

~~CA~~ CA Old Bridge 29-Jun-1981

O & Y v. O. B.

Brief in Opposition to D Planning  
Boards' Motion for Summary Judgment  
on P's CONSPIRACY Claim

pgs = 11

CA 002322 B



POINT I

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE  
A PLANNING BOARD ACTING PURSUANT TO THE  
MUNICIPAL LAND USE LAW MAY BE  
CHARGED WITH CONSPIRACY

The issue raised by Defendant Planning Board's Brief in support of its Motion for Summary Judgment on Plaintiff's conspiracy count is essentially whether or not a planning board acting pursuant to the directions of the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq. [M.L.U.L.]) can be charged with civil conspiracy. It is Plaintiff's position that even if the M.L.U.L. mandates cooperation between the Planning Board and other municipal agencies in the manner indicated in the Planning Board's Brief, as a matter of law, this authorized cooperation if designed to effectuate an illegal goal such as perpetuation of exclusionary land use patterns, is sufficient to form a basis for Plaintiff's civil conspiracy count.

The common definition of a civil conspiracy is an agreement, manifesting itself either in words or deeds, by which two or more persons confederate to do an unlawful act or to use unlawful means to accomplish a lawful result. Hill Dredging Corp. v. Risley, 18 N.J. 501, 541 (1955); Sokolay v. Edlin, 65 N.J. Super 112, 129 (App. Div., 1961); Duplex Co. v. Deering, 245 U.S. 465 (1920); Missouri v. Fidelity & Casualty Co., 107 F.2d 343 (8th Cir. 1939).

It is well established that acts committed in effectuation of a conspiracy need not be illegal in themselves; indeed the acts may be wholly innocent, yet be part of the intent to accomplish an illegal conspiracy. United States v. Newark Great Atlantic & Pacific Tea Co., Inc., 137 F.2d 459, certiorari denied 320 U.S. 783; United States v. Reading Co., 226 U.S. 324; United States v. Patten, 226 U.S. 525. Stated differently, an unlawful goal converts lawful acts into unlawful ones. For examples of legal acts in furtherance of unlawful conspiracies see the line of federal cases involving conspiracies to violate constitutional or federal statutory rights under 42 U.S.C.A. Section 1983, including:

- a. Steel Hill Development Inc. v. Sanbornton, 335 F.Supp. 947 (NH 1971), in which the court found that the township violated a developer's civil rights by adopting a zoning ordinance which increased required minimum lot sizes.
- b. Sixth Camden Corp. v. Tp. of Evesham, 420 F.Supp. 709 (D.N.J. 1976) which involved a developer's claim under Section 1983 that a conspiracy existed to deprive him of property rights through the denial of a variance and site plan approval.
- c. Wade v. Bethesda Hosp., 356 F.Supp. 380 (1973) and Blake v. Delavey, 441 F.Supp. 1189 (1977)

where the court found that Section 1983 was intended to encompass conspiracies to violate rights protected by the statute.

See the line of cases which holds that a union's legal right to strike or threaten to strike was a sufficient act in furtherance of a conspiracy when used for coercive or improper purposes:

Brennan v. United Hatters of No. America Local 17, 73 N.J.

729 (1906); Kinane v. Fay, 111 N.J.L. 553 (1933); Carroll v.

Local No. 269, etc., Electrical Workers, 133 N.J.Eq. 145 (1943).

A third example of conspiracy to achieve an unlawful goal by

otherwise lawful means may be seen in the cases which hold

that competitive business practices if used for illegal coercive purposes, are sufficient to support a claim of conspiracy:

Duplex Co. v. Deering, 254 U.S. 443 (1921); Winkler-Koch Eng.

Co. v. Universal Products, 79 F.Supp 1013 (S.D.N.Y. 1947);

Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962).

Thus, even assuming all facts as stated by the Planning Board, including the fact that all of its cooperative efforts with the Township Council, the Municipal Utilities Authority and the Sewerage Authority were not only authorized but required by State statutes, if the goal of this cooperation was to preserve the exclusionary land use patterns of Old Bridge Township and prevent the provision of least cost housing in accordance with New Jersey Supreme Court mandates, then Plaintiff's conspiracy count should stand.

POINT II

SUMMARY JUDGMENT SHOULD BE DENIED  
BECAUSE OF THE EXISTENCE OF MATERIAL  
ISSUES OF FACT

A. An Issue Of Fact Exists As To The Planning Board's  
Compliance with the M.L.U.L.

In Point I of the Planning Board's Brief it is alleged without supporting Affidavit that the Planning Board has followed mandatory statutory requirements to coordinate its actions with the actions of the other municipal agencies. Plaintiff certainly agrees that the M.L.U.L. requires:

- 1) Referral of any land use ordinance by the governing body to the Planning Board for comment before final adoption;
- 2) That the Mayor and one member of the governing body be members of the Planning Board;
- 3) That the zoning regulations be substantially consistent with the land use plan element of the Master Plan promulgated by the Planning Board;  
and
- 4) That the Planning Board prepare a utility service plan as an element of the Master Plan.

However, the question of the Planning Board's compliance, vel non, with these mandates of the M.L.U.L. raises genuine issues of material fact.

It is Plaintiff's position that summary judgment should be denied until Plaintiff is able to complete discovery and ascertain whether and in what manner the Planning Board cooperated and worked with other municipal agencies in preparing the land use and water and sewer policies of Old Bridge Township. For example, the Planning Board alleges that the M.L.U.L. requires it to prepare and adopt the "utility service plan element"\* of the Master Plan with the aid of other municipal agencies. Assuming arguendo that this is correct, Plaintiff would like to know whether the Utility Authority did in fact cooperate with the Planning Board by aiding it in analyzing future water supply needs of Old Bridge Township.

Thus, until discovery is fully completed, Plaintiff will not have the necessary information concerning cooperative efforts among Defendants to meet and rebut the Planning Board's claim that it acted in accordance with the M.L.U.L.

B. An Issue Of Fact Exists As To The Legality Of The Land Use Controls Promulgated By Defendants.

As argued at Point I of this Brief, even if the Planning Board's actions in cooperating with the other municipal agencies were entirely legal and innocent, the Planning Board may be

---

\* N.J.S.A. 40:55D-28b(5) defines the utility service plan element as follows:

"(5) A utility service plan element analyzing the need for and showing the future general location of water supply and distribution facilities, drainage and flood control facilities, sewerage and waste treatment, solid waste disposal and provision for other related utilities."

charged with conspiracy if its actions tended to accomplish an unlawful purpose. The heart of Plaintiff's claim in the within action is that each of the Defendants has acted independently and in concert to preserve exclusionary land use patterns in the Township by adopting a Land Development Ordinance which holds out the illusionary promise of moderate densities, and then makes a property owner's right to develop under this illusionary land use scheme subject to cost-generative utility fees and short-sited utility planning policies.

It is Plaintiff's position that the Planning Board's Motion raises a question of fact regarding the end result of all Defendants' exclusionary conduct, and that it should therefore have the right to pursue discovery in order to prove that Defendants concerted actions resulted in a violation of the New Jersey Constitution.



POINT III

PLAINTIFF'S CONSPIRACY COUNT HAS SPECIAL  
SIGNIFICANCE TO ITS EXCLUSIONARY  
LAND USE POLICY CLAIM

Although Plaintiff does not believe that policy arguments are necessarily germane to its right to maintain a conspiracy claim which is permitted under State law, it believes that this Court should be aware of the reasons why this conspiracy claim is both relevant and necessary to show the interrelationships among Defendants.

It has generally been recognized that the main danger of a civil conspiracy is the fact that an organized group of people working together can produce results which are much different from those which would be produced by individuals acting without assistance and that concerted action may make oppressive and dangerous that which, if it proceeded from a single person, might be harmless. Weiner v. Lowenstein, 51 N.E.2d 241 (S.J.Ct. Mass. 1943). In the within case Plaintiff believes that absent the conspiratorial agreement among Defendants to independently prevent development in Old Bridge Township, each Defendant, acting without the mutual reinforcement of the conspiracy, might have felt compelled to act in accordance with State law.

Additionally, the conspiracy theory serves to put into context and connect a number of acts by Defendants which

would otherwise appear to be unrelated incidents. Willems v. Barclay's Bank, 263 F.Supp. 774 (S.D.N.Y. 1966); Continental Confections, Inc. v. S & M Sugar Co., 194 N.Y.S.2d 178, 20 Misc.2d 914 (1959). Plaintiff would like the opportunity to prove that the Sewerage and Water Authorities, for example, have not merely acted independently to block any large development in Old Bridge but have, in fact, acted together with the other Defendants in deliberate furtherance of a common conspiracy.

Finally, a pleading of civil conspiracy should be permitted because it aggravates the wrong complained of in the other counts and may therefore affect the determination of a proper remedy. Stein v. Schmidt, 21 N.J.Misc. 218 (1943); McGrath v. Keenan, 24 N.J.Misc. 12 (1946); Cabakov v. Thatcher, 27 N.J.Super. 404 (1953). In the context of an exclusionary land use suit, the fact that the exclusionary conduct complained of was deliberate pursuant to a conspiracy rather than accidental and innocent is clearly relevant to Plaintiff's right to specific corporate relief as a remedy. As the New Jersey Supreme Court indicated in Oakwood at Madison v. Tp. of Madison, 72 N.J. 481, not every builder-plaintiff who wins an exclusionary zoning suit will be entitled to specific corporate relief since that remedy is within the discretion of the court, to be exercised in light of all attendant circumstances. Plaintiff in this case contends that given the history of this municipality's deliberate disregard of previous Court Orders and the concerted

and intentional conspiratorial agreement among these Defendants to prevent the production of least cost housing in violation of Court Orders, that specific corporate relief is essential to insure that further judicial intervention in the land use policies of Old Bridge Township is not required. Proof of Plaintiff's conspiracy theory will thus aid the Court in deciding whether the remedy of specific corporate relief is appropriate under the attendant circumstances of this case.

CONCLUSION

For the aforementioned reasons, Plaintiff respectfully requests this Court to deny the Planning Board's Motion for summary judgment on the conspiracy count of the Complaint.

Brener, Wallack & Hill  
Attorneys for Plaintiff

By:

  
Guliet D. Hirsch

Dated: June 29, 1981