

- ~~1985~~ Plaintiff's letter Brief in support of ~~the~~ motion for leave to intervene and to lift Restraints

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REFER TO OUR
 FILE NO. C-3719

October 29, 1985

HONORABLE EUGENE D. SERPENTELLI, AJSC.
 Superior Court of New Jersey
 Ocean County Court House
 Toms River, NJ 08754

RE: Docket No. C-4122-73, Urban League of
 Greater New Brunswick v. Mayor and
 Council of Carteret, et al. and Docket
 No. C-5204-85, Massaro, et al. v.
 Borough of South Plainfield, et al.

Civil Action: Motion to Allow
 Intervention and Lift Restraints;
 Brief of Plaintiffs/Intervenors.

Dear Judge Serpentelli:

Would you kindly accept this letter brief in lieu of a formal brief in support of Plaintiffs/Intervenors motion for leave to intervene and to lift Restraints in the above actions? All references to "Plaintiffs", "Plaintiffs/Intervenors", or "Intervenors" refer to the purchasers of certain parcels of land from the Borough of South Plainfield who seek to intervene in the Urban League case to have Restraints preventing consummation of their land purchases lifted and to compel the Borough of South Plainfield to convey title to the said parcels.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The relevant facts and procedural history are set forth in the Certification of Philip G. George, Esq. supporting this motion.

LEGAL ARGUMENT

POINT I - Plaintiffs HAVE STANDING TO SEEK INTERVENTION
 IN THIS CASE BECAUSE THEY ARE SUFFERING IMMEDIATE,
 IRREPARABLE HARM BY THE BOROUGH'S REFUSAL TO PASS
 TITLE TO THE LANDS BUT CANNOT OTHERWISE PROTECT
 THEIR INTEREST IN THE LANDS.

Plaintiffs in this case are contract purchasers, under authority of resolutions of sale, of municipally-owned unimproved lands in the Borough of South Plainfield, New Jersey. None of the Plaintiffs have yet received a deed to the properties they bought; however, as the recitations of fact in the accompanying certification and Exhibits A-D attached thereto show, the Borough of South Plainfield made time of the essence in these contracts and required payment of the full purchase price, a total sum for the lands in question of almost \$1,500,000.00. The demand for payment, which had to be met to preserve any rights in the contracts, was made when the Borough knew or should have known that it could not convey title due to the restraint on conveyances of titles to land made by this Honorable Court in July, 1985, and continuing down to the present time.

As such, these Plaintiffs are being denied both the use and enjoyment of the funds required to be tendered as well as the title to the land they bought. It is now more than 60 days since they paid their money and have received no title. However, despite institution of a suit for specific performance, no transfer of title can be completed because the Restraints imposed by this Court prevent transfer, whether by choice or compulsion.

Thus, the dilemma Plaintiffs find themselves in by the actions of the Borough demonstrate standing to assert a basis for intervention in the present case. Standing in New Jersey is a practical concern, where a party's interest "evidence(s) a sufficient stake and real adverseness." Crescent Park Tenants Assoc. v. Realty Equity Corp. of N.Y., 58 N.J. 98, 107 (1971). Here Plaintiffs' "stake" is the completion of substantial purchases of real property from the Borough. In particular, the large tract under contract to plaintiff, Lawrence Massaro is designated for multifamily development and of prime importance to compliance with the order and judgment in the Urban League action against South Plainfield. The requisite adverseness is demonstrated by the deliberateness of the BOROUGH'S action in requiring payment when title could not be conveyed coupled with the loss of use of either purchase money or land, a situation which requires Plaintiffs to institute suit to remedy. Therefore, Plaintiffs respectfully submit they have the requisite standing to seek intervention in this matter.

POINT II - Plaintiffs' APPLICATION FOR INTERVENTION IS
TIMELY BECAUSE THEY HAVE MOVED FOR INTERVENTION AS
QUICKLY AS PRACTICABLE IN THE FACE OF SUBSTANTIAL
COMPLEX LITIGATION AND REPEATED DELAY IN RESOLUTION
OF THE ISSUE OF Restraints.

Plaintiffs' causes of action in their suit for specific performance and their right to relief in the instant motion accrued on August 23, 1985, when the Borough did not tender title. This

application is being made slightly more than 2 months later. At the time set for performance the BOROUGH'S motion to transfer their Mount Laurel action to the newly-constituted Fair Housing Counsel was already pending, and with it the possibility that the Restraints in issue would be lifted. That motion, originally to be heard on the day that Hurricane Gloria struck our area and closed the Courts, was only heard three weeks ago, and an order continuing the Restraints made at that time.

Against this time frame must be set the complexity of the Mount Laurel action against South Plainfield, particularly throughout recent months when the Borough has several times been before this Court on contempt charges and for enforcement of litigant's rights. And the matter is further complicated by the fact that it has become a political football resulting from and generating anew sanctions such as the instant Restraints.

Square in the middle of these complexities and complications sit the Plaintiffs, who have been forced to pay full price by the Borough for land which the Court has said cannot be sold, yet which the Borough contracted to sell. Having weathered the transfer motion and the continuance of Restraints, Plaintiffs' motion must be deemed timely as all substantive issues in the South Plainfield branch of the Urban League action are resolved and the case is moving to its final compliance stage. Although the last two months have seen many developments in the case, Plaintiffs properly waited for the issue of Restraints to be resolved, unfavorably to their point of view, in the transfer motion, in the greater context of the litigation.

POINT III - Plaintiffs SHOULD BE GRANTED LEAVE TO INTERVENE AS OF RIGHT OR PERMISSIVELY BECAUSE THEY HAVE A VESTED INTEREST IN THE CONVEYANCES RESTRAINED, THE Restraints IMPEDE THEIR ABILITY TO PROCEED TO PROTECT THAT INTEREST, AND THERE IS A COMMON QUESTION WHETHER Restraints SHOULD CONTINUE TO BE IMPOSED.

The criteria for a person to intervene in a pending action is set forth in R.4:33. Intervention as of right is controlled by the standard of R.4:33-1, which allows a party intervention when the party "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impeded his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

In the present case, Plaintiffs are contract purchasers of certain parcels sold by resolution of sale by the Borough of South Plainfield. It is true that the issues in the Urban League case are of constitutional magnitude and touch upon specific property only in

their overall effect. However, the Restraints on property conveyance imposed as sanctions for the BOROUGH'S refusal to comply with the order and judgment, and to adopt an amended zoning ordinance, directly impair consummation of these sales or any proceeding, application or litigation to enforce the sale, should the Borough refuse to convey. Thus, while the Urban League issues only peripherally effect these Plaintiffs, the Restraints effectively prevent moving the sales or alternative remedies. Therefore, Plaintiffs respectfully submit they have met the standard of interest on the limited issue of Restraints in this action.

Further, no party to the action adequately represents Plaintiffs' interest. The Urban League's interest lies in insuring "fair-share" housing and in overseeing related zoning and planning decisions for implementation thereof. There is no interest in protecting contract rights to unimproved lands, except in passing as to the multifamily-zone parcel sold to plaintiff Massaro; in fact, the positions may be adverse because the Urban League might well assert continuance of the Restraints as a necessity to preserve its own litigation interests in order to insure continuing compliance.

The BOROUGH'S position is plainly adverse. First, the Borough is the contract vendor of the properties, while these Plaintiffs are the contract purchasers who have had to institute an action for specific performance, against the Borough, in order to preserve their rights and compel transfer of the property. Further, the Borough, evaluating the stance of non-compliance which it has demonstrated for sometime now, might well acquiesce to continuance of Restraints in order to preserve a sort of status quo pending further litigation and/or appeal.

For these reasons, Plaintiffs submit that intervention as of right should be granted and the Restraints on property conveyances lifted. Additionally, the restraint issue is common as a matter of law and fact to both the Urban League and the present actions, although the gravamen of each complaint may not be. Therefore, Plaintiffs submit that, even if arguendo mandatory intervention under R.4:33-1 were not granted, permissive intervention under R.4:33-2 should be granted. The issue of Restraints is common because, as shown above, the Restraints must be lifted to permit Plaintiffs to consummate their sales, yet the Restraints are an integral part of the Urban League case sanctions. Thus, they are common issues to both cases, both in law and in fact.

Further, intervention will not unduly delay or prejudice adjudication of any rights of the parties. The sole issue Plaintiffs assert in this action is to lift Restraints; there is no issue taken with the outcome of the Urban League litigation. Any litigation by the Borough would presumably address use or development of the

properties after sale, as counsel for the Borough may advise; this issue does not therefore impact upon lifting Restraints now to allow sale of the property to be completed.

Therefore, Plaintiffs respectfully submit leave to intervene should be granted. They possess the requisite standing and have made timely application. They are sufficiently affected by the continuance of Restraints to convey a right to intervene, and intervention will not delay the Urban League litigation. For all these reasons intervention should be granted.

POINT IV - THE Restraints ON CONVEYANCE OF THE SUBJECT PROPERTIES SHOULD BE LIFTED BECAUSE THE NEED TO PRESERVE THE STATUS QUO OF THE URBAN LEAGUE LITIGATION NO LONGER EXISTS AND ADEQUATE REMEDIES ARE OTHERWISE AVAILABLE TO THE BOROUGH.

As noted above, the Restraints at issue here were imposed after a consent judgment was entered outlining South Plainfield's responsibilities in meeting its Mount Laurel burden. Essentially, the Restraints were made as part of a series of sanctions following the BOROUGH'S continued refusal, despite direction from this Court, to adopt the requisite ordinances implementing provisions for low cost housing. The Restraints served to preserve the status quo of South Plainfield land use until such time as the Borough acted to implement the consent judgment.

However, the Borough has now enacted Ordinances 1009 and 1010 which implement that judgment. As such there is no longer any necessity to restrain land sales from being consummated. In fact, lifting the Restraints particularly in reference to the property purchased by Lawrence J. Massaro as referenced in Count 2 of the complaint for specific performance will ultimately facilitate the achievement of the BOROUGH'S fair share housing allocation since the tract is targeted for Mount Laurel development. Further, with the availability of Fair Housing Act financing, the Borough could apply for grants and/or loans under the application procedures recently announced if the developer were allowed to close title and present plans for development with adequate leeway for the Borough to make a timely application for funding.

The BOROUGH'S future legal position will not be prejudiced by dissolving the Restraints because adequate PROCEDURAL protections exist pursuant to R. 2:9-5(b), which allows the Borough the right to apply for a stay, presumably coupled with any Restraints it might seek, first to this Court and then to the Appellate Division, assuming the Borough elected to appeal. Therefore, the instant Restraints, having served their purpose, should be dissolved.

POINT V - THE BOROUGH SHOULD BE COMPELLED BY THIS HONORABLE COURT TO CONVEY TITLE TO THE SUBJECT PROPERTIES.

This argument and request for relief is withdrawn.

POINT VI - THE BOROUGH OF SOUTH Plainfield SHOULD BE COMPELLED TO PAY ATTORNEY FEES TO THESE Plaintiffs BECAUSE THE BOROUGH'S DEMAND FOR TENDER OF PAYMENT IN THE FACE OF THIS COURT'S Restraints IS THE SOLE REASON Plaintiffs ARE FORCED TO SEEK LEAVE TO INTERVENE

The award of attorney fees in this action is not specifically covered by R. 4:42-9. However, in the circumstances of this somewhat unusual application for dissolution of Restraints by Intervenors who are Plaintiffs in the separate equity action for specific performance, Plaintiffs urge that the general equity powers of this Honorable Court can and should be exercised to grant them an award of attorney fees.

First, the Borough of South Plainfield through its legal counsel and mayor and council knew that there were Restraints enjoining consummation of the contracts in question. Therefore, it knew it could not complete the sales according to the resolutions of sale. Yet it proceeded to require Plaintiffs to tender payment, by making time of the essence in these agreements. Without arguing the merits of any other claim Plaintiffs may have, surely this action on the BOROUGH'S part required it to also be ready to perform.

Thus, in order to enforce any right plaintiffs might have in completion of the sales, Plaintiffs must first have these Restraints lifted. The sole reason for this application was the premature action of the Borough, therefore Plaintiffs would not otherwise have had to belabor this Court with yet another application in this extensive litigation, nor ventured more funds in order to protect their rights. Therefore, Plaintiffs respectfully request this Court award them attorney fees as certified for this application.

CONCLUSIONS


For all the foregoing reasons, Plaintiffs urge they should be allowed to intervene in this action and that Restraints against the conveyance of borough-owned property be lifted. Plaintiffs have standing to assert this claim because as a practical matter they have a high stake in the outcome of the application and are adverse to the parties in this action. Their interest in the property in question may be collateral to the issues in this action but this late in the Urban League case, their property rights are impaired and are not protected by other parties. There are common issues of law and fact in the restraint issue. Further, the Restraints have served their purpose in insuring preservation of the status quo in the Urban League

case and should be dissolved. Plaintiffs are entitled to an award of attorney fees as a matter of general equity because the Borough's actions are the sole reason Plaintiffs must seek relief from this Court, where otherwise they would not have had to resort to any litigation.

Respectfully Submitted

John George
Attorney for Plaintiffs

by:


Philip G. George
for the Office

PPG:eam

cc: Urban League Distribution List
Lawrence Massaro
Vincent Orazi
Gene and Debra Mohan
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