CA - Old Bridge 4/7/89

Brief in support of Civic League
Pls' motion for Stay and remand

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CA 002434B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-4335-87T3
A-4572-87T3
A-4752-87T3

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,
Plaintiff-Appellant

vs.

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

and

O & Y OLD BRIDGE DEVELOPMENT CORPORATION, a Delaware Corp.,
Plaintiff-Appellant

and

WOODHAVEN VILLAGE, INC., a New Jersey Corporation,
Plaintiff-Appellant

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-Respondents

Civil Action

ON APPEAL FROM
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (MOUNT LAUREL)
MIDDLESEX COUNTY (VENUE)
OCEAN COUNTY (TRIAL)

SAT BELOW:
EUGENE D. SERPENTELLI, A.J.S.C.

BRIEF IN SUPPORT OF CIVIC LEAGUE PLAINTIFFS' MOTION FOR STAY AND REMAND

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PROCEDURAL HISTORY

This litigation was originally commenced because Old Bridge Township used exclusionary zoning measures to prevent the construction of low or moderate income housing. The Civic League, representing the interests of low and moderate income people in Middlesex County, filed suit in 1974. Olympia and York Old Bridge Development Corporation ("O & Y") and Woodhaven Village, Inc. ("Woodhaven"), developers interested in constructing affordable housing, independently filed complaints against Old Bridge in 1984.

The Civic League's complaint, filed before the historic Mount Laurel I decision, requested relief on the grounds that Old Bridge's zoning measures excluded low and moderate income people. The developers requested relief on the grounds that the Township had a duty under the State Constitution to provide a realistic opportunity for the construction of affordable housing for low and moderate income families within the regional community. In orders entered July 2, 1984 and August 3, 1984, the trial court granted partial consolidation of these three suits.

After two years of litigation and negotiation, an Order and Final Judgment of Repose (the "Judgment") between the Township, O & Y, Woodhaven, and the Civic League was signed by the parties and Judge Serpentelli on January 24, 1986. (WPa7)[1]

In December 1986, defendants Old Bridge and Old Bridge Planning Board moved for a vacation of the Judgment. Judge Serpentelli granted the motion for vacation by Order dated

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[1] WPa refers to Appendix of Brief submitted by plaintiff Woodhaven Village, Inc. (March 8, 1989).

October 6, 1987. (WPa 44) This order also transferred the issue of the Township's affordable housing obligation to the Council on Affordable Housing ("COAH").

Woodhaven and the Civic League moved for reconsideration, which was denied by the trial court on April 21, 1988. (WPa46)

The three plaintiffs appealed. Woodhaven and the Civic League appeal from the Orders of October 6, 1987 and April 21, 1988. O & Y appealed from the Order of October 6, 1987. Woodhaven's motion to consolidate the three appeals, filed on November 21, 1988, was granted by Order dated December 23, 1988. (WPa67)

A motion for a thirty (30) day extension of time for the filing of appellate briefs was requested by Woodhaven. An extension from February 6, 1989 to March 8, 1989 was granted. (WPa69)

By letter dated February 28, 1989, O & Y withdrew its appeal from the Order of October 6,1987. (Epps' Certification, Exhibit H).

A motion for a thirty (30) day extension of time, from March 8, 1989 to April 7, 1989, was filed by the Civic League and granted administratively.

STATEMENT OF FACTS

The Judgment between Old Bridge, O & Y, Woodhaven, and the Civic League was entered by the court on January 24, 1986. The Judgment resolved all issues between the parties concerning the type of developments as well as the proportion of affordable housing. Ten (10) percent of all residential units to be built by O & Y and Woodhaven were to be affordable housing units and considered toward satisfaction of the Township's Mount Laurel obligation. The parties contemplated that the overall size of the developments were subject to land use factors, including the final delineation of wetlands, and market contingencies. Regardless of the ultimate size of the developments, the proportion of affordable housing would remain the same. At the time of settlement, moreover, all parties knew that COAH, in compliance with the Fair Housing Act, would be promulgating guidelines establishing fair share numbers of low and moderate income units for each municipality in the state.

In Spring 1986, COAH set Old Bridge's fair share at 417 low and moderate income units--approximately one quarter of the obligation voluntarily assumed by Old Bridge in the Judgment. Following COAH's publication of statewide fair share numbers, large areas of the O & Y and Woodhaven project sites were designated wetlands.

The Township moved to vacate the Judgment in December 1986 on the basis that the newly discovered wetlands rendered its performance impossible. Despite the developers unequivocal willingness to proceed with scaled-back versions of their

projects as contemplated in the Judgment and the Civic League's equally explicit acceptance of a commensurate reduction of affordable housing, Judge Serpentelli vacated the Judgment, by Order dated October 6, 1987. The decision was based on mistake and/or newly discovered evidence with regard to the extent of the wetlands. (WPa44) The trial court recognized that its order to vacate the Judgment and the transfer of the matter to COAH might well result in the construction of no affordable housing in Old Bridge (T. 120-2 to 5). Judge Serpentelli nevertheless ordered the matter transferred.

On January 11, 1989, The Star-Ledger published an article which indicated that on January 10, 1989, the Old Bridge Planning Board "approved a conceptual proposal by the O & Y Old Bridge Development Corp. for construction of 1995 homes and about 2 million square feet of commercial space on a huge tract in the southern portion of the Township." The article also emphasized that "O & Y must obtain preliminary and final subdivision approval before July 1, when new state regulations concerning wetlands take effect. . .Both O & Y and township officials have said the company could not get approval for its plan under the new regulations." (Epps' Cert., Exhibit A)

As set forth in greater detail in the Epps and Orlowski Certifications, plaintiffs' attorneys' efforts to obtain detailed information on this development proposal have been largely futile. Plaintiffs eventually received a copy of the Planning Board's Resolution of Memorialization, however. (Epps' Cert., Exhibit F).

On February 23, 1989, plaintiffs' attorney wrote to Stuart Hutt, Esq., counsel for Woodhaven, requesting information on the status of any current project planned by Woodhaven for Old Bridge. To date, plaintiffs' attorney has received no written response. It appears very likely that discussions are underway between Old Bridge and Woodhaven as well, which Woodhaven has conspicuously failed to deny.

By letter dated February 28, 1989, Thomas Hall, Esq., Counsel for O & Y, informed plaintiffs' attorney that O & Y was immediately withdrawing its appeal from the Order of October 6, 1987. The letter indicates that O & Y agreed to dismiss its litigation against the Township "as part of the GDP approval." (Epps' Cert., Exhibit F)

The letter also indicated that the senior citizen housing component of O & Y's new development plan will be constructed "in lieu of any affordable housing obligations." The original O & Y plan, of course, included <u>both</u> senior citizen and affordable housing units. But for the ill-considered vacation of the Judgment, the affordable housing obligation would remain. It appears that the major substantive difference between the old and new plans of plaintiff developers is the absence of affordable housing in the latter.

INTRODUCTION

This brief is respectfully submitted in support of the Civic League plaintiffs' motion; first, to stay the trial court's Orders vacating the Judgment insofar as same permit defendant Planning Board to proceed with its review of the plans submitted by the developer plaintiffs; second, to order defendant Planning Board to provide copies of agendas pending resolution of the within appeal; third, to remand for a plenary hearing; and fourth, following such remand, to expedite the within appeal.

This case, one of the oldest of the Mount Laurel cases has been in litigation for 14 years.[2] The Judgment, finalized after two years of negotiations, resolved all issues between the parties concerning the type of developments as well as the proportion of affordable housing to be constructed within Old Bridge. It provided that 10% of the units constructed by developer plaintiffs would be "affordable" units. (Wpa29) Thus, if the entire 16,680 units were built, 1,668 of these would be Mount Laurel units. Under the terms of the Judgment, construction was to proceed in stages, so that affordable housing units actually constructed would remain proportional to market units built. It is noteworthy that completion was not anticipated within the fair share period. Six months after the entry of the Judgment, the Council on Affordable Housing ("COAH")

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[2] Neisser, "Civil Liberties Today," 23 N.J.L.J. 155.

published guidelines setting Old Bridge's fair share number at 417 units, approximately 25% of the obligation consented to by the Township.

At the time of the Judgment, all parties were aware COAH would be promulgating fair share guidelines. They also knew that the wetlands delineation had not been finalized. The U.S. Army Corps of Engineers subsequently determined that approximately fifty-six percent of O & Y's acreage and twenty-eight percent of Woodhaven's property would be considered wetlands. On December 11, 1986, the Township moved to vacate the Judgment on the grounds that the wetlands designation was "newly discovered evidence" rendering compliance with the Judgment impossible. By Order dated October 6, 1987, the Honorable Eugene D. Serpentelli vacated the Judgment. On April 21, 1988, plaintiffs' motions for reconsideration and rehearing were denied.

The instant motion was prompted by an article appearing in the Star-Ledger on January 11, 1989. (Epps' Certification, Exhibit A) This indicated that O & Y and Woodhaven, the other plaintiffs to the appeal, had settled or were negotiating settlement with defendant. As the public interest plaintiffs argued below:

> "Vacation of the Judgment provides a powerful incentive for the developer plaintiffs to approach the Township and negotiate new scaled-down developments essentially comporting with the plans previously submitted. The main difference between the new plans and those set forth in the Judgment may simply be the omission of any Mount Laurel

> component in the former." (Emphasis added; Epps' Certification, paragraph 9).

It appears that this is precisely what has occurred.

The relief requested in the instant motion is crucial to the resolution of the within appeal. Thus, in this application, the Civic League plaintiffs seek a stay of the October 6, 1987 and April 21, 1988 Orders only insofar as same permit defendant Planning Board to act on the developer plaintiffs' plans. In order to monitor this relief, if granted, plaintiffs request that defendant Planning Board be required to provide copies of agendas pending resolution of the within appeal. Second, the public interest plaintiffs respectfully request that the matter be remanded for a plenary hearing. Clarification is necessary with respect to recent events, which suggest that Old Bridge and the developer plaintiffs are proceeding with rapid development which may well render the instant appeal moot. Finally, plaintiff respectfully submits that, following the remand and whatever supplementation of the record may be appropriate, the instant appeal should be expedited so as not to avoid any further delay in the provision of desperately needed affordable housing.

LEGAL ARGUMENT

POINT I

THE OCTOBER 6, 1987 and APRIL 21, 1988 ORDERS OF THE TRIAL COURT SHOULD BE STAYED PENDING APPEAL INSOFAR AS SAME PERMIT DEFENDANT PLANNING BOARD TO APPROVE PLANS SUBMITTED BY O&Y AND WOODHAVEN PURSUANT TO RULE 2:9-5

A stay of the Orders dated October 6, 1987 and April 21, 1988 pursuant to Rule 2:9-5 is requested as said Orders permit the Old Bridge Planning Board to approve development plans submitted by O&Y and Woodhaven. If the requested stay is not granted, the question raised in the within appeal may well be moot as rights will vest in the developers. At the very least, it is respectfully submitted that this Court should order that any further approvals granted to O&Y or Woodhaven be subject to the result reached in the instant appeal.

Here, as in Landy v. Lesavoy, 20 N.J. 170 (1955), "[t]he opportunity to apply for a stay to preserve the subject matter or res of the suit is implicit in [an] appeal which can be taken as a matter of right." Id. at 175. In Landy, the plaintiff moved for an order vacating the order quashing the writ of attachment issued by the trial court and staying the proceedings pending an appeal to the Appellate Division. The stay was granted but the attached property was nonetheless removed from the State. The Appellate Division dismissed the appeal as moot.

The Supreme Court of New Jersey reversed because of the injustice caused to the plaintiff by the defendant's actions. The Court in Landy stated:

> "These actions were a calculated attempt to deprive the courts of this State jurisdiction of the res, thus defeating the right of appellant of an opportunity to apply for a stay to preserve the subject matter of the appeal until he could perfect and prosecute his appeal. The rules of practice and procedure aim to facilitate orderly judicial procedure and are intended to provide for 'the just determination of each cause.' Such purpose cannot be permitted to be thwarted or defeated by the sleight-of-hand of counsel or the fleetness of foot of an elusive defendant." Id. at 175-75.

The Civic League plaintiffs are faced with a similarly "fleet..foot[ed]" defendant. In its motion to vacate the Judgment, Old Bridge argued that newly discovered wetlands prevented the construction of the approved development. Defendant Township claimed that "the present package or any alternative that's given to them constitutes poor planning and the benefits which induced them to settle are gone." (T109-22 to T109-24.) Now evidence is before this Court demonstrating that Old Bridge is in the process of approving a new development consisting of 1,995 residential units, not one of which is Mount Laurel housing. (Epp's Certification, Exhibit F). A grave danger exists that if the Planning Board is permitted to continue granting approvals, rights will vest in O&Y and Woodhaven rendering a subsequent favorable decision a hollow victory for the Civic League plaintiffs.

It is well settled that the power to grant a stay is within the sound discretion of the court. Moreover, a stay should be granted when "circumstances equitably call for such action." See Devlin v. National Broadcasting Co., 47 N.J. 126, 131 (1966). The public interest plaintiffs respectfully submit that equity

and fairness require that a stay be granted in the present case so that if they succeed on appeal the construction of affordable housing in Old Bridge will not be precluded by development rights vested during the pendency of the appeal. Furthermore, in order to enable them to monitor this relief, if granted, plaintiffs request that the defendant Planning Board be ordered to provide them with Planning Board agendas pending the resolution of the within appeal.

Glassboro v. Board of Chosen Freeholders, 98 N.J. 186 (1984) cert. denied 474 U.S. 1008 (1985) is the only case in which the New Jersey Supreme Court has discussed the circumstances under which a stay should be granted under R. 2:9-5. The court suggested one factor - probability of success on appeal - which should influence the decision to grant a stay. That court did not grant a stay where it found that it was unlikely that Philadelphia would prevail on its claim that an order barring their use of a New Jersey landfill violated the commerce clause. In reaching this decision, the court emphasized statewide concerns regarding solid waste disposal as manifested in the Solid Waste Management Act. The court found that it did not appear "that any asserted hardship to the City [would] be intolerably excessive notwithstanding additional evidence, subsequently offered by the City, suggesting greater hardship then originally portrayed." Id., at 195.

Here, unlike the Glassboro case, there is a substantial likelihood that the Civic League will succeed on appeal, especially if a plenary hearing is granted. As set forth in

Point II, a plenary hearing is necessary to determine the extent to which the new O&Y development plan is like the original, except for the omission of a Mount Laurel component. According to Alan Mallach, the plaintiffs' expert, the new plan appears "similar in overall concept and direction" to the original plan. This strongly suggests that if these plans had been before the court at the time of the motion to vacate the Judgment, the result would have been different. (Mallach Certification, paragraph 3).

Furthermore, unlike Glassboro, where the stay would have violated state public policy, the stay requested here would promote public policy by preserving the possibility of the construction of affordable housing in Old Bridge. If the Planning Board is permitted to approve development plans devoid of any Mount Laurel component, the hardship suffered by the Civic League plaintiffs would be "intolerably excessive." Indeed, not only will Old Bridge have successfully avoided its agreed to Mount Laurel obligation, but, after 14 years of litigation, the public interest plaintiff will be the only party stripped of the benefit of the bargain.

It appears that O&Y hopes to receive Preliminary Subdivision/Site plan approval by May 21, 1989 and Final Subdivision approval as soon thereafter as feasible. (Orlowski Certification, paragraph 5). As each of these approvals is granted by Old Bridge, rights will vest in O&Y. Although the Civic League plaintiffs have received no written clarification of Woodhaven's plans (Epps' Certification, paragraph 14), it seems

likely that Woodhaven will also seek approvals before July 1, 1989, when new state regulations regarding wetlands take effect. (Epps' Certification, Exhibit A). If these approvals are granted, a favorable decision from this Court would be undermined by newly vested rights effectively precluding the development of affordable housing on the land owned by O&Y and Woodhaven. A stay pending appeal should be granted when its denial is likely to render the ultimate question moot. See Humble Oil & Ref. Co. v. Wojtycha, 48 N.J. 562 (1967).

In the alternative, the Civic League plaintiffs respectfully request that this Court order that any future development approvals granted by defendant Planning Board to O&Y and Woodhaven be contingent upon the outcome of this appeal. Thus, no rights would actually vest unless, and until, Old Bridge prevailed. There can be no question that this Court has the power to grant the requested relief. It is well established that "[t]he court of equity has the power of devising the remedy and shaping it so as to fit the changing circumstances of every case and the complex relationship of all parties." American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 274 (Ch. Div. 1974) aff'd, 136 N.J. Super. 442 (App. Div. 1975). Moreover, as the court in Westinghouse Elec. Co. v. United Elec., 139 N.J. Eq. 97 (E. & A. 1946), stated: "Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path." Id. at 108.

For all of the foregoing reasons, the Civic League plaintiffs respectfully request that this Court stay the trial court's

Orders insofar as those orders permit defendant Planning Board to grant approvals for O&Y and Woodhaven pending appeal. In the alternative, the plaintiffs respectfully submit that this Court should order that any such approvals be contingent upon the resolution of the instant appeal.

POINT II

THIS MATTER SHOULD BE TEMPORARILY REMANDED TO THE TRIAL COURT FOR A PLENARY HEARING

A. The Newly Discovered Development Plans Would Probably Have Changed the Result of the Motion to Vacate the Judgment.

R. 4:50-1(b) provides for the reopening of a judgment when there is newly discovered evidence, and it appears that "the evidence would probably have changed the result, that it was unobtainable by the exercise of due diligence for use at the trial, and that the evidence was not merely cumulative." Quick Check Food Stores v. Springfield Twp., 83 N.J. 438, 445 (1980).

The trial court granted Old Bridge's motion to set aside the judgment based upon mutual mistake of fact and newly discovered evidence in accordance with R.4:50-1(a) and (b), respectively. Judge Serpentelli found that "the extent of the wetlands of which the parties now are aware does affect a material aspect of the settlement, that being the ability of O & Y and Woodhaven to build the planned development as depicted in the plates or at least some reasonable facsimile thereof." (T107-23 to T108-3).

It now appears, however, that large-scale development of the same property is indeed feasible, as evidenced by the Resolution of Memorialization adopting O & Y's development plan (Epps Cert., Exhibit F). It is the opinion of plaintiff's expert, Alan Mallach, that this new plan "appears similar in overall concept and direction to O & Y's original plan," which was the basis for the original settlement between the parties. As Mr. Mallach makes clear, additional fact finding is needed to determine with

specificity the similarity of the plans. (See Mallach Cert., Paragraph 3.) If the two plans are as similar as they appear to be, and if the more recent had been before the trial court, Old Bridge's motion to vacate the Judgment may well have been decided differently.

In light of this newly discovered plan, and Woodhaven's obvious incentive to reach a similar agreement with Old Bridge, the Civic League Plaintiff respectfully submits that it is imperative that this matter be temporarily remanded for a plenary hearing to determine with specificty the extent to which the new plan and original plans are similar; the major differences, if any, aside from the elimination of a Mt. Laurel component; and precisely when, and by whom, negotiations were initiated between O & Y and Old Bridge with respect to this plan.

In addition, a plenary hearing is also essential to determine if Woodhaven has submitted any plan or is in the process of negotiating with Old Bridge to do so. As of this date, the Civic League has not received a response to its letter dated February 23, 1988 (Epps' Cert., Exhibit G), regarding the current status of any project planned by Woodhaven. The wetlands discovered on Woodhaven's property was substantially less than the wetlands on O & Y's property. Any proposed plan between Old Bridge and Woodhaven is, therefore, even more likely to be similar to the original plan than that of O & Y. Since Woodhaven has refused to answer the Civic League's inquiry, a plenary hearing is the only means of ascertaining its actual intentions.

The procedure to be followed on a R.4:50-1 motion was

outlined in Hodgson v. Applegate, 31 N.J. 29 (1959). In Hodgson, defendant's counsel failed to file an appeal or apply for a new trial within the time provided under those rules. Instead, counsel attacked the Judgment under R.R. 4:62-2 based on newly discovered evidence, fraud and error. The court held that the proper procedure to follow in such a case "would have been to have perfected the appeal from the original judgment, and then to have sought a partial remand to the trial court for a determination on the motion." Id. at 42. In accordance with the mandate of the Hodgson Court, the Civic League has filed an appeal challenging the findings of law and now seeks a partial remand to the trial court for purposes of a plenary hearing.

A plenary hearing is crucial to the resolution of the appeal in the instant case. In order for this Court to properly resolve this matter on appeal, a full record must be developed. In light of the new evidence, and lack of information with respect to Woodhaven, the existing record is seriously deficient. It is respectfully submitted that without such a hearing, this Court will not be able to fully assess the merits of this action.

B. This Matter Should Be Temporarily Remanded For a Plenary Hearing in Order to Avoid Substantial Injustice to This Plaintiff

R. 4:50-1(f) provides for relief from a final judgment or order when the court finds "any other reason justifying relief from the operation of the judgment or order." This rule is applied in instances where the denial of such relief would result in a substantial injustice to one of the parties. In Manning

Engineering, Inc. v. Hudson Cty. Park Comm'n, 74 N.J. 113 (1977), for example, after a judgment awarding plaintiff payments under a contract breached by defendant was entered, defendant filed a motion to reopen the judgment claiming the contract had been illegally awarded. In support of the motion, defendant submitted a transcript from a hearing, which took place several years prior, in which Manning testified that he had been a party to a "kickback" scheme. The transcript could not be considered newly discovered evidence since, unlike the information sought here, it was conceded that it had been available at the time of trial. The Court nevertheless reopened the judgment under R.4:50-1(f), noting "[t]he rule is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." Id. at 120.

Upon its receipt of the transcript, the Manning court remanded the case to the trial court to "make findings of fact concerning the relationship, if any, between Manning's illegal activities and the award of the contract." Id. at 119. Here, as in Manning, plaintiffs should be afforded the opportunity to have a court make findings of fact with respect to critically important new evidence.

In Scheck v. Houdaille Const. Materials, Inc., 121 N.J. Super 335 (Law Div. 1972), similarly, the court granted a motion to vacate an order dismissing the negligence counts of the plaintiff's complaint when it found that subsequent cases had interpreted a new statute plaintiff had relied upon differently

from the trial court's interpretation of that statute. The court held that,

> "to let matters stand as they are would do violence to our basic concepts of justice...The very essence of R.4:50-1(f) is its capacity for relief in exceptional situations. And in such exceptional cases, its boundaries are as expansive as the need to achieve equity and justice." Id. at 344.

It would be unjust if the Orders which are the subject of the within Motion were permitted to stand, particularly in light of O & Y's new development plan. At the hearing on its motion to vacate the judgment, the defendant Township argued that the discovery of additional wetlands eliminated the benefits which had induced it to settle on the construction of 1,668 affordable housing units. It appears, however, that the real incentive to the Township to continue under the bargained for settlement agreement was lost when the Council on Affordable Housing ("COAH") had set the Township's fair share number at a substantially lower number (approximately 417 units). Consequently, the lower court's wholesale vacation will result in a windfall to both the Township and the developers if they are free to proceed with a substantially similar development plan, distinguishable from that deemed "impossible" by the trial court mainly by the deletion of the Mt. Laurel component.

It appears that this is precisely what Old Bridge and O & Y have done. As shown by the Resolution of Memorialization (Epps' Cert., Exhibit F), Old Bridge has approved a large-scale development of the land owned by O & Y. In addition, paragraph 12 of that Resolution shows that O & Y is seeking a waiver of any Mt. Laurel obligation. The full extent of the unfairness to the

public interest plaintiff cannot be shown until a plenary hearing is held to determine the circumstances surrounding O & Y's new plan and to determine the substance of any agreements between Woodhaven and Old Bridge. There can be no "equity and justice" where, as here, the public interest plaintiff, without whom there would have been no Judgment, is the only party to this action stripped of any of the bargained for benefits.

As this court held in Miller v. Estate of Kahn, 140 N.J. Super 177 (App. Div. 1976), (where the voluntary dismissal of the action was set aside under R.4:50-1(f), even though the statute of limitations had run, and the matter remanded for a plenary hearing), "Should contested issues of relevant fact develop, the matter should not be determined on affidavits, but a plenary hearing should be afforded." Id. at 184, citing Hallberg v. Hallberg, 113 N.J. Super 205 (App. Div. 1971). The Civic League respectfully submits that this Court should apply its reasoning in the Miller case and recognize that in light of the "contested issues of relevant fact" presented in the instant action, a temporary remand for the purposes of a plenary hearing is essential to avoid an injustice to this plaintiff.

POINT III

THE WITHIN APPEAL SHOULD BE EXPEDITED FOLLOWING REMAND

R. 2:9-2 provides that the time schedule for an appeal may be accelerated on the court's motion, or that of a party. In New Jersey, it is well settled that expedited review may be granted in matters in which the public has a great and urgent interest. In DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428 (1970), the New Jersey Supreme Court found that litigation involving low income housing, like the affordable housing at issue here, was "of great public importance and urgently requires prompt final adjudication." For this reason the Court not only accelerated review, but the filing of its decision as well. Id. at 434-35. In the case at bar, as in DeSimone, accelerated review is essential to ensure that there is no further delay in the provision of affordable housing.

The public interest plaintiffs have requested that this Court remand this matter for a plenary hearing. Although they recognize that such a hearing will further delay the ultimate resolution of this case, for the reasons explained under Point II, above, they had no choice. As Mr. Mallach explains, under the circumstances here further fact finding is essential.

Moreover, as set forth in the Epps' Certification, on July 1, 1989 new state regulations concerning wetlands take effect. It appears that the plans of developer plaintiffs would not meet the requirements established by these regulations. The new regulations may well pose similar obstacles to the Judgment which the Civic League plaintiffs seek to reinstate. Thus, the

expeditious resolution of the within appeal would be in the best interests of all parties.

The filing of the instant motion tolls the time for filing of the Civic League plaintiffs' main brief under R. 2:4-3(e). For the reasons set forth above, plaintiffs respectfully request the issuance of an expedited briefing schedule following the plenary hearing, if granted.

CONCLUSION

For all the foregoing reasons, the Civic League plaintiffs respectfully request that the October 6, 1987 and April 21, 1988 Orders of the trial court be stayed insofar as same permit defendant Planning Board to act on development plans of plaintiffs O & Y and Woodhaven; that the defendant Planning Board be further ordered to provide the Civic League plaintiffs with Planning Board agendas pending the resolution of the within appeal; that the matter be remanded to the trial court for a plenary hearing and that following such remand, the within appeal be expedited.

Dated: April 7, 1989

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On Behalf of the American Civil
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