ML/CA

Old Bridge

8-6-87

Brief in opposition to
Motion to vacate Judgment & transfer

- W/letter opinion from Hoveis & Ochs v. Borough of Far Hills, 10-9-86

pgs. 39

CA 002402B

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY/OCEAN COUNTY (Mount Laurel II) DOCKET NO. C 4122-73
and	
O&Y OLD BRIDGE DEVELOPMENT CORPORATION, a Delaware Corporation, and WOODHAVEN VILLAGE, INC., a New Jersey Corporation, Plaintiffs, vs. THE TOWNSHIP OF OLD BRIDGE in the COUNTY OF MIDDLESEX, a Municipal Corporation of the State of New Jersey, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, THE MUNICIPAL UTILITIES AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE, THE SEWERAGE AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE and THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY/OCEAN COUNTY (Mount Laurel II) DOCKET NO. L 009837-84 PW and NO. L 036734-84 PW CIVIL ACTION BRIEF IN OPPOSITION TO MOTION TO VACATE JUDGMENT AND TRANSFER

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Introduction

This brief is respectfully submitted on behalf of the Civic League plaintiffs in opposition to the motion of the Township of Old Bridge and the Planning Board to vacate the Order and Final Judgment of Repose dated January 24, 1986 (the "Judgment") and transfer this matter to the Council on Affordable Housing ("COAH"). Neither the wetlands delineation nor the fair share numbers promulgated by COAH provide any basis for the vacation and transfer demanded here.

It is well settled that COAH's publication of a lower fair share number does not permit a municipal defendant to avoid its obligations under a final judgment. Nor can Old Bridge substantiate its claims that the wetlands render performance impossible. At the time of settlement, all parties knew that the wetlands delineation had not been finalized. While the developments contemplated by the Judgment may be reduced in scale, plaintiff-developers remain ready to go forward.

Nor can Old Bridge claim that it cannot "perform"; that is, that it cannot meet its fair share obligation under the Judgment. It is implicit in the Judgment that the agreed upon fair share number represented a goal, which would necessarily be contingent upon market conditions. Indeed, the Judgment refers to a "Proposed Mechanism," and "units intended to be provided" (emphasis added, Paragraph 2). The Judgment only provides, and

Mount Laurel only requires, that the Township provide a realistic opportunity for affordable housing. Old Bridge's fair share of the regional need represented a target, a commitment to provide a realistic opportunity for the construction of the specified number of units, not a guarantee that those units would actually be built. The Civic League is willing to proceed under the terms of the existing Judgment despite the possibility that the number of units actually produced will be less than anticipated in the Judgment. Indeed, all of the plaintiffs are willing to proceed. Old Bridge's refusal to permit them to do so is the only factor rendering performance "impossible" here.

Finally, even if newly discovered evidence did render performance impossible, Old Bridge offers no reason for ignoring the reopening clause appearing at page 8 of the Judgment, which provides for just such a contingency. Old Bridge concedes the pertinence of this clause, "reserving its rights" with respect to same.

The real reason for this motion is not a "mistake of fact" or "newly discovered evidence," but the Township's determination to avoid at any cost the terms of the arduously negotiated settlement. The Township's present dissatisfaction with that settlement is no basis for setting it aside. As this Court held

in Haueis v. Far Hills (Letter Opinion dated October 9, 1986, attached hereto as Exhibit A):

> The bottom line of defendant's motion is a disturbing signal which, if reflective of general attitudes among our municipalities, bodes ill for those settlements already solemnly reached and for cases now pending. It bespeaks an attitude to avoid at all costs any obligation not set in concrete. It draws into question the moral commitment to do what all concede should be done -- provide at least some affordable housing, recognizing we will not provide all that is needed. Matters of conscience do not necessarily dictate legal results. However, nothing short of raw expediency, opportunism and obstructionism require that conscience be abandoned in an effort to misuse the law. Id. at 8, 9.

Unfortunately, the within motion is clearly the product of precisely such "raw expediency, opportunism and obstructionism." It is respectfully submitted that it should be denied in its entirety by this Court. The Final Judgment remains viable and Old Bridge should remain bound by its terms.

Counterstatement of Facts

It is undisputed that larger areas of the O&Y and Woodhaven projects than were originally anticipated are technically wetlands, and therefore under the jurisdiction of the Army Corps of Engineers. The impact of this delineation on the O&Y and Woodhaven developments cannot be evaluated until the developers have had the opportunity to submit plans incorporating this information, as provided in Section III-A.6 of the Settlement, at p. 8. It is significant that the developers both unequivocally indicate that their projects can go forward.

The Hintz Report, prepared well after the motion to set aside the Judgment was made, is in part premature and in part too late. Virtually from the moment that the wetlands problem was discovered, Old Bridge has hastened to demonstrate that the settlement cannot work, betraying its underlying concern to escape the settlement by whatever means in favor of what it believes will be COAH's more generous disposition. The Hintz Report is consistent with this strategy, because it focuses on the worst case wetlands scenario -- before the landowners have been given an opportunity to present plans that accommodate the wetlands limitations. Indeed, in December 1986, well before the specific boundaries of the wetlands were known, Mr. Hintz

expressed similar reservations. (Convery Certification dated December 23, 1986, paragraphs 7-8.) As will be explained below, the Judgment contains a detailed and adequate mechanism for considering the wetlands issue, at which time the landowners' and the municipality's approaches to the matter can be reconciled if necessary. By rejecting this mechanism before the plans have even been developed or evaluated, the Township only demonstrates its bad faith.

The Hintz Report is too late insofar as it expresses Old Bridge's present regret that it ever entered into the settlement. That regret is now beside the point. Thus, the extensive discussion of planning considerations militating against the size of the O&Y and Woodhaven developments (e.g., the concern about the effect on development costs of the nearly flat slope of portions of the sites unaffected by the wetlands, Hintz Report, p. 18) are totally inapposite. Except for the wetlands problem, the physical condition of the land was known to the Township throughout the settlement process and the Township cannot now bootstrap its own purported second thoughts on these matters to set aside a settlement into which it knowingly and voluntarily entered.

The Township further contends that it would not have entered into the settlement if it had known it would not in fact obtain the commercial ratables anticipated therein. The Township's lack of interest in, or commitment to, affordable housing, (confirmed with admirable candor by Joan George's affidavit), is well known to the Civic League plaintiffs after thirteen numbing years of litigation. Be that as it may, affordable housing is what this litigation is all about, and it is only because they are willing to provide affordable housing that the developer-plaintiffs have the development rights provided them under the settlement. Old Bridge's desire for commercial ratables is beside the point. In any case, as set forth in the "Planning Report for the Olympia and York Planned Development," dated May 26, 1987 ["Sullivan Report"], O&Y expects to provide between 128 and 155 acres of commercial uses, and a total of between 277 and 304 acres of ratables under the existing wetlands delineation.

Nor may production of Mount Laurel housing be held hostage to construction of the Trans Old Bridge Connector ("TOB"), which was planned long before the Judgment, is intended to serve the needs of the entire community, and is independent of this litigation. Only two things are required at this point: O&Y must affirm its commitment (as it has done) to contribute to the

road if the necessary permits can be obtained, and the Township must cooperate in applying for the necessary wetlands permits. Moreover, even if the TOB cannot be built, it should be noted that a dramatically down-scaled development will correspondingly reduce the amount of traffic and congestion which justifies the developer exaction in the first place.

It is respectfully submitted that the "facts" set forth in the Hintz Report are nothing more than an advocate's effort to preempt the Judgment. Even if the Sullivan Report did not provide a compelling alternative to the scenario set forth in the Hintz Report, the latter neither requires nor justifies vacation of the Final Judgment of this Court.

Argument

POINT I

THERE IS NO BASIS FOR VACATING THE ORDER AND FINAL JUDGMENT OF REPOSE DATED JANUARY 24, 1986.

A. The COAH Fair Share Determination Provides No Basis for Reopening the Judgment.

Defendants argue that Old Bridge's fair share should be reduced to 412 because this was COAH's fair share determination (Planning Board Brief, dated December 30, 1986, at 14). It is well established that a final judgment in this context is exactly that, enforceable without regard to subsequent statutory, administrative or case law developments. N.J.S.A. 52:27D - 322. As this Court held in Haueis, supra:

> [Defendant] entered into this agreement a full three months after the enactment of the Fair Housing Act. . . . To allow defendant to reduce its number would undermine all other cases which had reached final settlements. Id. at 8.

The Appellate Division has similarly refused to transfer a Mount Laurel case in which a final Judgment had been entered. Urban League of Essex County v. Mahwah No. A-210-84T7 (unreported opinion, App. Div. 1986).

Nor can the COAH fair share be considered a "subsequently adopted administrative regulation" for purposes of invoking the reopener clause in the settlement. At the time of the settlement, all of the parties were either involved in, or actively following, the litigation in Hills which was about to be decided by the Supreme Court. The parties were well aware that the decision in Hills, depending on its outcome, could make it more difficult for one party or another to agree to the settlement. A conscious decision was made to hasten the process of final negotiations, drafting, and presentation to this Court so that further delays and expense could be avoided.

The parties' understanding that the settlement was not to be affected by subsequent COAH proceedings was clearly stated in colloquy with the bench on January 24, 1986.

> The Court: Suppose [COAH] adopts some regulations which would affect the fair share number?
>
> Mr. Hutt: The fair share, I think, is solid under this. (T35-26 to T36-3)

Eric Neisser, Esq., attorney for the Urban League plaintiffs, responded to the Court's observation that the language of the reopener clause left "some uncertainty in the process":

> It was certainly our understanding that the question [the Court] raised on fair share was not going to be reopened. (T38-11)

As the Court noted, counsel for Old Bridge did not dispute either comment, and it is respectfully submitted that it should not be permitted to do so now.

B. There Is No Basis Under R. 4:50 to Vacate or Reopen the Judgment.

Defendants demand that the within Judgment be vacated on the grounds of "newly discovered evidence," "material mistake of fact," and "impossibility." All of these demands are predicated upon the wetlands determination of the Army Corps of Engineers. The parties knew throughout the negotiations and subsequent settlement that the wetlands were to some extent an open question, although no one would argue that the precise scope of the problem was anticipated.

Assuming, arguendo, that the parties all expected some unspecified but smaller amount of wetlands, this would nonetheless provide no grounds for setting aside the Judgment unless defendant municipality can establish (1) that this assumption was the basis for its agreement and (2) that it will be prejudiced by the enforcement of that Judgment. As the Appellate Division noted in Beachcomber Coins, Inc. v. Boskett, 166 N.J. Super. 442 (App. Div. 1979),

> [W]here parties on entering into a transaction that affects their contractual

> relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be. Restatement, Contracts, § 502, at 961 (1932); 13 Williston on Contracts (3d ed. 1970), § 1543, at 74-75. Id. at 445.

Old Bridge conspicuously fails to meet either test. The settlement does not relieve the parties of their obligations in the event of a change in the housing market or any other reason preventing the completion of the envisioned developments. Rather, it sets forth a carefully structured phasing schedule which assures that, if no party gets all that it bargained for, each gets some. The terms of the Judgment itself preclude the rigid construction upon which Old Bridge now insists.

Nor is there anything before this Court to indicate that enforcement of the Judgment would be any more onerous for the Township than enforcement under the circumstances which it contends were originally contemplated. Defendant municipality's argument that it should not be required to abide by the Judgment because it will not be receiving all of its hoped-for ratables only demonstrates its fundamental disregard for the underlying principles of this litigation. In a large-scale planned development, the non-residential component is a legitimate

consideration, but "fiscal zoning" is not. As the court noted in Glenview Development Co. v. Franklin Twp., 164 N.J. Super. 563 (Law Div. 1978):

> One of the evils which Mt. Laurel sought to remedy was so-called fiscal zoning, i.e., zoning for and attracting industrial and commercial ratables, while at the same time excluding from residence within the community all but a few of the persons employed in these facilities." Id. at 571.

See also Taxpayers Ass'n of Weymouth Tp., Inc. v. Weymouth Tp., 80 N.J. 6 (1976), cert. denied, Felman v. Weymouth Tp., 430 U.S. 977 (1977); Inganamort v. Fort Lee, 120 N.J. Super. 286 (Law Div. 1972), cert. granted, 62 N.J. 186; aff'd, 62 N.J. 521 (1973); appeal after remand, 72 N.J. 412 (1977); So. Burlington Co. NAACP v. Tp. of Mount Laurel, 67 N.J. 151 (1975).

Old Bridge argues in essence that its only reason for agreeing to the settlement was that it would achieve a fixed amount of commercial ratables, irrespective of the amount of housing that was built. That asserted motivation is inconsistent with the terms of the settlement, however. The settlement provides for linkage of the commercial development to the progress of the housing development, thus embodying the correct focus of a Mount Laurel case on housing. (See Settlement, p. 3-4.) If less housing gets built, less commercial development gets

built. The township's representatives, who are experienced and sophisticated in land development matters, obviously knew that development on the scale contemplated by O&Y and Woodhaven, extending over so long a period of time, was subject to so many contingencies that the final buildout number had to be regarded as speculative. The settlement mechanisms are responsive to these considerations, whether the changes are attributable to economics or wetlands. The plaintiff developers, moreover, have expressed their ability and intention to provide ratables commensurate with their proposed residential development. (Sullivan Report at 12).

Old Bridge's argument that the wetlands delineation, if not a "mutual mistake," constitutes "newly discovered evidence" justifying the reopening of the Judgment under R. 4:50 similarly must fail. "Newly discovered evidence" must "be such that it would probably change the result" if the Judgment were set aside and the case were tried again. State v. Speare, 86 N.J. Super. 565 (App. Div. 1965). This test focuses on the Court's determination, not the parties' assessment of their case. Here, the question is not whether Old Bridge would have entered into the Judgment as of the date of the revised wetlands delineation, but whether this Court would have approved the Judgment if

submitted at that time. It is respectfully submitted that such approval would have been amply justified for the same reasons that, under the "mutual mistake of fact" test, enforcement of the Judgment cannot be considered onerous, i.e., those features of the settlement that allow it to adjust smoothly to the now-known scale of the wetlands problem.

It is well settled that it is in the discretion of the trial court to reopen a Judgment if the Court believes that there is "manifest injustice" or "extraordinary circumstances" warranting such action. Manning Engineering, Inc. v. Hudson County Park Comm., 74 N.J. 113 (1977); Tenby Chase Apts. v. N.J. Water Co., 169 N.J. Super. 55 (App. Div. 1979); Quick Chek Food Stores v. Springfield Tp., 83 N.J. 438 (1980). Here, the wetlands delineation -- which was always an open issue -- cannot seriously be considered such an "extraordinary circumstance." Furthermore, it would be inequitable to allow Old Bridge to avoid the consequences of its bargain, especially since two aspects of that bargain ensure its continuing fairness.

First, the settlement embodies a careful mechanism for submission of plans, review by the township, and decision, if necessary, by the Master and the Court. (Section V-B.3, p. 12-14). Second, the settlement embodies a fair share principle of

proportionality which shifts the risk of unbuilt units from the township to the Civic League plaintiffs. (See, e.g., Section III-A.2, p. 7.) Indeed, notwithstanding the self-serving certification of Eugene Dunop to the contrary, there is no reason to believe that Old Bridge would have rejected the 10% set aside with respect to scaled-down O&Y and Woodhaven projects, especially since it welcomed such a set-aside with respect to all other development in the Township.

1. Review mechanisms. The settlement contains several very pretty maps, but they are hardly adequate as a master plan of these developments for the next twenty years. Indeed, the settlement even provides for additional land, unspecified in location, to be added to the developers' holdings and covered by the agreement at the developers' option. (Settlement, Section V-B.2, p. 12).

The settlement merely provides a framework for decisionmaking. The hard work of planning was to be done after the settlement was approved, with presentation of specific proposals and review by the municipality. In fact, it was in the initial stages of this review that the wetlands problem was uncovered. All that is necessary now is to let the settlement mechanisms function. With the delineations complete, O&Y and

Woodhaven will have to prepare and present revised plans. (A partial sketch of such a plan is contained in the O&Y Report submitted in connection with this motion, inaccurately described as a "proposal" in the Certification of Joan George.) These plans are subject to review, negotiation, and resolution by the master or the Court if necessary, just as envisioned at the time of settlement.

2. Proportionality. In addition to its procedural flexibility, the settlement was intended to be flexible in its substantive terms. In particular, there is no guarantee that the fair share number of 1668 will be achieved. The Civic League plaintiffs are willing to adhere to the terms of the Judgment and do not seek to compel the town to compensate for any hypothetical units lost because of the wetlands problem. This is contingent, of course, upon Old Bridge's equally good faith effort to comply insofar as possible with the terms of that Judgment.

The settlement provides for a uniform ten percent set aside in all Old Bridge residential projects, large and small, and without regard to whether they are lands specifically identified in the settlement. (Section III-A.2, p. 7-8). Thus, in effect, what the Civic League plaintiffs bargained for and got was a fair share of whatever development took place. The specific fair

share number set forth in the settlement order expressed an expectation of what could be done, an expectation now modified by the wetlands exclusion, but it was no more than an expectation.

It also bears noting that the fair share number stated was for the period through 1992 and includes projects not dependent on the wetlands determinations, such as Oakwood at Madison and Brunetti. The wetlands restrictions on O&Y and Woodhaven will operate to cut some years off their projected twenty-year buildout, but it will not necessarily limit the amount of building that will take place during the fair share period to 1992, except to the extent that the ever-mounting delays by the Township shorten the remaining time in the fair share period.

Thus, the loss of fair share is in fact deferred until after 1992, at which time all of the parties anticipated that new fair share calculations would be made using the then-prevailing methodology. It is ironic that Old Bridge in its supplemental brief laments the loss of this hypothetical future fair share when it has devoted so much of the concrete and specific past to avoiding its fair share altogether. The reduced, post-1992 expectations cannot be a basis on which to vacate the Judgment.

Old Bridge also argues that the loss of commercial ratables undercuts the settlement because the township regarded the

ratables as the key inducement to settling. This argument is unpersuasive. Once again, the key concept is proportionality. The settlement carefully links the amount of commercial development at any one time to the amount of residential development. (Section V-C.6, p. 20). There was never any guarantee that all of the residential would be built, and hence no guarantee that all of the commercial would be built.

So long as the amount of commercial space is reasonably commensurable with the schedule set forth in the settlement (exact equivalence is not necessary), Old Bridge cannot set up a defeated expectations argument. Moreover, this proportionality is consistent with good planning: now that the residential projects will have to be scaled back, a "balanced" plan will call for a scaled back commercial zone as well. Finally, as indicated earlier, fiscal zoning per se is not permitted in New Jersey and cannot be used as an excuse for avoiding the Final Judgment of this Court.

Old Bridge's attempt to condition enforcement of the Judgment upon construction of the TOB is similarly misguided. To the extent that the TOB cannot be built because of wetlands limitations, it could not be built whether or not this settlement had ever been reached. That the TOB may be more costly than Old

Bridge originally expected certainly does not relieve the Township of its other obligations, especially since the developers may be required to bear some portion of the costs[1] or may voluntarily assume a greater share of the costs by way of settlement.

It is respectfully submitted that the approach set forth in Bauer v. Griffin, 104 N.J. Super 530 (Law Div. 1969), aff'd, 108 N.J. Super. 414 (App. Div. 1970), cited by defendant municipality, is controlling here. There, denying plaintiff's motion to vacate an order approving a settlement on the grounds that the parties had mistakenly believed that death was imminent for the infant plaintiff, the court held:

> In order to invalidate a release on account of mutual mistake, the mistake must relate to a past or present fact material to the contract and not to an opinion respecting future conditions as a result of present facts. (Emphasis added, citations omitted.) Id. at 542.

Here, as in Bauer, if there was any mistake it related to the parties' expectations. All of the parties hoped that the wetlands would be less extensive than they have turned out to be;

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1 Within the stringent limitations of New Jersey exactions law, of course. N.J.S.A. § 40:55D-42; N.J. Builders Ass'n v. Bernards, ___N.J. ___ (decided July 8, 1987).

this cannot justify setting aside of the Judgment. As the Bauer court noted:

> To permit judgments to stand or fall according to an examination in the bright noonday sun of hindsight invokes policy considerations far less meritorious than those which augur for finality by judgment. Finality of judgments and an end to litigation are said to be objects of public policy and sound jurisprudence. (Citation omitted.) Id. at 545.

The New Jersey Supreme Court has explicitly recognized the importance of the concept of finality in this context. Hills Development Co. v. Bernards, 103 N.J. 1, 59, 64 (1986). It is respectfully submitted that the history of this particular litigation mandates adherence to that concept, and neither COAH's speculative fair share number nor revised wetlands delineations justify its abandonment at this point.

POINT II

EVEN IF THE WITHIN JUDGMENT WERE TO BE REOPENED THIS COURT SHOULD RETAIN JURISDICTION.

Old Bridge argues that this matter should be transferred to COAH because of COAH's promulgation of fair share numbers and because the wetlands render performance impossible. As explained at greater length in Point I above, neither COAH's numbers nor the revised wetlands delineation justify reopening the Judgment. Even if they did, however, under the Fair Housing Act as well as the express terms of the Judgment this Court should still retain jurisdiction of this matter.

A. Transfer of this Matter to COAH Would Contravene the Fair Housing Act.

As a matter of law, Old Bridge knowingly, intelligently and unequivocally waived its right to seek transfer to COAH under the Fair Housing Act, and cannot now be heard to seek further delay.

It is unclear whether Old Bridge ever formally advised COAH of its intent to participate. Whether it did or not, it is now too late for the Township to demand exhaustion of administrative remedies under the

Act. Section 9(a) of the Act sets forth the requirements for a municipality which has filed a resolution of participation, notifying COAH of its intent to submit a fair share plan:

> * * *
> Within five months after the council's adoption of its criteria and guidelines, the municipality shall prepare and file with the council a housing element, based on the council's criteria and guidelines, and any fair share housing ordinance introduced and given first reading and second reading in a hearing pursuant to R.S. 40:49-2 which implements the housing element.

COAH promulgated criteria on or about August 5, 1986, allowing a municipality until January 5, 1987 to file its housing element and fair share ordinance implementing same pursuant to the cited section. It is undisputed that as of this date Old Bridge has filed neither. If Old Bridge has not filed an intent to participate, it is not entitled to exhaustion of administrative remedies since it did not file its fair share plan and housing element prior to the institution of this litigation as required by Section 9(b) of the Act.[2]

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[2] Section 16(a), it should be noted, does not relieve a party of its obligations under Section 9. Section 16, moreover, refers to a pending matter, rather than a matter like the one at bar, in which a Final Judgment has been entered.

Moreover, Mr. Convery expressly conceded that by settling the case, Old Bridge relinquished its right to seek transfer:

> Now, concerning the language in the legislation, I acknowledge that the language indicates that for those cases, exclusionary zoning cases instituted more than sixty days before the effective date of this Act, that any party to the litigation may file a motion with the Court to seek to transfer the case to the Council. If, in fact, Your Honor accepts the compliance package and signs the judgment, I would submit to the reasoning that the case is settled and is, therefore, no longer in litigation. (T73-14)

Finally, as a matter of fairness, it would be grossly inequitable to deprive the parties of this Court's invaluable expertise, its familiarity with the factual details of this case, and its broad understanding of the goals of this litigation. Even if the parties had not all previously indicated their assent in this regard, for these reasons jurisdiction should remain in this Court.

B. The Parties Agreed that this Court Would Retain Jurisdiction in the Event the Judgment Were Reopened.

The Reopener Clause (Section III.A-3) expressly assures the continued jurisdiction of this Court in the event the Judgment were to be reopened. Indeed, this Court unambiguously denied Old Bridge's first motion to transfer "with prejudice," setting forth the extremely narrow circumstances under which an application for transfer would even be considered:

> Thirdly, I think it is fair to say, and Mr. Convery has been very candid about it, that the town does intend this to be a complete and final settlement of all litigation which in and of itself would render a transfer moot, because there would be nothing to litigate before the Housing Council. For those reasons I think it is appropriate to deny the motion because of the remoteness rather than the merits of any right to transfer and that the motion should be denied with prejudice, it being understood that what I've said before need not be incorporated in the order, but is incorporated in the record and, that is, that the Court understands the denial of the motion is based on mootness and that the mootness may, if I can put it that way, disappear if anyone sought to change the terms of the agreement. Therefore, if there is an application to suddenly modify the terms of the agreement as opposed to enforce it, the Township would not be precluded from countering with a motion to transfer. So the prejudice is for -- the denial, rather, with prejudice is with respect to the present mootness of the case. (Emphasis added.) (T80-11 to T81-8)

There was no question that such an application for modification would have had to be brought by one of the plaintiffs. As Mr. Convery explained:

> In regard to the position of the Urban League that the settlement documents indicate that the Court will retain jurisdiction, the Council has authorized me to sign this document, and I acknowledge that the Township of Old Bridge accepts the concept that the Court will retain jurisdiction as to enforcement of the judgment and settlement

> agreement that is incorporated. So on that basis I would submit to the Court that it is for the Court to determine whether or not the motion is moot.
>
> . . . I feel that it's clear that we have an agreement today. <u>But if any other party comes back to this Court and seeks to indicate that there, in fact, was not an agreement, there was not a meeting of the minds of the parties and seeks to ask this Court to indicate that there is no agreement, at that point the Township of Old Bridge should have the right to come back to this Court and seek to transfer</u>. (Emphasis added.) (T73-7 to T75-2)

Neither the Civic League nor the developer plaintiffs have in any manner attempted to repudiate the Judgment. Old Bridge's own interpretation of the cited clause precludes the construction which it now urges. Indeed, if there is any meaning to the phrase "manifest injustice" which precludes transfer under Section 16 of the Act, it must apply here. It is respectfully submitted, therefore, that the Judgment should remain in place and Old Bridge should be directed to proceed in accordance with its terms.

Conclusion

For the foregoing reasons, it is respectfully submitted that defendant Old Bridge's motion to set aside or reopen the Judgment and to transfer this matter to COAH should be denied by this Court. Even if defendant municipality's motion is granted insofar as it demands reopening of the Judgment, it is respectfully submitted that this Court should retain jurisdiction of the matter.

Dated: August 6, 1987

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The research assistance of Barbara Newmeyer, Patrick Malone and Jamie Plosia, students at Rutgers Law School, is gratefully acknowledged.

Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D. SERPENTELLI
ASSIGNMENT JUDGE

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October 9, 1986

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LETTER-OPINION

Re: Haueis & Ochs v. Borough of Far Hills, et als.

Gentlemen:

This letter opinion shall address defendant's motion to transfer this case to the Council on Affordable Housing or, alternatively, for a reduction in the fair share number. Plaintiff has cross moved for enforcement of the compliance order and for an order compelling the Planning Board to schedule public hearings on its site plan application. This latter issue has apparently been resolved to plaintiff's satisfaction so long as defendant provides for the final vote on site plan approval by the December 1, 1986 meeting. Additionally, plaintiff requested in its September 15, 1986 letter to the court that the Master, George Raymond, be instructed to help move along the sewer treatment plant expansion application so as to keep delays at a minimum.

Exhibit A

Herbert A. Vogel, Esq. October 9, 1986

J. Albert Mastro, Esq. Haueis,et al. v. Far Hills

The court heard the initial motion on August 1, 1986 and withheld decision pending the parties further briefing of the issue of finality of the October 4, 1985 compliance order and possible additional oral argument. I find no additional argument necessary. I hereby incorporate in this opinion the preliminary findings of the court made on August 1.

Defendant Far Hills argues the October 4, 1985 order, captioned "Order of Compliance Subject to Conditions" is not a final order because of the inclusion of conditions. Absent a final order, defendant claims it is entitled to be transferred to the Council on Affordable Housing. Defendant points to, among other things, paragraph 10 of the October 4th order which did not grant "final" repose but continued the "interim" repose granted by order dated December 31, 1984 entitled "Interim Order of Settlement". Defendant claims this "interim" repose is not the same "quality" as "final" repose.

Far Hills stresses condition #9, concerning the sewerage treatment plant expansion in cooperation with Bedminster Township (which expansion was considered critical to the compliance order), renders the order not final because Bedminster was not a named party to the litigation. To be a final order, appealable as of right, case law provides that it must be final to all

parties and all issues. Defendant is apparently arguing that the fact that sewer expansion was considered a "critical" issue and Bedminster's cooperation was essential to the resolution of that issue, since Bedminster was not a named party, the "critical" sewerage issue can not be said to have been resolved.

Defendant also argues that at the October 4, 1985 compliance hearing the court recognized further action may be needed relative to either the Township of Bedminster or the state Department of Environmental Protection. Defendant believes such anticipated court intervention makes the order interlocutory in nature.

Defendant uses Section 28 of the Fair Housing Act regarding the builder's remedy moratorium to further support its position. Section 28 provides that a court may not grant a builder's remedy in any case before it until a January 1, 1986, the time by which municipalities must file a housing element with the Council on Affordable Housing. The Act provides that if a final judgment granting a builder's remedy has already been granted, the moratorium does not apply. Final judgment is defined in Section 28 as a judgment subject to an appeal as of right for which all right to appeal is

exhausted. Defendant implies it did not believe it had a right to appeal the October 4, 1985 compliance order because it was not sure whether all issues were completely adjudicated.

Conversely, plaintiff argues that the compliance order is final. Plaintiff emphasizes that the compliance hearing was held at the defendants' request. Further, the court questioned Mr. Mastro, attorney for the Borough, about the voluntariness of the proceeding in light of the newly enacted Fair Housing Act. Specifically the court stated in part:

> I want to commend the municipality for having voluntarily resolved the issue. I should have, at the opening of this proceeding, as I have been doing since the adoption of the legislation, in essence, read the municipality its rights, but I know Mr. Mastro is entirely aware of its rights, and we proceed today at the request of the township.
>
> Mr. Mastro that's correct, I take it.....

Mr. Mastro (in part)...The compliance hearing was at our request.

The court further noted it was very sensitive to the fact that there was legislation and it was sensitive to the rights created thereunder.

Plaintiff compares the Far Hills matter to those cases which the Supreme Court referred to as having reached final settlement in its decision in Hills Development Co. v. Bernards Tp., 103 N.J. Super. 1 (Law Div.1986),

including Allan Deane v. Bedminster, 205 N. J. Super 87, (Law Div. 1985), which was settled in this court. Plaintiff emphasizes the fact that the majority of the compliance orders contained numerous conditions to be fulfilled subsequent to the compliance hearings which plaintiff argues is typical in Mount Laurel litigation. Lastly, plaintiff states all of the conditions are or can be fulfilled.

Thus the issue is whether the October 4, 1985 compliance order subject to conditions constitutes a final order which would preclude defendant from receiving a transfer to the Council on Affordable Housing.

Defendant claims its case is very similar to the cases decided in Hills, especially to the Hills v. Bernards litigation because of the interim order of settlement which exists in both cases. Defendant notes the only difference is that a compliance hearing was held in Far Hills but not in Bernards or any of the other cases. The fact that a compliance hearing was held is of significance. The hearing concluded the litigation. The Supreme Court in Southern Burlington County N.A.A.C.P. v. Mt. Laurel Tp., 92, N.J. 158,290 (1983) (Mount Laurel II), described the "remedial state of Mount Laurel litigation and stated that the litigation is concluded with a judgment of compliance or non-compliance...." Defendant received an order of compliance. The litigation was therefore no longer "pending" to be

transferred to the Council on Affordable Housing pursuant to Section 16a. All of the critical issues had been resolved. The conditions contained in the order memorialize the resolution and set forth the continuing obligations of the parties pursuant to the settlement.

Mount Laurel litigation would never be resolved if final orders could not be subject to conditions because of the very nature of the remedies granted - phasing, rehabilitation, development of sale and resale mechanisms are devices which are implemented over time. The court, in effect, retains jurisdiction to make sure the conditions are fulfilled. The court does not "police" its order - but relies on the parties to come before it - generally on a motion to enforce litigants rights in the event an order is not being fulfilled.

The fact that the order does not say "final" judgment exalts form over substance. Defendants claim that its repose was not of the same quality as "final repose" - is faulty. Defendant has clearly received the benefit of Mount Laurel repose to the fullest extent. It should be remembered that the compliance hearing was contested by a potential plaintiff. Timber Properties, wanted to be a part of the litigation but the court denied the request because of the repose previously granted. Furthermore, once all of the

conditions are met, if defendant wishes to submit a formal order of repose pursuant to Paragraph 10 - defendants' repose period would undoubtedly relate back to the October 4, 1985 order. Thus, in any event, the repose granted expires on October 4, 1991. Clearly that was what all parties and the court intended. If the "quality" of final repose was somewhat different from the repose defendant has benefited from thus far, it would be entitled to repose from the date of any order subsequently submitted pursuant to paragraph 10 of the October 4, 1985 order.

The sewerage issue is clearly a red herring. If in fact Bedminster is no longer willing to cooperate voluntarily in the sewerage expansion as it represented to this court on October 4, 1985, then either plaintiff or defendant can bring Bedminster into court in a separate action. This would in no way affect the validity or the finality of the order between the parties.

Defendant argues in its reply brief that plaintiffs would have the right to seek a modification of defendants fair share obligation if by chance there was significant commercial growth in Far Hills. Whether or not this is true in light of the Fair Housing Act is questionable. Undoubtedly any party

to an order may seek modification - even vacation pursuant to R. 4:50. The right to do so does not mean modification will be granted nor does it destroy the finality of the order of October 4, 1985.

Finally, defendant seeks, in the alternative, a reduction of the fair share number. Defendant is not entitled to any reduction in the number both because it did not reserve the right to do so and because there is simply no other justification to be found. It entered into this agreement a full three months after the enactment of the Fair Housing Act. Defendant indicated on the record it was aware of its rights pursuant to the Fair Housing Act and sought to proceed with the compliance hearing without any reservation of rights. To allow defendant to reduce its number would undermine all other cases which had reached final settlements.

The bottom line of defendant's motion is a disturbing signal which, if reflective of general attitudes among our municipalities, bodes ill for those settlements already solemnly reached and for cases now pending. It bespeaks an attitude to avoid at all costs any obligation not set in concrete. It draws into question the moral commitment to do what all concede should be done - provide at least some affordable housing, recognizing we will not provide all that is needed. Matters of conscience do not necessarily dictate legal results. However, nothing short of raw expediency,

opportunism and obstructionism require that conscience be abandoned in an effort to misuse the law.

This court cannot permit itself to be part of that effort unless the decision in Hills mandates the result. I find nothing in Hills to indicate that a final judgment subject only to compliance conditions should be disturbed. Quite to the contrary, I find that is where the Supreme Court drew the line between transfer and finality. As a result that is where I draw the line subject to further clarification by our appellate courts.

The defendants motions are denied. The plaintiff's motion shall be deemed moot without prejudice.

Very truly yours,

Eugene D. Serpentelli,
A. J. S. C.

EDS:RDH
cc: George Raymond