of  
4 vacant land or lack of capacity to build such  
5 housing.

6 My expert that had been attempting to answer  
7 these interrogatories, with regard to sewer  
8 capacity, informs me that he does not have the  
9 manpower, nor the ability to get the figures, even  
10 upon two or three month study, to get the answers  
11 with regard to sewer capacity, that that's -- that  
12 lies within the purview of the Middlesex County  
13 Utility Authority.

14 What I'm asking for, your Honor, is with  
15 regard to a number of those questions, since we're  
16 not putting forth the defense that lack of ability  
17 to build, or the capacity to build, that in the  
18 event that we don't -- we're unable to produce  
19 answers to any of those questions that we only be  
20 barred from producing testimony with regard to  
21 that, and that -- and presenting a defense along  
22 those lines, and not that all our answers to  
23 interrogatories, all our defenses be stricken,  
24 because I think that's the way the motion was  
25 couched, originally.

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THE COURT: All right.

MR. NEISSER: That's certainly agreeable to us in that form.

THE COURT: Why don't you submit a revised order, Mr. Neisser.

MR. LEFKOWITZ: Let's see what we can answer.

THE COURT: I'll not sign the order submitted based on the argument today with regard to discovery.

Okay. All the loose ends tied up?

MR. HUTT: I assume, as you did in previous cases, that we'll be entitled to get copies of these interrogatories and discovery?

THE COURT: Yes. Yes.

MR. HUTT: Can we put that in the order of consolidation?

THE COURT: You may put it in. Okay.

(Matter concluded.)

\* \* \*

C E R T I F I C A T E

I certify the foregoing to be a true and accurate transcript of the proceedings in the above entitled cause.

Date: 7-5-84

Dayette J. Zampolin  
DAYETTE J. ZAMPOLIN, C.S.R.