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↑ brief in opp. to motion to intervene

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs,	]	Docket No. C 4122-73
vs.	]	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	]	(South Plainfield)

URBAN LEAGUE PLAINTIFFS' BRIEF ON SOUTH PLAINFIELD COMPLIANCE, IN OPPOSITION TO HARRIS STRUCTURAL STEEL'S MOTION TO INTERVENE AND IN RESPONSE TO MASSARO ET AL.'S MOTION TO INTERVENE AND LIFT RESTRAINTS

FACTS

The Court is fully familiar with the key facts concerning South Plainfield's compliance efforts, most of which were set forth in the Affidavit of Barbara Williams of October 26, 1984, the Affidavit of Eric Neisser of June 21, 1985, the Affidavit of Barbara Williams of June 21, 1985, the Affidavit of Barbara Williams of July 30, 1985, the Affidavit of Eric Neisser of August 28, 1985, and the Certification of Lawrence Massaro of August 27, 1985, which were filed with this Court in connection with the plaintiffs' various motions for restraints and in opposition to the Borough's recent transfer motion. The Affidavit of Eric Neisser of November 7, 1985 and the Affidavit of Alan Mallach of November 5, 1985, submitted with this brief, contain the remaining necessary facts.

In summary, the Borough and plaintiffs voluntarily signed a Stipulation with all relevant facts on May 10, 1984. This Court entered Judgment on May 22, 1984 which required rezoning and all other steps for compliance to be completed by October 4, 1984. By letter-report dated May 30, 1984, Carla Lerman, the Court-appointed expert gave her opinion that the Stipulation, including the designated sites, was reasonable. By Order entered December 13, 1984, this Court consolidated this action with the Elderlodge action and directed compliance by January 31, 1985. By Order entered July 3, 1985, and modified on July 19, this Court ordered compliance by July 30, 1985 and restrained issuance of

any building permits and sale of any Borough-owned land. On July 18, the Borough filed its transfer motion. On August 7, 1985, the Borough adopted Ordinances 1009 and 1010. On August 9, 1985, this Court stayed the effectiveness of those ordinances pending determination of the transfer motion, continued the restraints on building permits only as to sites within the Judgment, and continued the restraints on all Borough land sales. By Order entered October 11, 1985, this Court denied the transfer motion, vacated the stay on the effectiveness of the ordinances, but continued the stays on certain building permits and all Borough land sales from the August 9 Order. Details as to particular sites will be mentioned in the course of the argument below.

ARGUMENT

In summary, the Urban League plaintiffs submit that the Borough of South Plainfield is almost in compliance with this Court's Judgment of May 22, 1984 but that because of the uncertainty as to several crucial parts of the compliance plan, this Court should either defer or condition a Judgment of Compliance on satisfaction of several specific conditions. Briefly these include:

a) a firm timetable for Borough application for funding for the Morris Avenue senior citizen site, with specific fall-back provisions should the timetable not be met;

b) placing of funds from the sale of Borough lands within the Judgment into escrow for use in subsidizing the senior citizen project;

c) slight modification of the permissible density of the Pomponio Avenue site to compensate for the units lost on that site through the Borough's sale of land and approval of inconsistent development during the 10 months of Borough refusal to rezone in accordance with the Stipulation and Judgment;

d) amendment of the zoning ordinance to specify the block and lot numbers of lands within the new zones, to prevent any ambiguity arising from the zoning map and any possibility of a repetition of the inconsistent Planning Board approvals earlier this year; and

e) Borough adoption of the resolution regarding subsidy fund applications required by Paragraph 6 of the Judgment.

In addition, we submit that the Borough's repose, whenever granted, should date from October 4, 1984, the date when the Borough was to have complied with the Judgment, rather than any subsequent date, because the Borough should not be allowed to extend its repose through intentional violations of a Court Judgment and other Court orders.

Finally, we oppose Harris Structural Steel's motion to intervene and any modification of Paragraph 3(A) of the Judgment or the zoning ordinance with respect to this site because now, as then, the site is clearly suitable for residential development at the specified density. We oppose the motion of Massaro, et al. to intervene, but do not object to vacation of the restraints on closing title on any Borough land sales for which bids have already been accepted, with one exception noted below, as long as

the funds from any sale of land within the Judgment are placed in escrow for funding the senior citizens project, as described in (b) above. We do oppose, however, sale of the three parcels in Block 427, Lot 1.01 in the Pomponio Avenue site to Gal-Ker whose final subdivision approval was expressly made subject to Urban League's claim in this action. Moreover, Borough-owned land on which bids have not yet been accepted should not be sold until it is clear that the Borough has fully satisfied its obligation with regard to the senior citizens project, as described in more detail below.

A. Ordinances

As we have previously informed the Court, we consider Ordinances No. 1009 and 1010 to be in compliance with the Judgment except insofar as the zoning ordinance, No. 1009, fails to identify the block and lot numbers or provide metes and bounds descriptions of the affected lands. Although such precise designation is not normally found in a zoning ordinance, we believe it is necessary here for two reasons.

First, there are very few vacant sites remaining in South Plainfield and it is crucial that the precise contours of the very limited zoned land be known to all developers, landowners, and Borough officials. Indeed, in South Brunswick, where much more open space exists and each designated site is much larger, the plaintiffs and Township have agreed to put the block and lot numbers in the zoning ordinance.

Second, the Planning Board twice during the extended period of Borough noncompliance approved subdivisions and developments on land within the Judgment, in one case immediately after discussing the very ordinances at issue here. Leaving to one side whether the Planning Board or its attorney could reasonably have been charged by April 1985 with knowledge of the May 1984 Judgment's requirements, it is certainly reasonable to require the Planning Board and its attorney to read the zoning ordinance that it is charged with implementing. If the block and lot numbers had been in the ordinance, the subdivision and ensuing construction on land within the Judgment's Pomponio Avenue site, detailed below, could not have occurred. The Urban League plaintiffs are certainly entitled to protection against its recurrence.

B. Harris Steel Site

At the very last moment, Harris Structural Steel has moved to intervene. The land has been owned by this entity since long before the Stipulation and Judgment. The moving papers admit that Harris was not only well aware of the required rezoning, but actually participated at the public hearing on the ordinances on March 11, 1985, nearly 8 months ago, and has had extensive contact with Borough officials about the rezoning since then. No reason is given why this motion was not brought in a timely fashion. None could be. For that reason, the court should deny intervention without consideration of the arguments presented by Harris Steel.

The motion fares no better substantively. The arguments boil down to two: that some portion of the site is not useable for housing, and that the re-zoning is unlawful because the Borough had no choice about it and thus the public hearings held were meaningless. Both contentions are fully refuted by the facts and the law.

Mr. Mallach's affidavit fully explains why the site is entirely suitable for residential development at the designated gross density of 12 units per acre. Unlike the movants, Mr. Mallach carefully analyzes the available data, which show that at most 15 acres are subject to floodplain restrictions and that the other 70 are entirely suitable for construction.[1] Moreover, Mr. Mallach, but not the movants, incorporates the difference between gross and net densities and thus demonstrates how all the required units, both market and lower income, can be effectively and properly accommodated on the site within the existing zoning.

Because it is apparent that the zoning is entirely reasonable and consistent with sound planning, it is doubtful that a Council informed about the true facts would have been persuaded by Harris Steel's arguments. Thus, any possible deficiencies in the procedure followed would almost certainly be

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1 The newspaper report provided as Exhibit C to Mr. Barcan's affidavit states that Harris Steel's planning consultant told the Borough at the March 11 that only 28 acres were buildable. The written March 11 report, their Exhibit B, claimed 30 acres were buildable. By their April 10 report, Exhibit D, the asserted buildable acreage was up to 41.5. Projecting this rate of correction over time, we assume that their consultants would soon be prepared to concede that the 70 acres documented by the available data are in fact buildable.

harmless error. But there was no error. The Council at least twice held public hearings properly noticed in the newspapers, as required by law -- one on March 11 and one on July 29, 1985. Harris Steel's representatives in fact took the opportunity to participate in the March 11 hearing, apparently at some length. The fact that they chose not to participate on July 29 hardly supports a contention that they were denied the opportunity. Nor is there any merit to the contention that the Borough Council felt it had no choice. The Council apparently felt free to violate the Judgment of May 22 and the Order of December 13, 1984, which required passage of these ordinances. Moreover, it did not adopt the ordinances at the March 11 meeting, when it heard Harris Steel's representatives, nor at the July 29 meeting, when it was under a third Court order to do so. The timidity or lack of discretion on the part of the Council to reject court orders that the movants wish to convey is quite simply not in accord with the facts.

Nor would it be unlawful had they felt "compelled" to adopt an ordinance in conformity with a settlement they voluntarily negotiated. The law does not preclude a governmental agency from settling litigation. Nor is it precluded from doing so without first holding a public hearing. Indeed, the Open Meetings Act expressly authorizes closed sessions to discuss litigation. The Municipal Land Use Law, which requires the kind of public hearings held in this case, is not a bar to such settlements. If the governing body decides to settle a case based on a commitment

to amend the zoning ordinance, it is understood that such agreements are subject to the public hearing requirements of the M.L.U.L. If the governing body, after hearing the public's views, believes it must vary the ordinance somewhat from the agreement, it can seek to renegotiate the agreement or convince the opposing party or court that the modified ordinance effectively satisfies the settlement. In a Mount Laurel context, of course, if the municipality, as here, has stipulated as to all the relevant facts but then fails to pass a compliant ordinance, the Court may ask a Master to draft an ordinance and order that version into effect. 92 N.J. 158, 285-90 (1983). Harris Steel would certainly have been no better off if the Borough had accepted its argument, reneged on the Stipulation, violated the Judgment, and had the Master, who had already given an opinion that its site was suitable, rezone the town to satisfy the Judgment.

Cases like Midtown Properties Inc. v. Madison Twp., 68 N.J. Super. 197 (Law Div. 1961), aff'd, 78 N.J. Super. 471 (App. Div. 1963), are simply not analogous. There, the Court granted the Township's motion to vacate a consent judgment based on a settlement with a developer, precisely because it was contract zoning effected without following the required statutory procedures for rezoning. Nor is this a case like Suski, Jr. v. Mayor & Commr's of Beach Haven, 132 N.J. Super. 158 (App. Div. 1975), where the ordinance was sought to be amended "by an act of a governing body of less dignity than that which created the ordinance in the first place."

Finally, it is not a requirement that a governing body amend an ordinance as introduced on first reading after hearing the public's comments. The purpose of the public meeting requirements of the Open Meetings Act and M.L.U.L. is to assure an opportunity for public input. The governing body is not required to accept all public criticisms and modify its ordinances accordingly. It would not have been a farce, legally or factually, if the Borough Council had not accepted Harris Steel's argument even in the absence of a settlement. It is no more a farce here. Harris Steel has received all the process it is due. It is not entitled to a specific result.

C. Senior Citizen Project (Morris Avenue site)

The Court's Judgment of May 22, 1984 directs the Borough to rezone the municipally-owned site of 6.15 acres on Morris Avenue exclusively for development as a senior citizens housing project. The project must contain 100-150 units, at least 50% of which will be low income, and the balance moderate income. Para. 3(F). In addition, the Judgment requires that the Borough contribute the land at that site and provide the necessary financial support for the project, including necessary seed money and tax abatements. Para. 4.

The Borough has now properly rezoned the site, but has essentially done nothing else required by the Judgment. It has still not completed acquiring all parcels in the site, even though it affirmatively represented to the plaintiffs and this Court 18 months ago that all parcels were already municipally

owned. Indeed, at some point in the last year[2] the Borough officials actually told the last private landowner that it was not interested in acquiring his site. The Borough has not adopted the resolution committing itself to apply for all available subsidy funds nor has it applied to the one major new funding source that has recently become available -- the NJHMFA. We note that, in contrast, South Plainfield moved with uncommon alacrity to avail itself of another option under the Fair Housing Act -- the right to bring a motion to transfer. Contrary to its voluntary commitment in the Stipulation, and the repeated assertions of the present and prior Borough Attorney as to the intense local political commitment to this project, not one penny has been spent, nor one plan has been drawn, not one funding application has been drafted. Only a nonprofit shell corporation has been established on paper. This footdragging with regard to as much as one-quarter of the specified fair share (150 out of a possible total of 603 lower income units on the eight rezoned sites in the Judgment) would itself probably warrant judicial supervision or modification of the Judgment. However, in the context of the Borough's repeated misrepresentations and demonstrations of bad faith,[3] strict measures to assure

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2 Plaintiffs do not know exactly when these interactions occurred, because the Borough has still not, as of this writing, supplied the documentation requested over two months ago.

3 We need not remind the Court here of the many instances in which the Borough has failed to meet discovery and compliance deadlines, has omitted significant sites from their lists of remaining vacant land in the Borough, has sold portions of the very parcels of land included within the Judgment, and has approved development on such parcels inconsistent with the required rezoning, after intentionally delaying the rezoning of those lands for low- and moderate-income housing. We refer the Court to the Affidavit of Eric Neisser of November 7, 1985 filed herewith and our Memorandum of Law in Opposition to South

compliance are clearly in order.

In the plaintiffs' opinion, the measures should include the following:

(1) The Borough shall submit a complete application to the New Jersey Housing and Mortgage Finance Agency (NJHMFA) for financing for this project, within sixty (60) days of this compliance hearing or the deadline for the first funding round set by the NJHMFA, whichever is earlier. If the application is denied for reasons beyond the Borough's control, then it shall have an additional 120 days after the denial to apply or arrange for and obtain alternate financing.

(2) Within eight (8) months of the receipt of financing, the Borough shall complete construction of the housing units, and immediately thereafter rent out the units to qualified low- and moderate-income individuals or families.

(3) If the Borough fails to apply to NJHMFA by the date specified in (1) above or is unable to obtain alternate financing within the additional 120 days provided for in (1) above, then the Borough shall grant an option to purchase the land, at a purchase price of $1, to any non-profit organization capable of, and committed to, providing the requisite Mount Laurel senior citizens housing for a period of one (1) year from the date of the option. The Court would have to approve the organization and its funding and development proposal.

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Plainfield's Motion to Transfer This Case to the Council on Affordable Housing, August 28, 1985, pp. 3-17, for a more complete recitation of these unfortunate facts.

(4) The Borough shall place in escrow with the Court the $1.27 million received for sale of the 23.33-acre portion of the Pomponio Avenue site to Lawrence Massaro (see below), and the $31,250 already received for sale of three tracts within the Pomponio Avenue site approved for development inconsistent with the Judgment. Certainly a town that has done nothing to fulfill its obligation to provide financial support for one-fourth of its fair share should not be allowed at the same time to profit from the sale of land made more valuable by the rezoning it has so vigorously resisted. These escrowed funds would, of course, be released for use in subsidizing the senior citizens project, in whole or in part, once funding or a nonprofit sponsor is in place.

N.J. Court Rule 4:57-1 provides that monies may be deposited with the Superior Court in an action in which any part of the relief sought is a disposition of a sum of money. The Judgment called for the Borough's financial support of this project. Para. 4. Although this Rule is not applicable "to allow a party to deposit monies into court to avoid a breach of contract or create a fund to secure the satisfaction of a prospective judgment" (AC-Berwick Transporters, Inc. v. Sendell, 176 N.J. Super. 339, 341 (Ch. Div. 1980)), such would not be the case here, where the Judgment has already been entered, and is, therefore, not "prospective" in nature. Instead, the deposit will serve to guarantee the availability of the funds when the time for satisfying that part of the May 1984 Judgment arrives.

In light of the Borough's past behavior, the plaintiffs view such a deposit of (or other appropriate escrow arrangement for) the monies made available by the sale of another Mount Laurel site, as crucial to rendering the Court's Judgment meaningful and realistic with regard to one-quarter of the fair share.

(5) Should the steps above still not produce the promised units on the Morris Avenue site, the Court should preserve the option of providing for some of the units elsewhere. To this end, the Borough should be restrained from selling any further land for which bids have not yet been accepted.

D. Pomponio Avenue Site

The Court's May 22, 1984 Judgment also provides that the Borough shall rezone the municipally-owned site of approximately 25 acres, known as the Pomponio Avenue site, exclusively for multi-family development at a density of 15 units per acre, with a mandatory set-aside of 10% low-income and 10% moderate-income units. Para. 3(C). However, in wilful and flagrant violation of the Judgment, the Borough sold a portion of this site, amounting to 25,000 square feet, or .5739 acres, for non-Mount Laurel purposes, approved two-family home construction and then improperly granted a building permit prior to Planning Board final approval and signing of the subdivision maps.[4]

It is clear that such municipal action was in direct violation of this Court's Order and without legal authority. A

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4 In addition, the Borough signed a contract of sale on the remaining 23.33 acres, but the contract purchaser of that portion, Lawrence Massaro, has already contracted for re-sale of the property to an experienced Mount Laurel developer.

building permit issued as a result of such a void action may, in fact, be rescinded by the Borough, without recourse by the new landowner. See, e.g., Hilton Acres v. Klein, 35 N.J. 570, 174 A.2d 465 (1961), and Esso Standard Oil Co. v. No. Bergen Township, 50 N.J. Super. 90, 141 A.2d 81 (App. Div. 1958). However, plaintiffs here do not seek such drastic measures, which would perhaps inflict more harm on the apparently good-faith purchasers than on the Borough, which acted in bad faith. Instead, we seek to ensure that the Borough does not profit, nor the lower-income plaintiffs here suffer, from the Borough's unwarranted actions.

We propose that the density on the remainder of the Pomponio Aenue site be slightly increased to compensate for the .5739 acre improperly approved for contrary development by Digian. The Borough now asserts that the site contains a total of 26.08 acres. Assuming for argument's sake the truth of this assertion, which is contrary to the 32 acre total which the Planning Board attorney informed us of in June 1985, then the sales to DiGian have reduced the site by only 2.2 percent. Increasing the density by 2.2 percent yields a new gross density of 15.33 units per acre on the remainder of the site. In addition, we believe that the money derived by the Borough from sale of this land ($31,250) should be placed in escrow to be used for the Borough's financial commitment to the senior citizen project. See above. This approach will not require tearing down any new construction by the contract purchaser. It will not cause untoward density on

the remainder of the Pomponio Avenue site. However, it will prevent the Borough from profitting from its own illegal deeds and, most importantly, it will help assure that the Borough complies with the remainder of the Judgment.

In this connection, we note again that we have no objection to lifting the restraint on sale of Borough owned land on which bids have already been accepted, except, of course, for the sale to Gal-Ker of the three parcels within the Pomponio Avenue site. The Planning Board had granted preliminary approval of a subdivision of the Gal-Ker parcels in the Spring of 1985 without regard to the Judgment and only when the Urban League was informed and objected, did the Planning Board condition final approval on the claims of the Urban League. Clearly there is no inequity in denying final approval, because the developer has been on notice since June, if not earlier, that his application was inconsistent with the pending and mandated rezoning. The developer may, of course, have little interest in this purchase, once his subdivision application is denied. But regardless of his interest, the Borough should not be allowed to sell the land until it is clear that the purchaser has the capacity and intent to develop it in accord with the now effective zoning. Arrangements for sale and resale only drive up the cost of development and make lower income housing less likely. The purchaser of the neighboring, far larger Massaro site, would be the most likely user of this site. In any case, given the history of the Borough's transactions as to this site, we believe

that the plaintiffs are entitled to judicial supervision of its future disposition.

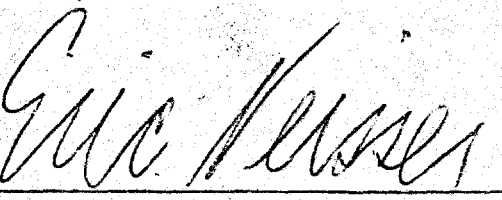
We oppose lifting of the restraint as to Borough land for which bids have not yet been accepted. Such a restraint will not defeat any legitimate expectations of a potential buyer. Moreover, given the sorry history of the Borough's efforts with regard to the Morris Avenue project, it is important for the Court to maintain options in case the Borough does not now begin to comply. By restraining sale of further Borough land, the Court retains the option of rezoning some of that land for Mount Laurel purposes should it become necessary.

E. Repose

Whenever it becomes appropriate for this Court to grant the Borough of South Plainfield repose because it has finally complied with the May 22, 1984 Judgment, it should do so for a 6-year period starting from October 4, 1984. That is the date on which the Borough was to have complied with the Judgment, which allowed 120 days from its effective date. There has been no "mutual written consent" to an extension nor was there a "written application to the Court" for one. Judgment, Para. 12. All delays since October 4, 1984 have been the result of intentional, contumacious behavior by the defendant. Those dragged into compliance against their will should not then be heard to claim that benefits should flow from the delayed date of compliance. Those who desire equity must do equity.

Dated: November 7, 1985

Respectfully submitted,



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Counsel wish to note the assistance of Eileen Gavin McKenna and Florence Williams, Class of 1987, Rutgers Law School, in the preparation of parts of this brief.