

CA - Metuchen

2/25/76

brief in ~~the~~ opposition to  $\Pi$ 's notice  
of appeal + in support of  $\Delta$ /~~&~~ Metuchen's  
motion to dismiss

pg 5

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-33-76

URBAN LEAGUE OF GREATER NEW  
BRUNSWICK, etc., et al

Plaintiffs-  
Appellants,

vs.

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

Defendants-  
Respondents.

Civil Action

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BRIEF IN OPPOSITION TO PLAINTIFF'S NOTICE OF APPEAL  
AND IN SUPPORT OF DEFENDANT-RESPONDENT BOROUGH OF  
METUCHEN'S MOTION TO DISMISS

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STATEMENT OF FACTS

During the course of the trial below, at the conclusion of a portion of plaintiffs case, a series of dismissals for various municipalities took place. The first dismissal as to Dunellen, was unconditional, as Judge Furman found no zoning violations. The second as to the Borough of Highland Park, was conditional upon its making two amendments to its zoning ordinance. The third as to the Borough of Metuchen, was conditional on the elimination of one provision-the 1,400 square foot minimum living area requirement in the R-1 zone. There is no question that the attorney for plaintiffs several times consented to this dismissal.

In reliance on such consent, attorney for defendant, Borough of Metuchen, forwarded copies of the amended ordinance eliminating the offensive provision, to the attorney for plaintiffs and in fact, was the first municipality to amend its zoning ordinance.

As a result of plaintiffs' consent, and in reliance on the settlement of its case, the Borough of Metuchen introduced no affirmative defense.

The Order of Dismissal consented to in open court by attorney for plaintiffs, was signed by Judge Furman on September 24th, 1976.

ARGUMENT

POINT: PLAINTIFFS-APPELLANTS ARE PRECLUDED FROM APPEALING THE SETTLEMENT

This court has already granted motions to dismiss the appeal for the following municipalities: Helmetta, Middlesex, Highland Park, Woodbridge and Milltown, on the basis of the settlement and consent provisions as set forth in the various affidavits and briefs supplied by the respective counsel. The Borough of Metuchen is in the same position as the other conditionally dismissed municipalities. Any appeal from the settlement with the Borough of Metuchen would be untimely, offensive, and unfair, as was in the case of the other municipalities.

The provisions in the judgment as to Metuchen is as follows:

"The defendant, Borough of Metuchen, as condition to settlement and dismissal has agreed to appropriately amend its zoning ordinance as follows:

"Elimination of the required minimum living area of 1,400 square feet in the R-z zone."

The attorney for plaintiffs treated all the conditionally dismissed municipalities the same, as is shown in transcripts which this court had relative to the previous motions by the other five defendant municipalities.

Plaintiff-Appellants seek, in effect, an Order setting aside the settlement entered by their counsel and the Borough Attorney of the Borough of Metuchen. To permit this would be a gross injustice.

Plaintiffs-Appellants voluntarily settled this matter in Court. The Borough of Metuchen has relied, to its detriment, on the settlement, since the offensive provision was eliminated as required and the Borough subsequently ceased its affirmative defense.

This appeal is untimely and improper. If Plaintiffs-Appellants are dissatisfied with the settlement, they should move to have it set aside by the trial court on whatever grounds they feel exist. In the event their motion succeeds, the Defendants-Appellants should then be permitted to go forward with their defense before that Court.

Plaintiffs-Appellants never applied to Judge Furman for an Order setting aside the settlement, nor did they caution the Borough of Metuchen to curtail its defense, due to their dissatisfaction with the settlement. Plaintiffs-Appellants remained silent while the Borough of Metuchen eliminated the provision. Mr. Searing knew, or should have known, that the Borough of Metuchen intended to present additional defense witnesses, but did not do

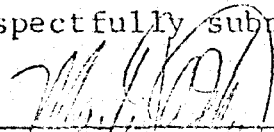
so due to the settlement.

It is this defendant's position that all of the conditionally dismissed municipalities were dismissed as a result of a settlement after Judge Furman ruled, based on Alan Mallach's testimony, that certain zoning provisions were exclusionary. Where some provisions involved complicated formulas such as bedroom ratios, or the amount of land devoted to industrial areas, detailed discussions were necessary with plaintiffs counsel, so that Judge Furman's rulings could be followed. In other cases, such as Highland Park and Metuchen, a simple elimination of a provision agreed to by all counsel did conform to the court's ruling. However, all the dismissed municipalities were in similar positions to the defendant-respondents Helmetta, Middlesex, Highland Park, Woodbridge and Milltown, whose similar motions were granted by this court.

This defendant attaches the Borough of Metuchen's transcript dated February 25th, 1976, and the Order of Dismissal dated September 24th, 1976.

Based on the above, the court should vacate, strike, and dismiss the notice of appeal of plaintiffs-appellants filed against this defendant.

Respectfully submitted,

  
Martin A. Spritzer, Attorney  
for Defendant-Respondent  
Borough of Metuchen