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Brief of Plaintiff in opposition to Defendants' Motion to Sever

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December 2, 1974

Honorable David D. Furman
Middlesex County Courthouse
New Brunswick, New Jersey

RE: Urban League of Greater New Brunswick, et als, v. Mayor and Council, Borough of Carteret, et als. Docket No. C-4122-73

Dear Judge Furman:

Enclosed please find the original and two copies of Plaintiffs' brief in opposition to Defendants' motions to sever, to be heard on December 6, 1974.

Sincerely,

David H. Ben-Asher

DAS:blt

Enclosures

cc: All defense counsel

12-2-74

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - MIDDLESEX COUNTY
DOCKET No. C-4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al,

Plaintiffs

v.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,

Defendants.

BRIEF OF PLAINTIFFS

IN OPPOSITION TO DEFENDANTS' MOTIONS TO SEVER

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I. INTRODUCTION

The plaintiffs submit this brief in opposition to defendants' motions to sever. On July 23, 1974, one organizational and seven individual plaintiffs initiated this action against 23 municipal defendants in the Chancery Division of the Superior Court of Middlesex County. Procedurally, the case stands as follows:

Nineteen of the defendants have answered. Motions by various defendants for a more definite statement and several motions to dismiss grounded on a variety of theories were denied on November 1, 1974. As of December 2, 1974, 16 defendants have moved to sever.[1/]

II. SUMMARY OF COMPLAINT

The plaintiffs are representative of a class consisting of low-and moderate-incomes persons, both white and non-white, residing in Northeastern New Jersey, who seek housing and employment opportunities for themselves and educational opportunities for their children in the 23 defendant municipalities.

Plaintiffs initiated this suit for injunctive relief against the 23 municipal defendants because each defendant

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1/ Carteret, Cranbury, Dunellen, East Brunswick, Edison, Helmetta, Highland Park, Jamesburg, Metuchen, North Brunswick, Piscataway, Plainsboro, Sayreville, South Plainfield, South River, Spotswood.

discriminates against the plaintiffs through the adoption, maintenance and operation of a variety of exclusionary zoning and other land use practices that impede and deter the construction of housing they can afford. The result of this conduct has been to exclude low-and moderate-income households, especially those with children, from residing within defendant communities. The effect of this conduct also has been to confine low-and moderate-income persons, both white and non-white, to overcrowded, substandard, and often unsafe, housing within central city areas.

Plaintiffs contend that this conduct violates the general welfare clause of the New Jersey Zoning Enabling Act, N.J.S.A. 40:55-32. This conduct also discriminates against low-and moderate-income minorities and perpetuates white, isolated, and elite communities, in violation of the 1968 Federal Fair Housing Act, 42 U.S.C. 3601, et. seq. and the Civil Rights Act of 1866, 42 U.S.C. 1981, 1982. In addition this conduct denies plaintiffs and the class they represent the equal protection of the laws and perpetuates incidents and badges of slavery, in violation of Article 1, paragraphs 1 and 5 of the New Jersey Constitution, and the Thirteenth and Fourteenth Amendments to the United States Constitution.

III. ARGUMENT

A. Severance at This Time is Premature

The defendants have moved for severance under both R. 4:29-2, which is designed to "prevent a party from being embarrassed, delayed or put to expense by inclusion of a party against whom he asserts no claim",[2/] and R. 4:38-2, which provides for separate trials "for the convenience of the parties or to avoid prejudice."[3/]

Plaintiffs urge that at this time, with the case in the earliest procedural posture, it is premature to sever. Both rules are designed to provide for separate trials, after the discovery process has sharpened the issues to a degree where it is plain that certain tests are met, such as that embarrassment will lie or that claims initially thought similar are not so. In Fairchild Stratos Corp. v. General Electric, 31 F.R.D. 301 (S.D.N.Y., 1962) involving the nearly identical Federal rules on severance, plaintiff was suing for damages for

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2/ 4.29-2 Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed or put to expenses by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

3/ 4.38-2 Separate Trials. (a) Severance of Claims. The court, for the convenience of the parties or to avoid prejudice, may order a separate trial of any claim, cross-claim, counterclaim third-party claim, or separate issue, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

patent infringement. Defendants, less than eight months after the complaint had been filed, moved for separate trials on the issues of liability and damages. The court held that such a motion was premature because discovery had not proceeded long enough to sharpen the issues sufficiently. In the instant case, discovery has only recently commenced, with four defendants as well as plaintiffs having served first sets of interrogatories. Responses to the plaintiffs' interrogatories have not yet been made. Thus sufficient information is not yet available to determine whether plaintiffs' joinder was inappropriate. Severance should be denied at this time as premature.

B. Even if Defendants Motions for Severance Are Not Premature, They Should be Denied Because Defendants Have Not Met the Necessary Tests for Severance

The rules provide specific criteria for determining whether severance should be allowed. Plaintiffs contend that defendants have not met these criteria and that, accordingly, the motions to sever should be denied.

R. 4:29-2 operates to prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom no claim is asserted. In this case, there is no suggestion that extraneous parties are present.

All of the plaintiffs allege that the defendants' unlawful conduct injures them, and the claim is made against each of the defendant municipalities. Thus despite the defendants' speculative assertions regarding the potential inconvenience and expense to them of sitting through a lengthy trial the criteria for severance under R. 4:29-2 are not satisfied.

R. 4:38-2 allows the court to sever for the convenience of the parties or to avoid prejudice. There has been no showing that severance is necessary in this case to avoid prejudice. As to the issue of convenience, the asserted inconvenience to the defendants of being joined in a single suit must be balanced against the inconvenience to the plaintiffs, and to the Court, in the event severance is granted, of going through 23 separate trials, all of which, as we argue, infra, involve common questions of law and fact.

C. The Joinder of All Defendants is Proper

The issues involved in deciding whether the motion to sever should be granted or denied can best be understood by considering whether plaintiffs' initial joinder of the 23 defendant municipalities was proper.

The permissive joinder provision of the New Jersey rules (R. 4:29-1(a)) states:

> All persons may join in one action as plaintiffs or be joined as defendants jointly, severally in the alternative, or otherwise, if the right to relief asserted by the plaintiffs or against the defendants arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences and involves any question of law or fact common to all of them. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Plaintiffs have joined the 23 defendant municipalities in this action in fulfillment of the recognized policy of settling similar claims and issues in one hearing. This principle is well established in New Jersey law. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. Super. 143 (Ch. Div., 1951); Garnick v. Serwich, 39 N.J. Super. 496 (Ch. Div., 1956) and Woodbridge v. DeAngelis, 125 N.J.L. 519 (1940). All these cases recognize the need for efficient control by the court over litigation involving multiple parties and recognize that the important issue is the settlement of the controversy as expeditiously as practicable in one action. The purpose of the rule is underlined by

considering commentary on the identical Federal provision, Fed.R.Civ.P. 20(a). This rule, as pointed out in 2 Barron and Holtzoff, Federal Practice & Procedure, Sec. 531, is intended to promote trial convenience,[4] prevent a multiplicity of suits,[5] and expedite the final determination of litigation[6] by inclusion in one suit of all parties. "The rule should therefore be liberally construed and applied in practice when consistent with convenience in the disposition of actions [omitting citations]." 2 Barron and Holtzoff 531.

Basic to any discussion of the rule is the reasonable desire to avoid multiple litigation. As the Supreme Court of the United States has stated:[7]

> Under the rules, the impulse is towards entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.

Two tests are established under the rules: the first being whether the right to relief develops from the same occurrence or series of occurrences, and the second, whether any question

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4/ Nagler v. Admiral Corporation, 248 F.2d 319, 328 (2nd Cir, 1957); Eastern Fireproofing Co. v. United States Gypsum Co., 160 F. Supp. 580 (D. Mass., 1958); General Investment Co. of Connecticut v. Ackerman, 37 F.R.D. 38 (S.D.N.Y., 1968).

5/ Nagler v. Admiral Corporation, supra; Goodman v. H. Hentz and Co., 265 F. Supp. 440, 443 (N.D. Ill., 1967).

6/ Rumbaugh v. Winifrede Railroad Company, 331 F.2d 530 537 (4th Cir., 1964).

7/ Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966)

of law or fact is common to the transactions. Plaintiffs contend that both tests are satisfied in the instant case and that, accordingly, joinder is appropriate.

1. The first test is whether the right to relief asserted by the plaintiffs "arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences. . . . ." Plaintiffs' research has not uncovered any New Jersey cases in which this concept was discussed in other than cursory fashion. There is also a dearth of discussion by other courts. On what constitutes a transaction or series of transactions, the Supreme Court of the United States has observed that "transaction is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." Moore v. N.Y. Cotton Exchange, 270 U.S. 593, 610 (1920).

Plaintiffs urge that the common occurrence or series of occurrences here involved is the plaintiffs' fruitless search for housing within that part of Middlesex County occupied by the defendant communities, a search that has been rendered fruitless as a result of the zoning and other land use policies and practices of the defendants.

There are a few cases interpreting the Federal rule, identical to New Jersey's, that provide a basis for analysis. In U.S. v. Mississippi, 380 U.S. 128 (1965), involving a fact situation similar to the instant case, the complaint alleged that six county registrars in the State were jointly

liable for refusal to register. The lower court noted that the acts of the defendants were "individual torts committed by them separately", but the Court approved joinder on the basis of the allegations of continuing state-wide actions depriving blacks of the right to vote. In the instant case the defendants' individual zoning and other land use policies form virtually a county-wide system depriving the plaintiff class of equal housing opportunities.

In Eastern Fireproof Company, Inc. v. U.S. Gypsum Co., 160 F. Supp. 580 (D. Mass., 1958), the court, in interpreting the rule on permissive joinder, noted that there is no hard and fast rule, but that the question must be whether there are enough "ultimate factual concurrences" to warrant the parties defending jointly. Plaintiffs urge that in view of the similarity of the defendants' zoning and other land use policies and the exclusionary effect common to all, there are more than enough such concurrences. This point will be discussed more fully, infra.

2. The second part of the test concerns whether there are common questions of law or fact. There is no doubt that the standard by which the legality of the conduct of each of the defendants is to be measured is the same. The legal issue in this case, common to all defendants, is whether they have violated the general welfare clause of

the state zoning enabling legislation, and in so doing curtailed plaintiffs' civil rights and violated equal protection and due process. The principles enunciated in Oakwood at Madison, Inc., v. Tp. of Madison, 117 N.J. Super. 11 (Law Div., 1971), and 128 N.J. Super. 438 (Law Div., 1974), and Southern Burlington County NAACP v. Tp. of Mt. Laurel, 119 N.J. Super. 164 (Law Div., 1972), certif. granted 62 N.J. 190 (1972) -- that municipalities may not lawfully use their zoning and other land use powers to exclude the poor -- are fully applicable here. Other New Jersey court decisions have also expressed support for these principles. In Molino v. Borough of Glassbough, 116 N.J. Super. 195 (Law Div., 1971), the court, in overturning a municipality's zoning ordinance which effectively excluded housing for lower-income people, noted the right to be free from economic discrimination. In Ridgefield Terrace Realty Co. v. Borough of Ridgefield, 136 N.J.L. 311 (1947), the New Jersey Supreme Court rejected as fiscal zoning a municipal attempt to rezone land from apartment classification to one for single family houses.

Most important for purposes of determining the appropriateness of joinder in this case is Duffcon Concrete Products Inc. v. Borough of Cresskill, 1 N.J. 509 (1949), where the Court noted regional concepts in evaluating the legality of a zoning ordinance. The Court said:

> The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often perscribed decades or even centuries ago, and based in many instances on consideration of geography, of commerce, or of politics that are no longer significant with respect to zoning. at 513.

See also Borough of Cresskill v. Borough of Dunmount, 15 N.J. 238 (1954), where the Court indicated that one town's zoning should give due recognition to conditions across its borders.

The commonality of legal issues becomes even more obvious when relief is considered. Plaintiffs stress that the harm that has been done and continues to be done to plaintiffs is not limited to the conduct of one or two municipalities in an otherwise open metropolitan area. It is virtually county-wide in scope. Therefore, the appropriate remedy must also be county-wide. Plaintiffs allege that the zoning and other land use policies of each of the defendants are exclusionary and discriminatory. However, when viewed together, the total impact of these policies results in plaintiffs' exclusion from nearly the entire county. The defendants' actions have made it virtually impossible for plaintiffs to live in housing they can afford any place in the county except New Brunswick and Perth Amboy. Forcing the plaintiffs to move seriatim against each individual community would fatally undermine their effort to achieve equal housing opportunity throughout the county.

The plaintiffs' prayer for relief calls for a joint plan. The Court expressed reservations concerning its authority to order the preparation of such a plan. Plaintiffs stress that a "joint plan" per se is not central to their claim. Plaintiffs' concern is with securing adequate relief from their unlawful exclusion from nearly the entire county. It is plaintiffs' view that preparation of a joint plan or some other form of cooperative effort by defendants is the most effective way of achieving such relief. Plaintiffs would have no objection to each community's coming forth with its own plan, provided that each plan is based on a consideration of regional needs. Indeed, plaintiffs are not insisting on identical plans from each defendant. Plaintiffs are fully aware of differing topography, environment, industry, and the other myriad factors that must be considered. These differing factors may well dictate differing plans from the different defendants.

However, it is precisely these differing factors that also dictate joinder of all the defendants in a single action, if effective relief is to be secured. Plaintiffs contend that the responsibility of each defendant to provide relief to the plaintiffs, in the event plaintiffs prevail on the merits, can fairly be determined only in relation to the responsibility of the other defendants. Only through joinder of all the defendants in a single action can this determination be made in a manner that will assure that the plans for relief, whether developed in cooperation or in isolation, can provide

an effective remedy. Joinder also can preclude the obvious inequity that could result from a series of trials involving individual defendants in which hearing obligations are imposed on some, but not others.

Apart from common issues of law, plaintiffs urge that common substantive facts override the differences in form of each municipal zoning ordinance. There are two threads to this argument: relief (which has been discussed supra) and the regional impact of the harm. The overpowering regional exclusion of the plaintiff class is what plaintiffs allege and are prepared to prove. They will be effectively denied the opportunity to do so should this motion to sever be granted.

The complaint summarizes the common factual issues involving all 23 defendant municipalities. Plaintiffs will prove that Middlesex County is a common housing and labor market area, but that plaintiffs are permitted to live in only two of the 25 municipalities in the county. The basic fact common to all 23 defendants is that they maintain zoning and other land use policies that exclude low-and moderate-income people. The geographic and demographic differences among the defendant municipalities and the variations in form of their zoning and other land use policies do not alter their exclusionary character, a fact common to all.

Plaintiffs will show that the zoning and other land use policies of the defendants are closely related in purpose and effect. According to plaintiffs' best information (discovery is proceeding), of the 23 defendants, 22 prohibit mobile homes[8] and 21 defendants prohibit single-family attached dwellings.[9] Multi-family dwellings fare little better. Nine defendants prohibit them, exclude them by not mentioning, or require a special permit or special exception.[10] Fifteen have little or no land so zoned.[11] Of those allowing multi-family dwellings, 12 have some kind of bedroom restrictions.[12] Twelve have an excessive amount of land zoned commercial and industrial.[13] All defendants have cost increasing factors in their ordinance that make the construction of single-family detached houses costing less than $25,000 virtually impossible. As noted in the complaint, few have done anything to shelter

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8/ All but South Brunswick, where they are a conditional use.

9/ All but Plainsboro, which allows them subject to bedroom restrictions.

10/ Cranbury, Helmetta, Jamesburg, Milltown, Monroe, South Brunswick, South Plainfield, South River, Woodbridge.

11/ Carteret, Dunellen, East Brunswick, Edison, Highland Park, Madison (original ordinance), Metuchen, Middlesex, North Brunswick, Piscataway, Plainsboro, Sayreville, South Amboy, South Plainfield, Spotswood.

12/ Carteret, East Brunswick, Highland Park, Jamesburg, Middlesex, North Brunswick, Piscataway, Plainsboro, South Amboy, South River, Spotswood, Woodbridge.

13/ Cranbury, East Brunswick, Edison, Madison, Monroe, North Brunswick, Piscataway, Plainsboro, Sayreville, South Brunswick, South Plainfield, Woodbridge.

those eligible for public housing. Thus, there is a common thread running through the zoning and other land use practices of the 23 defendants. That common thread is exclusion of all but the affluent and maintenance of white, elite communities. Although the different defendants may seek to justify their exclusionary land use policies in different ways, the common element of exclusion makes joinder proper in this case. In NOPCO Chemical Div. v. Blaw-Knox Co., 59 N.J. 274 (1971) a purchaser of heavy machinery discovered hidden damage upon receipt. He sued the manufacturer, and all carriers and bailees who had, in turn, handled the machine. The plaintiff was allowed to sue multiple defendants who were all included in the one action. At the end of plaintiffs' case the burden shifted to each defendant to prove itself innocent of the damage claimed.

The case at bar is only slightly different from NOPCO. As in NOPCO, multiple defendants owe a duty to plaintiffs; as in NOPCO, plaintiffs allege that all have failed in that duty, albeit in differing degrees. As in NOPCO, all should be joined in one action, as ". . . the complexity of the situation should not leave plaintiff remediless or require it to sue each defendant separately and successively at its peril-simply because there is no precise precedent in this State." (at 282).

CONCLUSION

For the reasons set forth above the plaintiffs urge that defendants' motions for severance be denied.

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