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CA(?) brief in support of motion for leave to take an ~~motion~~ interlocutory appeal for Δ-appellant, ~~for~~ Twp of Cranbury

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Superior Court of New Jersey

Appellate Division

CA002252B

Docket No. AM

Nos.	**C 4122-73**	**L 055956-83 P.W.**
	L 079309-83 P.W.	**L 59643-83**
	L 054117-83	**L 058046-83 P.W.**
	L 070841-83 P.W.	**L 005652-84**

CONSOLIDATED

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, et al.,

Plaintiffs,

-vs-

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

Defendants,

and other Consolidated Cases.

CIVIL ACTION – On Motion for Leave to take an Interlocutory Appeal from the Order entered October 11, 1985, in the Superior Court of New Jersey - Middlesex/Ocean County at No. C 4122-73. Honorable Eugene D. Serpentelli, A.J.S.C. presiding.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO TAKE AN INTERLOCUTORY APPEAL FOR DEFENDANT-APPELLANT, TOWNSHIP OF CRANBURY

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PROCEDURAL HISTORY

This action was commenced on July 23, 1974 when Plaintiff, Urban League filed a Complaint in the Chancery Division of Superior Court naming Cranbury and 22 other Middlesex County Municipalities as defendant. The Complaint alleged a history of exclusionary zoning by each of the defendants. The trial commenced on February 3, 1976 and took 28 trial days. Judgment was entered on July 9, 1976 and 11 municipalities, including Cranbury, were given 90 days to rezone. See Urban League of Greater New Brunswick, et al. v. Mayor and Council of Borough of Carteret, et al. 142 N.J. Super 11, 359 A. 2d 526 (Ch. Div. 1976)

Eight towns, including Cranbury, appealed. In 1979 the Appellate Division reversed Urban League of Greater New Brunswick, et al. v. Mayor and Council of Borough of Carteret, et al. 170 N.J. Super 461, 406 A. 2d 322 (App. Div. 1979). Plaintiffs sought certification in the Supreme Court which was granted. The matter was consolidated for argument with other pending exclusionary zoning cases and was decided as So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel. 92 N.J. 158, 456 A. 2d 390 (1983). That decision remanded the matter for a hearing in the trial court on the issues of region fair share, and the compliance of any new zoning ordinance with Mt. Laurel II, Ibid.

Thereafter, before trial, 4 other Complaints were filed charging exclusionary zoning and seeking a builder's remedy. They were filed by Garfield & Company, Cranbury Land Company, Lawerence Zirinsky and Toll Brothers Inc. between August, 1983 and January, 1984. These four cases were consolidated with the Urban League case still pending.

A trial was held in May, 1984 before Eugene D. Serpentelli, J.S.C. who entered an Order on July 27, 1984 fixing Cranbury's fair share of its regional need, both present and prospective, of low and moderate income housing at 816 units. (pa 1a) Since Cranbury had stipulated that its ordinance could not produce more than 300 units and it gave Cranbury 90 days to come up with a plan to accommodate its "fair share". After obtaining two extensions totalling 45 days in December, 1984, Cranbury presented its "Mt. Laurel Compliance Program for Cranbury Township, New Jersey" a document of 136 pages with 8 appendices totalling 139 pages.

Before the trial court conducted a hearing on the compliance pakcage, the legislature enacted and the Governor signed "The Fair Housing Act" Ch. 222 P.L. 1985. In accordance with Section 16 of that act Cranbury moved to transfer these actions to the Council on Affordable Housing. (Pa 66) That Motion was argued before Judge Serpentelli on October 2, 1985 and denied by him on October 11, 1985. (Pa 268a) This Motion followed.

STATEMENT OF FACTS

Cranbury Township is a small predominantly agricultural town in southern Middlesex County. Its population has remained stable for 40 years at about 2,000 people (Pa 14a 7-10). This litigation was five years old before it had a sewer system (Pa 14a-11-15). Its entire village area is on the National Register of Historic Places as an Historic District. Prior to the Order of Judge Serpentelli of July 27, 1984 Cranbury had a zoning ordinance which would have permitted up to 300 units of low and moderate income housing in combination with a transfer of development credit scheme to preserve agricultural lands.

Relevant to this motion is the fact that Judge Serpentelli in his oral opinion denying transfer relied almost entirely on a relative delay standard in determining the question of whether or not to transfer. No transcript is available yet, although it has been ordered (Pa 270a). Cranbury relies on the attached affidavit of its counsel as to what happened at that hearing of October 2, 1985.

ARGUMENT

POINT ONE

THE PROSCRIPTION AGAINST INTERLOCUTORY APPEALS IN MT. LAUREL II ONLY APPLIED TO JUDICIAL REMEDIES NOT TO LEGISLATURE REMEDIES.

In its decision in So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158, 456 A 2d 390 (1983, the Court stated a policy of not normally permitting an appeal by a municipality of a determination that its ordinance is invalid. See discussion of "Summary of the Remedial Stage", 456 A 2d at 458. It should be emphasized, however, that the proscription on interlocutory appeals was limited to attempts at appealing an Order of the trial court declaring an ordinance invalid for failure to provide its fair share of the regional low and moderate income housing need. This is the only type of appeal specifically mentioned in the opinion. The court makes it clear that in certain cases, interlocutory appeals may be taken.

"In the most unusual circumstances stays may be granted wither by the trial court or appellate courts and interlocutory appeals taken (or attempted)". 456 A 2d at 458. Later it discusses "the requirement that, generally, the matter be disposed of at the trial level in its entirety, before any appeal is allowed. . ." 456 A 2d at 459.

"The Fair Housing Act", Ch. 222 P.L. 1985 was passed over 2 years after Mt. Laurel II. The fact that the legislation, particularly the transfer provisions set forth in § 16 thereof, could not have been contemplated by the court in Mt. Laurel II clearly indicates that this type of interlocutory appeal was not intended to be enforced by the court's proscription in that opinion. Therefore, for all the reasons set forth below, it is submitted that this defendant together with those in the other cases likely to be consolidated on this Motion should be permitted to bring this interlocutory appeal.

POINT TWO

THE INTEREST OF JUSTICE REQUIRES THAT AN INTERLOCUTORY APPEAL BE PERMITTED BY RULE 2:2-4.

R. 2:2-4 provides that:

> "Except as otherwise provided by R. 3:28, the Appellate Division may grant leave to appeal, in the interest of justice, from an interlocutory order of a court or of a judge sitting as a statutory agent, or from an interlocutory decision or action of a state administrative agency or officer, if the final judgment, decision or action thereof is appealable as of right pursuant to R. 2:2-3(a), but no such appeal shall be allowed in cases referred to in R. 2:2-2(a)".

This case does not come within the exceptions in R. 3:28 (pre-trial intervention matters), nor is it one of the cases referred to in 2:2-2(a) (death penalty cases). The situation here cries out for appellate intervention for several reasons.

a. The remedy provided by the Fair Housing Act is brand new and has yet to be construed by any Appellate Court. At the time it was passed these were 135 Mt. Laurel cases pending in New Jersey, 88 of them before Judge Serpentelli. As of this writing he has ruled on §§ 16 transfer Motions involving 31 of those cases, and has denied every one of them. These decisions fly in the face of the enunciated intent of the Fair Housing Act.

"The Legislature declares that the State's preference for the resolution of existing and future disputes involving

exclusionary zoning is the mediation and review process set forth in this act and not litigation. . ." § 3 Ch. 222 P.L. 1985.

Judge Serpentelli has established a standard under which it becomes impossible to transfer any case to the Counsel on Affordable Housing Council. That standard is which avenue will promote the speediest start of construction of low and moderate income housing. Because of the delays inherent in setting up the administrative framework within which the Council must function in every case, Judge Serpentelli finds that he provides the speedier route. This standard ignores the fact that the only standard set forth in the statute is whether the transfer would result in a "manifest injustice" to any party. § 16 Ch. 222 P.L. 1985. It ignores the fact that manifest injustice has been construed by our courts in the past and most of these transfer cases do not arise to that level. See Argument Point Three, infra. It ignores the fact that speed of resolution was dropped by the legislature as a standard for determining transferability before final adoption.

These cases cry out for immediate appellate review and assistance.

b. The Supreme Court in Mt. Laurel II is replete with language to the effect that legislative action is preferred to judicial action in this area. For a partial list of these references see Pa 23a and 24a. The legislature has finally acted and the trial court is batting 1.000 in ignoring the stated intent of the legislature.

The importance of the issue of affordable housing and the impact of the confrontation between the trial court and the legislature which has developed, cry out for immediate appellate review. These are not cases involving private litigants. Virtually every citizen of the state will be affected by their outcome, either directly or indirectly. Surely the Appellate Courts have a duty to see that they are handled correctly the first time, particularly when the courts seem to be circumventing a stated legislative intent.

c. The complexity of the issues involved mandate attention by the appellate courts. The issues referred to are not those involved in any Mt. Laurel case such as region, fair share or entitlement to builder's remedy. Those and the multitudinous sub-issues they engender are extremely complex. However, the three judge system established by the Supreme Court has assured as much expertise as judicially possible in those areas.

The complex issues referred to are the questions of deference to legislation intent, and the presumption of

validity which attaches to legislature enactments. This presumption was recognized and explained in Mt. Laurel II where the court encouraged legislative action. 450 A. 2d at 466. Judge Serpentelli did not mention it in denying this request for transfer. Any issue which pits the judiciary against the legislature should have interpretation and direction by the highest possible court at the earliest possible date.

d. Even with only three trial court judges, there is still a need for early appellate assistance and the uniformity of treatment that would come with that. As noted in Point I supra. the Supreme Court was concerned about delays in implementing its ruling caused by numerous appeals. An early and expedited ruling by the Appellate Division on this issue of transferability would actually lessen the possibility of future delays. If an interlocutory appeal is granted and decided quickly, the risk of future delays is diminished. As of now, no transfer motions have been granted. It is not unlikely that if interlocutory appeals are denied, that most, if not all, of the towns will appeal the issue as part of the normal appeal process at the conclusion of the case. To the extent that the Appellate Division feels that transfer was appropriate in even some of the cases, then at least 18 months and hundreds of thousands of dollars will have been wasted. An expedited interlocutory appeal in all cases would eliminate that risk.

There are virtually no cases in New Jersey construing R.2:2-4 or its predecessor rule on the question of the standard to be applied in determining whether to grant leave for an interlocutory appeal. Virtually the only case is Appeal of Pennsylvania Railroad Company 20 N.J. 398,120 A. 2d 94 (1956) where Justice Jacobs cited with approval language in Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541, 546, 69 S. Ct., 1221, 93L. Ed. 1528, 1536 (1949). Apparently there had been no rule permitting interlocutory appeals and a practice had grown up of treating some interlocutory orders as final for purposes of appeal. The new rule permitting such appeals was seen as stopping the old practice of treating some orders as final where they invoke matters "too important to be denied review", Cohen supra. 120 A 2d 100.

Clearly, the issues here fall into such a category and immediate appellate assistance is a necessity.

POINT THREE

THE TRIAL COURT MISINTERPRETED AND MISAPPLIED THE TERM MANIFEST INJUSTICE AS USED IN § 16 CH. 222 P.L. 1985.

§ 16 of Ch. 222 P.L. 1985 states:

> "For those exclusionary zoning cases instituted more than 60 days before the effective date of this act any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation. (emphasis supplied)

In light of the specifically stated legislative preference for resolution of existing disputes involving exclusionary zoning through the mediation and review process set up in sections 14 and 15 of the statute, it is clear that there is a legislative presumption in favor of transfer. § 3 Ch. 222 P.L. 1985. In effect this becomes a legislative intent to have retroactive application of the statute to existing disputies.

With that intent in mind, it comes as no surprise that the legislature used the "manifest injustice" standard for determining whether or not a transfer is appropriate. The courts of New Jersey have used that standard for years in determining whether or not a statute should be given retroactive application. See inter alia Gibbons v. Gibbons 86 N.J. 515, 432 A 2d 80 (1981), Kingman v. Fennerty 198 N.J. Super. 14, 486 A 2d 342 (App. Div. 1985); Berkley Condo Ass'n v. Berkley Condo, Res. 185 N.J. Super. 313, 448 A. 2d 510 (Ch. Div. 1982).

The test for manifest injustice is a two part one as first stated in Gibbons v. Gibbons supra. 432 A. 2d at 85

> "The essence of this inquiry is whether the affected party relied, to his or her prejudice, on the law that is now changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that is would be unfair to apply the statute retroactively".

Here there is no argument that the first part of the test has been met. Plaintiffs relied merely by filing suit. But in this case there has been no showing of reliance so "deleterious and irrevocable that it would be unfair to apply the statute retroactively". Such a showing is the burden of the plaintiffs since the statute has established a preference for transfer. No such showing has been made. It would require a demonstration either a. that the Council on Affordable Housing will not function as intended or b. that because of some unique facts it would not be possible for an individual plaintiff to obtain any relief for reasons unrelated to the merits if the case were transferred. No such showing has been made here.

Judge Serpentelli based his entire finding in Cranbury's case, and in the Monroe, South Plainfield, Piscataway and Warren cases, on the fact that the process would take longer if the case were transferred than if it stayed before him. This is not the test that was written out of the statute before final passage. A previous version of S. 2046 which

became Ch. 222 P.L. 1985 the presumption went the other way and in fact, would have permitted transfer only when it was likely to expedite the process. That version read:

> For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, no exhaustion of the review and mediation procedures described in sections 14 and 15 of this act shall be required unless the court determines that a transfer of the case is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing.

That section was removed and the present transfer provision was put in. At the same time the language in § 3 was inserted favoring the mediation process for resolution of existing disputes.

Judge Serpentelli ignored the intent of the legislature and instead effectively rewrote the removed portion of the act back into it. Because of the delay in establishing the Council and developing rules and guidelines for it built in to the legislation which created the preference, Judge Serpentelli established a standard which is impossible for any municipality with existing litigation to meet. He effectively removed 135 cases from the jurisdiction of the Council.

POINT FOUR

CRANBURY'S CASE IS UNIQUELY SUITED TO RESOLUTION BY THE AFFORDABLE HOUSING COUNCIL.

Two factors have been presented by Cranbury as having a unique impact on its ability to provide low and moderate income housing and the desirability of locating such housing at the whim of a builder. They are the issues of farmland preservation and historic preservation. Cranbury is one of the few towns involved in Mt. Laurel litigation with a farmland preservation issue. To its knowledge, it is the only town with an historic preservation issue. The importance of that issue is evidenced by the fact that the National Historic Trust and a part of the Department of Interior has given the Cranbury Historical Socieity a grant to appear as an amicus curiae in this suit.

Judge Serpentelli has fixed Cranbury's fair share number at 816 units. The formula he used made no adjustment for either agricultural or historic preservation. § 7(c)(2) directs the Affordable Housing Council to make adjustments to any municipality's fair share number based on those two considerations.

Simultaneously with its motion to transfer, Cranbury made an alternate motion to adjust its fair share number in accordance with the criteria of the act. Judge Serpentelli

has refused to rule on that motion and has scheduled the final court hearing on the towns compliance package for December 2, 1985 without scheduling a hearing on the motion.

While he has indicated a willingness to "phase" Cranbury's fair share number,"phasing" 816 units is much different than only having a number of 300 to begin with.

Only Cranbury of all the towns involved in Mt. Laurel litigation can take advantage of both those sections of the statute. Yet this far, the courts have seen fit to frustrate that effort of the legislature.

CONCLUSION

For all of the above reasons, it is respectfully submitted that an interlocutory appeal should be permitted and that the order of the trial court denying Cranbury's motion to transfer this litigation to the Council on Affordable Housing should be reversed.

Respectfully submitted,

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BY: _____
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