

CA - Old Bridge

5/5/89

Brief + appendix for  $\Delta$  - Planning  
Board of Twp of Old Bridge

18

CA 002441B

**Superior Court of New Jersey**

URBAN LEAGUE OF GREATER  
NEW BRUNSWICK, et al. Plaintiffs-Appellants,

v.

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

and

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

and

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

v.

THE TOWNSHIP OF OLD BRIDGE in the COUNTY  
OF MIDDLESEX, a Municipal Corporation of  
the State of New Jersey, et al.  
Defendants-Respondents.

*APPELLATE DIVISION*

*DOCKET NO.* A-4335-87T3  
A-4572-87T3  
A-4752-87T3

*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 AND APPENDIX  
FOR*

DEFENDANT-RESPONDENT

THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE

**KATZENBACH, GILDEA & RUDNER**

PRINCETON PIKE CORPORATE CENTER

997 LENOX DRIVE-BUILDING 3

LAWRENCEVILLE, NEW JERSEY 08648-2311

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THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE

EZRA D. ROSENBERG  
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Of Counsel

EZRA D. ROSENBERG  
On the Brief

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

For purposes of the instant motion, the following chronology is relevant:

In 1974 the Civic League (then the Urban League) filed an action against, inter alia, the Township of Old Bridge and its Planning Board challenging the Township's zoning on behalf of low and moderate income people. Olympia & York Old Bridge Development Corp. ("O&Y") and Woodhaven Village, Inc. ("Woodhaven") developers, filed similar complaints in 1984. The three suits were partially consolidated that year. Two years later, the parties executed an Order and Final Judgment of Repose (the "Judgment") between and among the Township, O&Y, Woodhaven, and the Civic League which was entered by the Honorable Eugene D. Serpentelli, A.J.S.C., on January 24, 1986 (WPa7).\*/

In December 1986, defendants Old Bridge and Old Bridge Planning Board ("Planning Board") moved for vacation of the Judgment. Judge Serpentelli granted these defendants' motion by Order dated October 6, 1987 (WPa44). This Order also transferred the issue of the Township's affordable housing obligation to the Council On Affordable Housing ("COAH").

On April 21, 1988, Woodhaven and the Civic League moved for reconsideration of the Court's Order of October 6, 1987.

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\*/ "WPa" refers to Appendix to the Brief filed by Woodhaven on March 8, 1989.

This motion was denied by Judge Serpentelli on April 21, 1988.  
(WPa46).

All three plaintiffs appealed. Woodhaven and the Civic League appealed from the Orders of October 6, 1987 and April 21, 1988. O&Y appealed from the Order of October 6, 1987. The Court consolidated the three appeals on Woodhaven's application by Order dated December 23, 1988 (WPa67).

By letter dated February 28, 1989, O&Y withdrew its appeal from the Order of October 6, 1987. Woodhaven filed its brief on the merits, having obtained an extension of time from the Court on March 8, 1989. The Civic League, whose brief on the merits was due on April 7, 1989, has yet to file its brief. Instead, on April 7, 1989, it filed the instant motion for stay and remand.

To date, the Civic League has never filed a motion for stay before the trial court.

### COUNTER-STATEMENT OF FACTS

The Judgment entered into by all parties embodied a comprehensive, detailed and wholly integrated Settlement Agreement under which the rights and obligations of the parties were set forth. Specifically, the Township was to be obligated to provide 1,668 units of affordable housing, half of which were to be low income, and half of which were to be moderate income; thereby satisfying the Township's Mount Laurel obligations for at least a six-year period during which it would have repose from any further Mount Laurel litigation. O&Y would be permitted to build 10,560 units on its 2,640 acre tract and Woodhaven would be permitted to build 5,820 units on its 1,455 acre tract; 10% of all units of both developers were to be set aside for low and moderate income housing. The Settlement Agreement and the plans that were made a part thereof, set forth detailed specifications as to the scope and nature of site specific improvements attendant to both the O&Y and Woodhaven plans. (See Settlement Agreement, WPa18 to 44).

Defendants' motion to vacate the Judgment and to transfer the matter to COAH was based upon newly discovered evidence and/or mistake of fact as to the extent of wetlands, primarily on the O&Y tract, which precluded the defendants from obtaining certain benefits of the Settlement Agreement. In granting defendants' motion and vacating the Judgment, Judge Serpentelli made the following findings of fact:

The parties contemplated and planned for one of the largest, if not the largest development in the State of New Jersey.

The magnitude of the change, and particularly at the very initial step of development in the Court's opinion results in a totally new plan, be it appropriate, be it sound planning, it is not what we [had] when we began and is not in any sense truly comparable to what we [had] when we began.

Plaintiffs' return promise was to develop a project such as depicted in plates A and B. (TM-124:10-20).\*/

It would be disingenuous to argue that the parties contemplate[d] having to totally revise the plans before any approvals were received.

Really, what is proposed is not a modification, but it is a brand new plan. Both developers admit the plans designated as plates A and B are no longer viable due to the magnitude of the change and in light of what the Court believes the parties reasonably intended . . . .

(TM-126:18 to TM-127:1).

In reaching this conclusion, Judge Serpentelli relied, inter alia, upon the findings of the Master he had appointed who concluded that "under the current circumstances [this plan or any plan that is possible] is very different from the plan that was incorporated as an administration of what was intended by the developers in the settlement." (TM-96:7-10). Specifically, the Court found that the parties had not contemplated the issue of

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\*/ "TM-" refers to the transcript of the hearing on the motion held on September 14, 1987.



the extent of the wetlands at the time of the Settlement Agreement (TM-107:11-13), that the parties thought and planned with an expectation that there would be a full 20-year build-out in accordance with the submitted plans (TM-111:13-15), that the Trans Old Bridge Connector, which could not be built under the revised plans, was an integral part of the plans contemplated by the Settlement Agreement (TM-112:22 to 114:24), and that the diminution of the O&Y plan to one-half its original size was so drastic a change as to lead to vacation of the entire agreement:

The parties contemplated that there could be a reduction, but they didn't contemplate that there would be a reduction in half the proposed development which would result in a wholesale modification of the plan even before, by the way, the first approval was granted.

(TM-116:9-14).

Finally, Judge Serpentelli found that even though the Woodhaven plan was not as drastically changed as was the O&Y plan, the entire settlement as to all parties had to be vacated:

The defendant is entitled to a vacation as to both plaintiffs. The settlement with respect to the two parties is totally inter-related and interdependent.

The defendant was induced to settle with two parties, based upon the total package because of what each could contribute towards an integrated development.

Therefore, the vacation will apply to both of the plaintiffs.

(TM-129:1-10).

On the motion by the Civic League and Woodhaven for reconsideration, Judge Serpentelli refused to budge from this position.

Woodhaven may have had some independent rights regarding developmental approvals and so forth, but it was both developments for whatever they could jointly offer which induced these plaintiffs to settle.

(TMR-42:22-25).\*/

Accordingly, the issue of Old Bridge's Mount Laurel obligations was transferred by Judge Serpentelli to COAH. Although all plaintiffs initially appealed from various of Judge Serpentelli's Orders, no plaintiff ever moved to stay the effect of the Court's decision, until the instant motion was filed approximately one year after entry of Judge Serpentelli's last Order. This failure to move for a stay occurred even though, as the Civic League admits, it anticipated the very action that it asserts has occurred and that it hopes to stay with this motion. Specifically, on December 16, 1987, in support of its motion for reconsideration, the Civic League advised Judge Serpentelli that:

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.

(CL-1).\*\*/

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\*/ "TMR-" refers to the transcript of the hearing on the motion for reconsideration held on April 13, 1988.

\*\*/ "CL-" refers to the Appendix of the Civic League filed with the instant motion.

On February 14, 1989, the Planning Board of Old Bridge passed a Resolution approving a general development plan for the O&Y property. (Exhibit F to Certification of C. Roy Epps submitted by Civic League in support of motion). The general development plan, which was devised in response to the finding of the extensive amount of wetlands, allows O&Y to construct 1,995 residential units on its property, a drastic reduction from the 10,560 units contemplated in the original Settlement Agreement. (Attached to Epps' Certification). The Resolution was published by the Planning Board on February 23, 1989. (Affidavit of Publication, (PBDa1).\*)/ No action in lieu of prerogative writs has been filed by the Civic League or any other party challenging the Resolution.

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\*/ "PBDa" refers to the Appendix attached hereto.

LEGAL ARGUMENT

POINT I

THE MOTION FOR STAY AND REMAND SHOULD BE DENIED

R.2:9-5(b) provides in pertinent part that:

A motion for a stay in a civil action . . . prior to the date of the oral argument in the appellate court or of submission to the appellate court for consideration without argument shall be made first to the court which entered the judgment or order.

Here, despite having foreseen that the developers and the Township might enter into negotiations for a plan to develop the properties if the original settlement were revoked, the Civic League waited over a year before seeking a stay. Indeed, to date, it has never made application to the trial court for a stay, thus giving Judge Serpentelli, who obviously has a greater familiarity with this matter than does this Court, the opportunity to decide for himself whether a stay is appropriate. For this reason alone, the instant motion must be denied.

In addition, to the extent that the Civic League seeks to challenge the Resolution of February 14, 1989, its proper avenue (having failed to seek a stay of any such action prior to the issuance of the Resolution), would be by way of filing an action in lieu of prerogative writs within 45 days after publication of the Resolution. Again, the Civic League failed to do so and it should not be permitted to circumvent established rules of procedure by means of the instant motion.

In any event, applying settled precepts of equity to the application for injunctive relief before this Court, it is clear that the Civic League has failed to demonstrate a substantial probability of success on the merits entitling it to the extraordinary remedy of a stay. Its wholesale reliance on the conclusory "net opinion" contained in the Certification of Allan Mallach to the effect that "the 1989 approved development plan appears similar in overall concept and direction to earlier plans prepared by O&Y, and to the plan which was the basis for the earlier settlement" is, in reality, an attempt to compel Judge Serpentelli to hold another fact-finding hearing on the original motion. This is clear because Mr. Mallach admits that the "overall intensity of development on the site has been substantially reduced." (Certification of Mallach). Indeed, the Resolution of February 14 indicates that the general development plan of O&Y consists of 1,995 units as opposed to the 10,560 units anticipated in the Settlement Agreement. This drastic diminution in the size of the O&Y development was the primary reason that Judge Serpentelli found the original Settlement Agreement could not be enforced. (TM-116:9-11).

Indeed, the purported new evidence does not in any way alter the facts as they stood before Judge Serpentelli on September 14, 1987 when he found that the Settlement Agreement was no longer capable of being performed because approximately one-half of the units anticipated to be developed by O&Y could not be developed because of the extent of wetlands. Nor does

this "new evidence" provide a sufficient basis for believing that the trial court's well-reasoned decision will not be upheld on appeal.

First, Judge Serpentelli found that the extent of the wetlands was not a known risk and that, therefore, the revelation of the extent of the wetlands was tantamount to mutual mistake of a material fact thus leading to revocation of the Settlement Agreement. See Bauer v. Griffin, 104 N.J. Super. 530, 542 (Law Div. 1969), aff'd., 108 N.J. 414 (App. Div. 1970), certif. denied, 56 N.J. 245 (1970); Reinhardt v. Wilbur, 30 N.J. Super. 502, 505 (App. Div. 1954). Second, the Court found that there was a failure of consideration of performance, thereby also leading to revocation of the Agreement, relying on Giumarra v. Harrington Heights, 33 N.J. Super. 178, 190 (App. Div. 1954), aff'd., 18 N.J. 548 (1955). Finally, having vacated the Agreement, the Court was compelled by the decision in Hills Development v. Bernards Township, 103 N.J. 1 (1986), to transfer the matter to COAH. Nothing set forth by the Civic League in its moving papers should lead this Court to believe that the findings of fact and clear legal reasoning of Judge Serpentelli will be disturbed on appeal.

Finally, the Civic League argues that the stay requested here "would promote public policy by preserving the possibility of the construction of affordable housing in Old Bridge." (CLB-12).\*/ With all due respect to the Civic League,

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\*/ "CLB-" refers to Civic League's Brief.

its position on the amount and location of affordable housing is not the only position synonymous with public policy. Indeed, a cogent argument could be made that the Fair Housing Act of 1985 is itself a concrete manifestation of the public policy of this State on the issue of affordable housing. The Supreme Court has so indicated. Hills Development Co. v. Bernards Township, 103 N.J. 1, 20-23 (1986).

The issue in this case is not whether Old Bridge will fulfill its Mount Laurel obligation. Rather, the issue is only whether Old Bridge's Mount Laurel obligation will be fulfilled pursuant to the now vacated Settlement Agreement or pursuant to COAH's determination in accordance with the Fair Housing Act. In either event, Old Bridge will be complying with Mount Laurel and affordable housing will be provided in accordance with the public policy of this State.\*/

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\*/ In this regard, we address the Civic League's claim that a stay is necessary so as to prevent the vesting of rights in O&Y. (CL-12). If the Civic League is right that preliminary subdivisions/site plan approval will vest rights in O&Y, then the same may be said of the general development plan that was approved on February 14, 1989. See N.J.S.A. 40:55D-45.1. Thus, a stay at this point will have no effect on O&Y's rights. If, on the other hand, the Civic League is right that this Court has the equitable power to ensure that the parties operate at their own risk, (CL-13), then a stay would not appear necessary.

CONCLUSION

For the reasons stated above, this Court should deny the motion by the Civic League for stay and remand.

Respectfully submitted,

  
Ezra D. Rosenberg

Dated: April 20, 1989



# AFFIDAVIT OF PUBLICATION

MIDDLESEX COUNTY  
STATE OF NEW JERSEY

SS.:

*Carmine Holoburn*

of full age, being duly sworn, on her oath, saith, that she is one of the employees of

## THE NEWS TRIBUNE

a newspaper published in the Township of Woodbridge, Middlesex County, and State of New Jersey, and that a notice, of which the annexed is a true copy was published in said paper for the term of \_\_\_\_\_

weeks \_\_\_\_\_ in each week successively, commencing on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

Namely 2/23/89

Sworn and subscribed before me this 23rd day of

Feb A.D., one thousand nine hundred and 89

VERA De MARCO

NOTARY PUBLIC OF NEW JERSEY

My Commission Expires April 14, 1993

*See Attached*

PBda1

Appl. No. 74-88P James and Cindy Burke, Block 2611, Lot 39, was approved for a minor subdivision with  
 Planas - North Street. Appl. No. 19-79P T. J. ... Builders/Tricentennial West, Block 1900, Lots 111-113, was approved for a final  
 December 13, 1989  
 Appl. No. 98-88P Lerner-Heldenberg Associates/Movies at Mariboro, Block 2100, Lot 4, was approved for a  
 waiver of site plan requirements - intersection of U.S. Highway 9 North and Texas Rd.  
 December 27, 1988  
 Appl. No. 56-88P Oasis Ford, Block 1600, Lots 10.12, 11.11, 12.11 - 12.13, was approved for a preliminary and final  
 major site plan - U.S. Highway 9 South.  
 January 3, 1989  
 Appl. No. 29-88P Barclay Square Homes, Inc., Block 323, Lot 32, was approved for a final major subdivision -  
 Merristown Rd.  
 Appl. No. 48-88P Foxborough Village, Inc., Block 1600, Lot 1; Block 1600, Lot 1, was approved for a  
 preliminary and final major site plan - U.S. Highway 9 South and Amby Road.  
 February 14, 1989

for a general development plan-class II planned development. Blocks and Lots listed below, was approved  
 for a general development plan-class II planned development - Routes 9 and 18 adjacent to Texas Rd.

BLOCK	LOT	BLOCK	LOT	BLOCK	LOT
16001	4	19006	90	19008	64
16002	81	19006	91	19008	65
16002	82.11	19006	92	19008	66
16002	82.12	19006	93	19008	67
16002	83.11	19006	94	19008	68
16002	83.12	19006	95	19008	69
16002	84.11	19006	96	19008	70
16002	84.12	19006	97	19008	71
16002	85.11	19006	98	19008	72
16002	85.12	19006	99	19008	73
16002	86.11	19006	100	19008	74
16002	86.12	19006	101	19008	10
16002	87.11	19006	102	19008	11
16002	87.12	19006	103	19008	12
18003	1	19006	104	19008	13
18003	2	19006	105	19008	14
18003	3	19006	106	19008	15
18003	4	19006	107	19008	16
18003	5	19006	108	19008	17
18003	6	19006	109	19010	135
18003	7	19006	110	19010	136
18003	8	19006	111	19011	72.31
18003	9	19006	112	19011	72.12
18003	75	19006	113	19014	1
18003	76.11	19006	114	19014	2
18003	76.12	19006	115	19014	3
18003	77.11	19006	116	19015	19
18003	77.12	19006	117	19019	1
18003	78.11	19006	118	20000	28
18003	78.12	19006	119	20000	29
18003	79	19006	120	20000	29.11
18003	80	19006	121	20000	30
19000	1	19006	195	20000	32
19000	2	19006	196	20000	33
19000	3	19006	197	20000	34
19000	7.12	19006	198	20000	35
19000	15	19006	199	20000	36
19000	7.12	19006	200	20000	40
19000	19	19006	201	20000	44.12
19000	22	19006	202	20000	48
19000	23	19006	203	20000	49
19000	24	19006	204	20000	50
19000	25	19006	245	20000	51
19000	26	19006	246	20000	52
19000	27	19006	247	20000	53
19000	30	19006	248	20000	54
19000	31	19006	249	20000	55
19000	32	19006	250	20000	56
19000	33	19006	251	20000	62.11
19000	34	19006	252	20000	62.12
19000	36	19006	253	20000	69
19001	170	19006	254	20000	78
19001	171	19006	255	20000	79
19001	172	19006	256	20000	80
19001	173	19007	11		
19001	174	19007	12		
19001	175	19007	41	20001	22.12
19001	177	19007	42	20001	43
19001	178	19007	43	20001	47
19001	225	19007	44	20001	48
19001	226	19007	122	20001	49
19002	140	19007	123	20001	53
19002	141	19007	124	20001	55
19002	142	19007	125	20001	57
19002	143	19007	126	20001	58.11
19002	144	19007	127	20001	59
19002	145	19007	128		
19002	146	19007	129		
19002	147	19007	130	20002	2
19002	148	19007	131	20002	3
19002	149	19007	132	20002	6
19002	221	19007	133	20002	7
19002	222	19007	134	20002	8
19002	223	19007	135	20002	10
19002	224	19007	136	20002	11
19002	225	19007	137	20002	14
19002	226	19007	138	20002	15
19002	227	19007	139	20002	16
19002	228	19007	140		
19002	229	19007	141	21000	4.12
19002	230	19007	142	21000	4.13
19002	231	19007	143	21000	5
19002	232	19007	144	21000	6
19002	233	19007	145	21000	7
19002	234	19007	146	21000	8
19003	15	19007	147	21000	9
19003	151	19007	148	21000	10
19003	152	19007	149	21000	11
19003	153	19007	157	21000	12
19003	154	19007	158	21000	13
19003	155	19007	159	21000	19
19003	156	19007	260		
19003	157	19007	261	21000	2.12
19003	158	19007	262	21000	3.11
19003	159	19007	263	21000	3.12
19003	203	19008	18	21001	4
19003	204	19008	19	25000	1
19003	207	19008	20	25000	2
19003	208	19008	21	25000	3
19003	209	19008	22	25000	6
19003	210	19008	23	25000	7
19003	211	19008	24	25000	9
19003	212	19008	25	25000	10.11
19003	213	19008	26	25000	10.12
19003	214	19008	27	25000	13.12
19003	215	19008	28	25000	17
19003	216	19008	29	25000	19
19003	217	19008	30	25000	20
19003	218	19008	31	25000	21
19003	219	19008	32	25000	24
19003	220	19008	33	25000	25
19004	176	19008	34	25000	26
19004	179	19008	35	25000	27
19004	180	19008	36	25000	28
19004	181	19008	37	25000	29
19004	182	19008	38	25000	30
19004	183	19008	39	25000	34
19004	184	19008	40	25000	83
19004	237	19008	45	25000	84
19005	185	19008	46	25000	85
19005	186	19008	47	25000	86
19005	187	19008	48	25000	87
19005	188	19008	49	25000	4
19005	189	19008	50	25000	5
19005	190	19008	51	26001	24
19005	191	19008	52	26001	24.11
19005	192	19008	53	26001	24.12
19005	193	19008	54		
19005	194	19008	55		
19005	238	19008	57		
19005	239	19008	58		
19005	240	19008	59		
19005	241	19008	60		
19005	242	19008	61		
19005	243	19008	62		
19006	88	19008	63		
19006	89	19008	63		

TAX SALE CERTIFICATES  
 19010 147  
 19010 148  
 SEWER EASEMENT  
 19009 132

Resolutions for the above applications were memorialized on February 14, 1989.

Dr. George Koehler, Secretary  
 Old Bridge Township Planning  
 Board  
 191.2