CA - Ganbury 4-4-84

Motion for recusal of
Trial Judge
w/ statm. of facts.

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Cranbury-South River Road
Cranbury, New Jersey 08512
(609)655-3600

Attorneys for Defendant, Township of Cranbury

LAWRENCE ZIRINSKY,

Plaintiff,

v.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, a Municipal Corporaion of THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY

Defendant•

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:
MIDDLESEX COUNTY

Docket No. L 079309-83 P.W,.

JOSEPH MORRIS and ROBERT MORRIS,

Plaintiffs,

v.

TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, a Municipal Corporation of the State of New Jersey,

Defendants.

Docket No.L 054117-83

GARFIELD & COMPANY,

Plaintiff,

v.

MAYOR and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation and the members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof.

Defendants.

Docket No.L 055956-83 P.W,.

NOTICE OF MOTION FOR RECUSAL OF TRIAL JUDGE

CRANBURY DEVELOPMENT CORPORATION,
A Corporation of the State of New Jersey,

Plaintiff, Docket No. L 59643-83

v.

CRANBURY TOWNSHIP PLANNING BOARD and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

Defendants.

BROWNING FERRIS INDUSTRIES OF SOUTH JERSEY, INC., A corporation of the State of New Jersey, RICHCRETE CONCRETE COMPANY, a Corporation of the State of New Jersey, and MID-STATE FILIGREE SYSTEMS, INC., a Corporation of the State of New Jersey,

Docket No.L 058046-83 P.W,

Plaintiffs,

v.

CRANBURY TOWNSHIP PLANNING BOARD and the TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

Defendants.

URBAN LEAGUE OF GREATER NEW BRUNSWICK,

Plaintiff,

v. CHANCERY DIVISION:
THE MAYOR and COUNCIL OF THE BOROUGH OF CARTERET,et al., MIDDLESEX COUNTY

Defendants.

CRANBURY LAND COMPANY, a New Jersey Limited Partnership,

Plaintiff, Docket No. L 070841-83

v.

CRANBURY TOWNSHIP, a Municipal Corporation of the State of New Jersey located in Middlesex County,

Defendant.

TOLL BROTHERS, INC., A Pennsylvania Corporation,

Plaintiff,

v.

Docket No. L 005652-84

THE TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, a Municipal Corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY,

Defendants.

NOTICE OF MOTION FOR RECUSAL OF TRIAL JUDGE

TO; ALL COUNSEL OF RECORD

TAKE NOTICE that the undersigned attorne^ for defendant, Township of Cranbury, shall move before the Honorable Eugene Serpentelli of the Superior Court of New Jersey^" Law Division at the Court House, Toms River, New Jersey on Monday, April 9th, 1984 at 10:00 A.M. or as soon thereafter as counsel can be heard for an order of the Court to recuse the trial judge in these consolidated matters.

Counsel shall rely on the attached Brief in support of his motion.

HUFF, MORAN & BALINT,
Attorneys for Defendant,
Township *cJt* Craabur^,

By: _____
WILLIAM C. MORAN, JR.

Dated: April 4th, 1984

I hereby certify that the original notice of motion was filed with the Clerk of the Superior Court, Trenton, New Jersey.

WILLIAM C. MORAN, JR.

I hereby certify that a copy of the within motion was filed with the Clerk of the Ocean County Superior Court and the Clerk of the Middlesex County Superior Court.

WILLIAM C. MORAN, JR.

On April 4th, 1984 copies of the within Notice of Motion for Recusal were forwarded to all counsel of record in the consolidated matters herein.

WILLIAM C. MORAN, JR.

STATEMENT OF FACTS

The plaintiff, Urban League of Greater New Brunswick, filed suit against the Township of Cranbury and others in July of 1974 in the Chancery Division, Middlesex County, claiming that the defendant's zoning ordinance did not permit the construction of housing for persons of low and moderate income. That action was tried before the trial court in 1976 and the trial resulted in an order declaring that Cranbury's ordinance failed to provide an adequate opportunity for the construction of the Township's fair share of the regional low and moderate income housing need. The Township appealed that decision and the Appellate Division reversed without remand. The Supreme Court granted certification and the action was consolidated with several other cases for purposes of argument. The opinion of the Supreme Court was reported in So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 j^J. 158, 456 A.2d 390 (1983), and resulted in a remand. That opinion is now commonly known as Mt. Laurel II.

In the meantime, the Township of Cranbury had amended and revised its master plan and shortly after the issuance of the Supreme Court opinion in Mt. Laurel II, the Township revised its zoning ordinance to bring it into compliance with the revised master plan. Thereafter, the remaining plaintiffs in these consolidated cases brought suit against the Township's new zoning ordinance on a variety of grounds. One of the plaintiffs (Garfield) challanges the transfer of development credits provisions and also claims that the revised ordinance

does not provide an adequate opportunity for the construction of the Township's fair share of the regional low and moderate income housing need.

Three other plaintiffs (Cranbury Development Company, Zirinsky and Toll Brothers) also filed Mt. Laurel type suits and sought builder's remedies. One plaintiff (Morris Brothers) simply challenges the Township's transfer of development credit scheme.

The other two plaintiffs (Cranbury Land Company, and BPI et als.) have brought traditional zoning attacks, claiming that the ordinance is unreasonable, capricqus and arbitrary as it applies to their specific pieces of property.

It was apparent from the outset that the determination of Cranbury[1]s fair share of the regional low and moderate income housing need would be a critical determination to be made early on in the case. For this reason, the court appointed its own expert at an early date. That expert is Carla Lerman, the Executive Director of the Bergen County Housing Authority. Ms. Lerman prepared her own extensive and detailed calculation of each municipality's share of the regional need based upon a methodology which was apparently independently developed by her. At approximately the same time, the plaintiff, Urban League's expert, Alan Mallach, also submitted a fair share allocation report. These two reports contained fair share allocations for Cranbury Township, which were remarkably similar

at approximately 600 units.

At this point in time, however, the trial court began to inject itself into the fair share methodology determination, and requested counsel for all parties to have their expert planners attend a meeting at the Court House in Toms River, to discuss the methodology to be used in determining a fair share allocation. Several counsel expressed reservations at such a procedure however the meeting was actually held. Based on reports received concerning that meeting and several subsequent meetings, it became apparent that the court either directly or indirectly injected its own thinking into the thinking of the experts for the various parties in an Effort to arrive at a so-called "consensus" approach. The first result of this attempt to obtain a consensus was a second report from Ms. Lerman, which contained a fair share allocation for Cranbury Township of 322 units of low and moderate income housing. Thereafter, additional meetings of the experts were held right up to the actual original trial date of March 19, 1984.

Again, it is counsel's understanding that the trial court had direct input into these meetings either directly or indirectly through one of the planners who reported to him. The planners were, to a large extent, guided by the judge's thinking in arriving at a revised version of this so-called consensus report. Two additional reports were done by Ms. Lerman, the first of which did not consider community wealth and the second of which did. Both of these reports substantially increased the allocation to Cranbury Township from the earlier reports 322 number to the point where, under the present allocation, Cranbury's fair share number is 822 units.

During all this time counsel for the various parties were not invited to attend the meetings of the planners and, indeed, a request by counsel for one party to attend the meeting was rebuffed. Counsel was also put in the difficult situation of not wanting to object to any part of the procedures until such time as the results of those procedures became apparent. Understandably, the Township of Cranbury was elated with the report which showed its allocation number at 322 units, since this was just over half of the original allocation numbers independently arrived at by Ms. Lerman and Mr. Mallach. When the final number of 822 units was reached, it was too late for the Township to do anything about it. Its expert, who had participate^; in the various meetings held at the Court House, has on the eve of trial effectively been removed as an effective witness for the Township. It is too late for the Township to seek other expert witnesses even if it could afford to respend the thousands of dollars to which it has already committed itself for its present expert.

Cranbury[1]s expert is George Raymond, an eminently qualified planning consultant, who has served as a court appointed master in other similar types of litigation. Cranbury is committed to him for his knowledge of the Township as the creator of its transfer of development credit plan. It was primarily his thinking about the use of vacant developable land as a factor in an allocation formula which resulted in the second report from the court appointed expert which allocated 322 units of housing to Cranbury.

It is also of note that the so-called consensus report results in a housing allocation to Cranbury which is

higher than the housing allocation to Cranbury submitted by the report of any of the experts independently.

POINT I

THE ACTIONS OF THE TRIAL COURT HAVE DENIED THE TOWNSHIP OF CRANBURY ITS RIGHT TO EFFECTIVE REPRESENTATION OF COUNSEL.

The court in this case has been presented with an extremely complicated and vexatious problem. It could anticipate the receipt of 13 different expert's reports and testimony from 13 different experts as to fair share methodology and allocation. The testimony from these experts alone could take in excess of a month at the very preliminary phase of trial. In an effort to shorten and expedite this process the court resorted to the so-called "consensus" approach described above in the Statement of Facts. However, the result of this approach has been to deny not only the Township of Cranbury, but all of the parties to this case their right to effective representation of counsel.

Inherent in our judicial system is the thought that when two adversaries present their conflicting views of a given situtation, the trier of the fact will be able to search and sort among those views to come up with truth and thereby administer justice. In this case, the court has sought to short-circuit that adversary process by, in effect, using all of the various experts of the various parties (who were being paid fees by their respective parties) in order to come with a methodology which is then adopted by the court appointed expert.

At this point in time, we are not even aware as to what extent that methodology represents the independent thinking of any single planner who was a party to the process. The difficulty with the process is that each of the respective planners came to the process with their own independent thoughts and their own independent thinking which would normally have been the basis for their independently developed expert report. Rather now, they have been involved in a process which was commenced in good faith by the court in order to save time. It is difficult for any expert at this time to disassociate himself or herself from that process to any great degree. In any event, the independent thinking for which the expert was hired in the first place by the party hiring him has been altered and amended through the indirect or direct intervention of the court prior to trial.

Cranbury Township is paying a substantial fee for its expert witness, to whom it was committed in many ways even prior to the inception of this litigation. This expert witness and his firm were responsible for the last revision to the Township's Master Plan and the Township Zoning Ordinance, which is now under scrutiny. It would be difficult to envision a scenerio in which he was not called as an expert on behalf of the town at trial, but to a large extent the town has now paid literally thousands of dollars for the benefit of his expertise arrived at independently, only to have that expertise bent and molded by the thinking of the court and by the thinking of the other experts who participated in this process. In the course of

representing the Township in this situation, the Township attorney has found himself in a situation unique in his practice of law. Rather than to be able to consult directly with his own expert witness in the course of preparation for trial, he has had to rely on that expert witnesses participation in several meetings from which counsel was excluded and hope that the result of those meetings would somehow be beneficial to his client. It is clear in Cranbury's particular situation that the fair share allocation number which would have been independently arrived at by Mr. Raymond would have been substantially less than the consensus report number, and even the report number that Mr. Raymond has now put forth in his own report. This is so particularly because of the fact that it was his thinking that resulted in the second court appointed expert's report, which showed a fair share number for Cranbury of 322 units. It is not realistic to think that having had to participate in this consensus approach, Mr. Raymond can disassociate himself from it in any real fashion. The result of this is his own current report which is, in effect, a compromise between the court appointed expert's report and his own independent thinking.

Instead of the attorney for the Township being able to meet with his expert and attempt to present the expert's thinking in such a way as is most favorable to his client, the Township attorney has had that function usurped by the court and the court's process of attempting to achieve a consensus methodology. The Township has committed itself to spending thousands of dollars in the defense of this case. It is

anticipated that the cost of the litigation will add several cents to the local tax rate. To a large extent the court's approach has deprived the municipality of the benefit of that expenditure. The primary effect of this action has been to deny counsel for the Township the opportunity to properly prepare his case by presenting in an adversary posture the independently arrived at thinking of the Township's own expert witness. The only possible solution to this problem is for the court to recuse itself and for the process to start over again with a new judge, who will permit the trial of the case according to the system which has existed in this country for hundreds of years, to wit, the adversary process, which will permit both sides to present their best case free from influence or interference by the court.

POINT II

THE RULES OF COURT REQUIRE A RECUSAL

R. 1:12-1 sets forth the causes for disqualification of a trial judge. Among others, they include:

> "(d) Has given his opinion upon a matter in question in the action, and
>
> "(f) When there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel for the parties to believe so."

It is urged here that both these grounds for disqualification apply.

It has been apparent that at all of the meetings of the various experts held at the trial judge's court room in Toms River, the court received reports from time to time as to the progress the planners were making and either directly or indirectly through one of the planners, conveyed its opinions on some of the approaches that the planners were contemplating. Clearly, this has the potential for having a chilling effect on the planners' independent thinking, because if the court expresses in any way its opinion as to the steps they are taking, there is a natural tendency to want to mold one's thinking into a form that might be acceptable to the ultimate trier of fact in the case. In effect it is likely that to some extent, whether large or small, the ultimate testimony that the court would receive during the course of the trial would be a reflection of the court's own opinion to whatever degree it may have been expressed to the planners. The fact that the attorneys for the

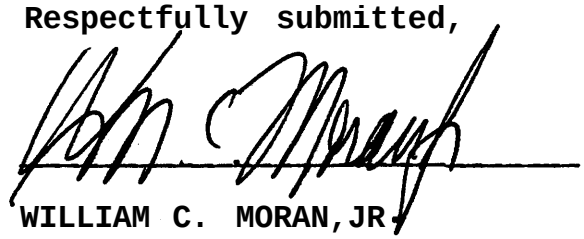
parties were not permitted to participate in those proceedings makes it impossible to gauge the extent that this was actually so. However, it is possible to report based upon conversations with Cranbury's own expert and with experts for other parties that those experts frequently report that "Judge Serpentelli said this" or "Judge Serpentelli thinks that". Clearly, this has the effect of interjecting the court's own thinking into the final outcome of the case.

Additionally, regardless of to what extent the court may actually have injected its thinking into the outcome, it is likely that the procedures used to date, "might reasonably lead counsel for the parties to believe" that the actions of the court might preclude a fair and unbiased hearing and judgment. It is natural for counsel to report to its governing body the progress being made on the case. The Township has committed large suras of money to the defense of the action, and is intensely interested in its progress. As the procedure began to unfold whereby the court appointed experts were participating in court requested meetings to mold a consensus opinion, the governing body began to express concern over the loss of its own expert witness and began to see the trial court as an adversary. Indeed, the consensus report at this point is viewed as the court's thinking on the question of fair share allocation, and it is not unreasonable for the Township Committee to have that opinion. Regardless of what approach the court is able to bring to the actual trial, paragraph (f) of the Rule on disqualification has already been brought into play.

CONCLUSION

For all of the above reasons, it is respectfully requested, and with utmost deference to the court's intentions in this matter, that recusal is the only proper solution.

Respectfully submitted,



WILLIAM C. MORAN,JR.