CA - Plainsboro 19-Oct-76

Brief of Defendant - Appellant, Twsp. of Plainsboro in support of motion for Permanent Stay. (+) cover letter

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October 19, 1976

Mrs. Elizabeth McLaughlin, Clerk
Appellate Division
Superior Court Of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: Urban League of Greater New Brunswick, et al. v
The Mayor and Council of the Borough of Carteret,
et al.
Docket No. A-4685-75

Dear Mrs. McLaughlin:

Enclosed please find an original and four (4) copies of a Brief in support of a previously filed Motion for A Stay in the above matter.

Very truly yours,

Original Signed By
JOSEPH L. STONAKER
Joseph L. Stonaker

JLS:MMB
encls.
cc: All Counsel of record

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4685-75

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs-Respondents,

vs.

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

Defendants-Appellants.

BRIEF OF DEFENDANT-APPELLANT, TOWNSHIP OF PLAINSBORO IN SUPPORT OF MOTION FOR PERMANENT STAY

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PROCEDURAL HISTORY

Defendant-appellant Plainsboro Township adopts the procedural history as set forth in the Brief submitted by counsel for The Township of Cranbury.

ARGUMENT

POINT ONE

THE STANDARD FOR GRANTING A STAY PENDING APPEAL IS ONE OF IRREPARABLE HARM TO THE SUBJECT MATTER UNDER REVIEW.

It must be noted immediately that standards for granting injunctive relief are not the same as those used for issuance of a stay pending appeal. The Plaintiff-respondents would have this court use the four criteria for grant of injunctive relief as set forth in Virginia Petroleum Jobbers Association v F.P.C., 259 F.2d 921(D.C.Cir.1958), to-wit: (a) likelihood of success on the merits; (b) irreparable injury; (c) no substantial harm to others; and (d) whether the public interest will be served although they concede that no New Jersey case explicitly adopts these criteria(Footnote 3, at page 4, Plaintiff-respondents' Brief and Appendix in Opposition to Defendants' Motion for Stay Pending Appeal.) No case can be found because the courts of New Jersey have not confused stays granted pending appeal, which originate from the common law writ of supersedeas, with injunctions or restraining orders. Originally a grant of certiorari operated automatically as a spersedeas, for by command of such writ the lower court's entire record was taken into the higher court, leaving nothing for enforcement "either by execution or otherwise" before the lower court. Harris, Pleading & Practice in New Jersey, Sec. 747(1926) cited by Two Guys from Harrison, Inc. v Furmen, 59 N.J. Super. 135, 139(1959). Such automatic stays upon appeal are no longer the rule in New Jersey, but stays issued during pendency of the appellate process as relief against execution of a

judgment are not thereby transformed into injunctions.

The two recent New Jersey cases, Humble Oil & Refining Co. v Wojtycho, 48 N.J. 562(1967); Coleman v Wilson, 123 N.J. Super. 310(Ch. Div. 1973), cited as support for the Plaintiff-respondents' argument that injunctive standards should apply to the issuance of stays cannot in any way be so read. The courts involved in those above-cited cases evidenced no interest in the possible success on the merits, serving of the public interest or relative damage to the other party. Those courts were concerned only with the need for maintenance of the status quo to insure a meaningful right to appellate review. The court in Christiansen v Local 680 of the Milk Drivers, etc., 127 N.J. Eq. 215.220(E & A, 1939) held even doubt as to the validity of the complainants' cause of action would not justify refusal to maintain the status quo of the subject under litigation pending a definitive settlement of substantive rights between the parties. Whatever standard New Jersey courts have adopted to guide their grants of stay during appeal, it has not been that advocated for issuance of injunctive relief by Virginia Petroleum Jobbers Association v F.P.C., supra, and its breathren.

The ability of either the trial or appellate court to grant a stay of judgment during the appellate process is a discretionary power granted by R.R. 2:9-5. No specific guidelines for exercise of this discretion are given by the cited court rule, nor does a uniform standard emerge from prior New Jersey case law. The comments to such rule, however, do indicate the change authorized by the court in 1972 was designed to end issuance of automatic stays during appeal and require each request be justified by the

facts and circumstances of that particular case. The situation presently confronting the Defendant-appellant Plainsboro not only justifies but requires this court stay execution of the trial-court's judgment until those matters presented on appeal can be resolved.

Unless an individual seeking review is able to protect those interests under appeal, the right to review is meaningless. The court in Landy v Lesavoy, 20 N.J. 170(1955) noted:

> "The opportunity to apply for a stay to preserve the subject matter or res of the suit is implicit in every appeal which can be taken as a matter of right." at p. 175

Courts have recognized the difficulties presented in situations where implementation of the lower court's decree would effect the subject matter under appeal. The court in Pennsylvania Railroad Company v National Docks and N.J.J.C. Railway Co., 54 N.J.Eq. 647(E&A 1896) stated:

> ". . . the entire purpose and object of the appeal is to preserve such rights and property from the ill effects of the decision that is challenged. . . . in fine the very essence of the remedy of appeal is to prevent, for the time being, the appellant from this execution of the existing decree . . . a decree cannot be used detrimentially to the appellant pending appeal, for the main reason that such a use will, for every practical purpose, defeat the appellate procedure." at p. 653

Ashby v Yetler, 78 N.J. Eq. 173(Ch. 1911) limited this language to those situations in which the action of the lower court destroyed or impaired the subject of the appeal and this position was cited with approval by the court in Morrison v Morrison, 93 N.J. Super. 96, 102(1966).

In accordance with this position, stays have been granted by New Jersey courts where necessary to protect the interests under appeal. While

Defendant-appellant Plainsboro must now put forward evidence indicating irrepairable damage to the subject on appeal, such evidence is clearly present.

POINT TWO

THE DENIAL OF THIS STAY WOULD RESULT IN IRREPARABLE DAMAGE TO THE SUBJECT MATTER UNDER APPEAL THEREBY DENYING THE DEFENDANT-APPELLANT PLAINSBORO TOWNSHIP ANY MEANINGFUL REVIEW OF THE TRIAL COURT'S JUDGMENT.

To fully comply with the July 9, 1976, judgment order signed by Judge Furman, Defendant-appellant Plainsboro will be required to provide zoning for 1333 units of low to moderate income housing. This revision of Defendant-appellant's Master Plan will be both costly and time consuming, necessitating professional expert assistance. The end result, however, will have a tremendous and devastating impact on what has traditionally been agrarian rural community.

Pursuant to State public policy as evidenced in the New Jersey Constitution, Art. 8, Sec. 1; the Farmland Assessment Act; the Report of the Blue Print Commission on the Future of New Jersey Agriculture (1973) and the new Land Use Act, Defendant-appellant has sought to preserve and encourage development of its agricultural sector. Plainsboro's concern for its agricultural basis is not motivated by some recent desire to exclude modest income families, but by recognition of its traditional and continuing agrarian character. Plainsboro Township contains a large number of working farms and some of the best farmland still available in the State of New Jersey. As the Court may be aware, small farm operations have, in this day and age,

become increasingly unviable economically. To remain solvent farming has been forced towards larger operations requiring greater acreage. In order to protect the numerous farms already in existance the Defendant-appellant has sought to preserve land into which agricultural activities could expand. Without such protection the farms of Plainsboro Township will be faced with economic strangulation. Proper zoning is critical in this regard for unlike housing or industry, the value and productivity of a farm is directly related to the quality of its land. Enactment by the State Legislature of The Land Use Act, N.J.S.A. 40:55D-2(g) is in direct response to this need.

The trial court rejected the pressing needs of Plainsboro's farms in rendering its judgment and the Defendant-appellant seeks review of this and other decisions in its appeal. Were the Defendant-appellant required to re-zone its agricultural land during the appellate process to accommodate the excessive number of housing units arbitrarily assigned it, the Appellate Court might well lose its ability to restore this agricultural land to Plainsboro's farms. Should developers purchase re-zoned agricultural land, they would acquire a vested interest in such property that could not then be withdrawn by either the Defendant-appellant or the Appellate Court. The Defendant-appellant is faced with destruction of the very subject under appeal, to-wit: how Plainsboro's land shall be used. Once the land has lost its agricultural character, it cannot be restored.

For these reasons the Appellate Court must grant a stay of the July 9, 1976, judgment order, for denial of such stay could strip this appellate tribunal of the power "to render an effecacious judgment due to the destruction or impairment of the subject matter." Zaleski v Local 401, United Elec., etc.,

Workers of America, 6 N.J. 109(1951) at 115. The Defendant-appellant Plainsboro Township would then have lost its right to any appellate review for:

> "If the appellate court loses by this means the faculty of fully vindicating such right and of remedying such wrong as may be found on review, the substance of the right is denied."
>
> Zaleski v Local 401, supra, at 115, citing in

support of this position Pennsylvania Railroad Co. v National Docks and N.J.J.C. Railroad Co., supra; Helbig v Phillip, 109 N.J.Eq. 546 (E&A 1932); Christiansen v Local 680 of the Milk Drivers and Dairy Employees of New Jersey, supra.

POINT THREE

THIS REQUESTED STAY IS MADE IN GOOD FAITH, THE DEFENDANT-APPELLANT HAVING ATTEMPTED TO COMPLY WITH TERMS OF THE JUDGMENT ORDER INSOFAR AS POSSIBLE WITHOUT DAMAGING ITS SUBSTANTIVE RIGHTS UNDER REVIEW AND THEREFORE SHOULD BE GRANTED THIS STAY PENDING APPEAL.

Since the Judgment Order was entered by the Trial Court, Defendant-appellant has taken a number of affirmative steps towards compliance with such Judgment Order where substantive issues under appeal would not be jeopardized. The proposed Master Plan is being devised, decreasing the maximum required lot size for single dwelling homes and apartments with a corresponding increased density of 5 units per acre. This proposed Master Plan also provides for modular housing projects which have the capability of use for low and moderate income housing.

In addition, Defendant-appellant's Planning Board has done all in its power to encourage and work with Princeton University in development of the University's Forrestal Project. This development, begun subsequent to the filing of Plaintiffs' action, will contain 600 housing units of which 20% was required by the Defendant-appellant's Planning Board to be low to moderate income units. The University has made a Section 8 application to the Federal Government and actual construction awaits approval of this application.

Any development in addition to the opportunities afforded under the proposed Master Plan as revised and Princeton University's Forrestal Project are beyond the capacity of the Defendant-appellant to assimulate.

Zoning ordinances set up pursuant to the Trial Court's Order would comply with a particular housing allotment, the very determination of which forms the subject under review. The expense and difficulty forced upon the Defendant-appellant could be rendered pointless by a successful appeal. More importantly, the acquisition of vested interests by developers would render the entire dispute moot.

CONCLUSION

The insurance of a stay of judgment during the appellate precedure is both justified and required by the situation confronting the Defendant-appellant Plainsboro Township.

Respectfully submitted,

JOSEPH L. STONAKER
Attorney for Defendant-Appellant
Town ship of Plainsboro

CERTIFICATION

I hereby certify that service of this Brief was made by mailing the original and four copies to the Clerk of the Appellate Division, Superior Court, two copies of the Brief to counsel for Plaintiff and one copy each to all counsel of record.

JOSEPH L. STONAKER
Attorney for Defendant-Appellant
Township of Plainsboro