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SUPREME COURT OF NEW JERSEY

DOCKET NO. 16,492 TERM 79

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	:	Civil Action
Plaintiffs-Petitioners,	:	
v.	:	Sat below:
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	:	Honorable Joseph Halpern, J.A.D. Honorable John L. Ard., J.A.D. Honorable Melvin P. Antell, J.A.D.
Defendants-Respondents.	:	

BRIEF IN OPPOSITION TO PETITION FOR CERTIFICATION

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SANFORD E. CHERNIN, ESQ.
ON THE BRIEF

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CASES CITED

FACTUAL STATEMENT AND PROCEDURAL HISTORY

The matter before this Court was commenced by complaint filed on behalf of the Urban League of Greater New Brunswick challenging the constitutionality and validity of the zoning ordinances of 23 municipalities all located within the County of Middlesex. The basic thrust of their argument stems from the holding in South Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975) (hereinafter referred to as the Mt. Laurel decision).

During the pendency of the matter, the Borough of Dunellen was dismissed outright by the trial Court, having found that it was not a "developing municipality" subject to the dictates of the Mt. Laurel decision.

Of the remaining 22 municipalities, eleven settled their differences with the plaintiffs by agreeing to adopt new zoning ordinances or alter their existing zoning ordinances to accommodate additional low and moderate income units and to eliminate certain other aspects of their zoning ordinances which tended to restrict the construction of low and moderate income housing. These settlements were approved by the trial Court and each were conditionally dismissed. It should be particularly noted that the dismissals came prior to the close of the case and prior to the time when the trial Court made any determination as to region, the need for additional low and moderate income units or imposition of any formula with regard thereto. Consequently, the trial Court effectively accepted, in advance, the

determinations reached by trial counsel for the eleven conditionally dismissed municipalities and made no consideration thereafter in his findings as to the impact upon the ultimate total need for such housing units.

The eleven remaining municipalities contested the claims presented by the plaintiffs and received an adverse finding by the trial Court. An appeal was taken to the Appellate Division of the Superior Court asserting a substantial number of assigned errors and grounds for appeal. Some of the grounds urged involved the substance of the decision while other grounds involved trial errors. The matter was heard before the Appellate Division of the Superior Court which rendered its decision on September 11, 1979 reversing without remand the decision of the trial Court. The basic point set forth in the opinion of the Appellate Division was that the plaintiffs had not properly established its case and did not properly define an appropriate region. Because of the extensive nature of the trial and conduct of the litigation, the Appellate Division felt it unwise to offer a "second bite at the apple" to the plaintiffs and refused to remand. A substantial number of questions raised in the Appellants' briefs asserting trial errors were not disposed of nor decided by the Appellate Division.

Between the decision of the trial Court and the reversal by the Appellate Division, a number of the eleven remaining municipalities have either materially altered their zoning ordinances or have adopted entire new ones. The Borough of South Plainfield adopted a new Zoning Ordinance

and Master Plan on December 11, 1978 and will adopt an amendment thereto on November 13, 1979. The newly adopted zoning ordinance of the Borough of South Plainfield is substantially and materially different than the zoning ordinance previously adopted in 1967. A remand based upon evidence adduced at the trial in 1976 would have no relevance to a zoning ordinance adopted in 1979.

The plaintiffs now petition for certification to this Supreme Court.

QUESTION PRESENTED

The question presented by the petitioners is stated as follows: "Is the definition of "region" essential to a trial Court's determination that a zoning ordinance is unconstitutionally exclusionary?"

POINT I. THERE SHOULD BE NO LIMITED RECONSIDERATION BASED SOLELY UPON THE TESTIMONY BEFORE THE TRIAL COURT.

The primary thrust of the petitioners' argument is that a reconsideration of "region" requires no new or additional testimony. In his determination, the trial Judge evaluated all of the volumes of data and documents submitted by the plaintiffs on the issue. The data constituted records by State, County and Federal agencies incorporating areas far beyond the geographic limits of Middlesex County. After so doing, the trial Court realized that "regions are fuzzy at the borders." (142 N.J. Super. at 21) After taking into account all the statistical data presented, the Court considered Middlesex County as part of the New York metropolitan region. He also stated that Plainsboro, Cranbury and portions of South Brunswick and Monroe were in some measure also part of the Philadelphia metropolitan region. Thereafter, he came to the conclusion that "its (Middlesex County) designation as a region for the purpose of this litigation within larger metropolitan regions is sustained"; obviously sustaining the position advanced by plaintiffs.

In view of the Court's overall consideration of the problem, what could be gained by a reconsideration. The plaintiffs had every opportunity to present their case and took 28 days within which to do so.

What is really being sought, at this juncture, is a very limited and unfair return to the trial arena in an attempt to cure what they failed to prove during the course of this protracted trial. Such limited remand cannot be considered. If the opportunity is afforded to correct their own errors, a similar opportunity also must be given to the defendants to present additional countering testimony. Such testimony was at all times available if the plaintiffs saw fit to utilize it.

It should also be remembered that the complaint in this matter was filed on July 23, 1974. The trial commenced on February 3, 1976. The plaintiffs had over a year and a half to accumulate the necessary data even beyond that which they actually submitted to the trial Court. Either through miscalculation or error, they saw fit not to do so. Now, they wish a second opportunity at the expense of all of the municipalities.

A remand of this matter would require a retrial of a major portion of plaintiffs' case. If there is to be a remand and retrial, additional volumes of proofs will be required by both plaintiffs and defendants in an attempt to ascertain what overall region or specific region the various communities are part of. It is quite conceivable that the defendants in one part of Middlesex County may attempt to prove that they belong in a Philadelphia-Trenton metropolitan area; while the municipalities in the northern portion of the county may attempt to prove that they are in an Elizabeth-Morristown-Somerville metropolitan area. The result would be a total retrial with all new evidence.

This Court should bear in mind that the various municipal governments have already expended hundreds of thousands of dollars by way of counsel fees and expert testimony to defend this litigation. A retrial would unduly burden the municipalities casting upon them massive additional financial expenditures. All of the original and future expenditures were created, in the first instance, by the filing of this complaint, and now by the requests of the plaintiffs for a retrial.

POINT II. THE DECISION OF THE APPELLATE DIVISION LEFT A NUMBER OF ASSIGNED ERRORS UNRESOLVED.

Petitioners seek to limit the inquiry to a tortuous determination as to region. They overlook other areas asserted by the defendants of assigned errors. A review of the briefs submitted by the various defendants will reflect their arguments. However, as to the brief filed by the Borough of South Plainfield, it should be noted that Points I, II, IV, V, and VI were not disposed of.

In Point I, this municipality asserted trial errors by way of violation of Rules of Evidence and the Court's own Order dated January 27, 1976 barring the use of expert testimony. The objections are more particularly set forth in Point II. Although argument was presented to the Appellate Division and appeared to receive approval, no mention thereof was made in its decision.

If there were prejudicial errors, then the entire case of the plaintiffs must fall. Effectively, the trial Court below permitted hundreds of documents into evidence over objection without affording trial

counsel an opportunity to review them in advance of trial.

In Point V, the Borough of South Plainfield asserted that it was not a developing municipality within the holding of the Mt. Laurel decision. No determination was made on this crucial and major issue. Proofs during trial indicated the existence of not more than 400 acres available for residential use in the Borough of South Plainfield. (142 N.J. Super. at 35) Almost three and one-half years have elapsed since the decision of Judge Furman dated May 4, 1976. Obviously, there has been substantial further development in the Borough of South Plainfield which would further reduce the remaining 400 acres available for residential growth. There must be, at the minimum, additional testimony as to the present amount of acreage so available.

On December 11, 1978, the Borough of South Plainfield adopted a new Master Plan and Zoning Ordinance. This zoning ordinance will be further amended on November 13, 1979. There have been substantial differences built into the new zoning ordinance which did not exist during 1976. A determination cannot now be made as to the validity of a 1979 zoning ordinance based upon facts adduced during the trial in 1976. A complete new hearing on the new zoning ordinance is mandated.

POINT III. THE TRIAL COURT SHOULD NOT BE PERMITTED TO RELY UPON STATISTICAL DATA MORE THAN 10 YEARS OLD.

Throughout the trial, it became clear that the testimony and data relied upon by the plaintiffs was compiled between 1965 and 1970. No hard data was submitted to the trial Court beyond 1970. Population

tables were submitted commencing in 1950 and ending in 1970. (142 N.J. Super. at 25) Income by families data ended in 1970. (142 N.J. Super. at 26) Industrial acreage and employees was based on data for 1967. (142 N.J. Super. at 27)

Common knowledge and information submitted during the course of the trial clearly indicated a dramatic fall off in population increase and student enrollment subsequent to 1970. No consideration was given to such declines. Since the trial Court's determination, there has been a further fall off in the population growth rate.

Considering the time frames in question, the data suggested to be reconsidered by the trial Court is somewhere between 10 and 15 years old and must be deemed antiquated.

POINT IV. THE CRITERIA OF "FAIR SHARE OF LOW AND MODERATE INCOME HOUSING" IS NO LONGER VIABLE.

Since the Mt. Laurel decision, this Supreme Court has handed down a substantial number of opinions which have materially modified the holding of Mt. Laurel. The cases now indicate that the test to be applied shall be fair share of "least cost housing" and no longer "low and moderate income housing." During the trial, attorney for the Borough of South Plainfield attempted to produce testimony relevant to the issue of the cost of housing and the possibility of providing the type housing suggested in view of the current day market. Stated another way, the question must be asked as to whether there can be any low and moderate income housing without governmental subsidies. The trial Court

refused to permit this type testimony indicating that it lacked relevancy.

Now, however, when the plaintiffs must establish the availability, type and cost of "least cost housing", the proffered testimony becomes material, relevant and essential. Accordingly, there can be no "simple" or "partial" retrial as suggested by the petitioners. Nowhere in the existing testimony is there any evidence as to the availability of "least cost housing" and the petitioners will be called upon to produce such testimony in the event of retrial. A similar opportunity must be afforded each municipal defendant.

POINT V. A RETRIAL ON THE ISSUE OF AN APPROPRIATE ZONE WILL REQUIRE NEW AND ADDITIONAL DEFENDANTS.

If the position of the plaintiffs is accepted, it will become necessary to reestablish a new zone. This zone to be established will necessarily include other municipalities, not now party defendants, but contiguous to existing municipalities. As it relates to the Borough of South Plainfield, such municipalities as Somerville, Green Brook, Warren, Watchung, North Plainfield, Plainfield should be brought in as additional parties.

If a more flexible interpretation of "zone" is to be employed, it then will become necessary to obtain data from these municipalities and any decision by the trial Court involving them would ultimately be binding upon them.

POINT VI. ANY RETRIAL SHOULD TAKE INTO ACCOUNT THE TRUE SHARE OF THE 11 CONDITIONALLY DISMISSED DEFENDANTS.

As pointed out prior, eleven municipalities made their own separate deals with the plaintiffs. Nowhere can it be found that an allocation by the trial Court correctly reflected the burdens accepted by the eleven conditionally dismissed defendants. Because these dismissals took place before the conclusion of the case, the trial Court was not in a position to have made such a determination. To conclude otherwise (which is not suggested here) would be to state that a premature determination, formula and allocation was made by the trial Court. It is quite conceivable that had the 11 conditionally dismissed defendants remained in the case to conclusion, their pro rata share would have been different than the amount contained in their settlement agreements. In some instances, where the conditionally dismissed municipality made a good deal involving less than their pro rata share, their remaining proper burden was then borne by the ultimate defendants in this case. At this juncture, no such determination can be made as no one knows.

CONCLUSION

It is urged that the Petition for Certification be denied for the reasons set forth herein.

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Mayor and Council of the Borough
of South Plainfield

BY _____
SANFORD E. CHERNIN

Dated: November 9, 1979

CERTIFICATION

I hereby certify that the within Brief in Opposition to Petition for Certification of the Plaintiffs-Petitioners, presents substantial question of general public importance and that said Brief is filed in good faith and not for purposes of delay.

_____
SANFORD E. CHERNIN

CERTIFICATE OF SERVICE

I hereby certify that service of this Brief in Opposition to Petition for Certification of the Plaintiffs-Petitioners was made by mailing the original and eight copies by Certified Mail - Return Receipt Requested, to the Clerk of the Supreme Court of New Jersey, and two copies of the Brief by regular mail to the attorneys listed below this 13th day of November, 1979.

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