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Memo of law in support of UL plaintiffs' motion for consolidation or intervention + for temporary restraints

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs v. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET et al., Defendants	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY Docket No. C-4122-73
O&Y OLD BRIDGE DEVELOPMENT CORP., Plaintiff v. THE TOWNSHIP OF OLD BRIDGE, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE and THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, Defendants	LAW DIVISION-MIDDLESEX COUNTY Docket No. L-009837-84 P.W.
WOODHAVEN VILLAGE, INC., Plaintiff v. THE TOWNSHIP OF OLD BRIDGE, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE and THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, Defendants	LAW DIVISION-MIDDLESEX COUNTY Docket No. L-036734-84 P.W.
OAKWOOD AT MADISON, INC., et al., Plaintiffs v. THE TOWNSHIP OF MADISON and THE STATE OF NEW JERSEY, Defendants	LAW DIVISION-MIDDLESEX COUNTY Docket No. L-7502-70 P.W.

MEMORANDUM OF LAW IN SUPPORT OF URBAN LEAGUE PLAINTIFFS' MOTION FOR CONSOLIDATION OR INTERVENTION AND FOR TEMPORARY RESTRAINTS

TABLE OF AUTHORITIES

INTRODUCTION

This motion is unusual. It asks the Court to consolidate two of the most celebrated and ancient Mount Laurel actions and to enter an injunction in order to enforce not one but two Supreme Court judgments. These steps are mandated, however, by the Township of Old Bridge's failure over 15 years to adopt a constitutional zoning ordinance and the substantial risk that allowing the developer and Township to ignore the Supreme Court's mandate in Oakwood at Madison would undermine the realistic opportunity for construction of the Township's 1990 fair share by developers, such as O&Y and Woodhaven Village, who stand ready to construct housing that is in compliance with constitutional requirements.

FACTS

In Oakwood at Madison, Inc. v. Township of Madison, No. L-7502-70 P.W., filed in 1970, a developer challenged the zoning ordinance of what is now the Township of Old Bridge. On appeal from Judge Furman's ruling of invalidity, the Supreme Court of New Jersey held that the Township was a developing community and thus subject to the nonexclusionary zoning requirements of Southern Burlington Cty. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, appeal dismissed and cert. denied, 423 U.S. 808 (1975). The Court not only required rezoning but also held that the corporate landowner was entitled to a permit to build its development, pursuant to its own plans "which, as they originally represented, will guarantee the allocation of at least 20% of the

units to low and moderate income families", defined by reference to the Statewide Housing Allocation Rep[ort. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 551 & n.49, 371 A.2d 1192, 1227 & n.49 (1977) (emphasis added). On remand, the Township and Oakwood at Madison agreed upon a Stipulation of Settlement permitting the construction of 1750 dwelling units of which 350 were to be "low and moderate income units." The Stipulation provided that the Court was to retain jurisdiction for site plan, subdivision, and other necessary approvals. The Stipulation was never signed by the Court and no further action has occurred in that case since May 31, 1977, nearly 8 years ago.

The developer did, however, obtain preliminary and final subdivision approval for its 1750 unit development from the Old Bridge Planning Board, although the final approval, issued on August 23, 1979, expressly provided that the 350 low and moderate income units were still subject to site plan approval.[1] The developer has never sought site plan approval for the low and moderate units. However, the developer has recently submitted detailed plans for the first 120 market units and, once the plats are signed, will have done everything necessary to obtain building permits. A meeting to review the plats and proposals for the first 120 market units is scheduled for this week. It is clear that the

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[1] For reasons that are not clear, Paragraph 21 of the Final Approval states that site plan approval is necessary for "550 dwelling units included in the multi family housing sites." Whether this is a typographical error and should read "350" or refers as well to some other, non-Mount Laurel units, it is clear from Mr. Norman's letter of February 22, 1985 and conversations with the Township Planner and Engineer that all of the 350 lower

final subdivision approval adopted by the Planning Board allows the developer to obtain building permits for all 1400 market units with merely administrative approval but requires formal Planning Board site plan approval for construction of the 350 low and moderate income units. Moreover, because there is no apparent link between the two, it appears that the developer could complete all 1400 market units without building any lower income units.

As this Court is well aware, the Urban League case is a Mount Laurel challenge to the zoning ordinances of 23 communities in Middlesex County. At trial in 1976, Judge Furman held the ordinances of 11 towns, including Old Bridge, to be unconstitutional. Seven towns appealed, but Old Bridge neither appealed nor sought a judgment of compliance. In Southern Burlington Cty. NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983), the New Jersey Supreme Court affirmed Judge Furman's rulings of unconstitutionality and remanded for a determination of region, regional need, fair share allocation, and each defendant's fair share. On July 13, 1984, this Court entered an Order, pursuant to a Stipulation between the Urban League plaintiffs and the Township of Old Bridge, determining that Old Bridge had a fair share allocation of 2414 low and moderate income units, but a credit of 279 units, for a net fair share of 2135 units to be constructed by 1990. The Court also found the existing zoning ordinance, enacted in 1983, to be not in compliance with Mount Laurel II and directed the parties to attempt to agree upon a

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income units are subject to the site plan approval requirement.

remedial plan. By orders dated July 2 and August 3, 1984, the Court consolidated with the Urban League case, for remedial purposes, the suits by O&Y Old Bridge Development Corporation and Woodhaven Village. When voluntary efforts among the parties failed, the Court, by Order dated November 13, 1984 appointed a Master to recommend ordinance revisions. The deadline for that process has not been extended past January 31, 1985 but the Master has not yet submitted a remedial recommendation.

By this motion, Urban League plaintiffs seek first to consolidate Oakwood at Madison with the three other cases involving Old Bridge's Mount Laurel obligation, or, in the alternative, to intervene in Oakwood at Madison, and then to restrain defendants from granting any further approvals to Oakwood at Madison for construction of its development unless there are firm requirements to insure that 20 percent of the units constructed will be affordable to low and moderate income households as required by both Oakwood at Madison and Mount Laurel II, or until Old Bridge adopts Mount Laurel-compliant ordinances that are approved by this Court.

I. CONSOLIDATION OR INTERVENTION

A. Consolidation

Rule 4:38-1 provides for consolidation of actions involving common questions of law or fact arising out of the same transaction or series of transactions. The benefits of this procedure are "the avoidance of multiplicity of litigation, duplication of judicial labor, inconsistent judgments, delay and expense." Holmes v. Ross, 113 N.J. Super. 445, 449, 274 A.2d 75 (Law Div. 1971). Urban League, O&Y, Woodhaven and Oakwood at Madison meet the requirements of Rule 4:38-1 and, therefore, should be consolidated.[2]

In all these cases, the issue of how the Township of Old Bridge is to meet the requirements of Mount Laurel is central. Determination of such an issue ordinarily requires the

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[2] In the Mount Laurel opinion, 92 N.J. at 217, 456 A.2d at 419, the Supreme Court indicated that the Chief Justice would determine whether to reassign pending Mount Laurel litigation to one of the three assigned special judges or to the judge who originally handled it. Oakwood at Madison has presumably not been reviewed for this purpose because no formal proceedings have occurred since issuance of the Mount Laurel II opinion. However, following the rationale for assignment of the Urban League case, it would appear likely that the Oakwood at Madison case, which had also been originally decided by Judge Furman who is now sitting on the Appellate Division, would be assigned to Judge Serpentelli. We assume that the Court has authority to determine the suitability of consolidation of Oakwood at Madison with three other cases already formally assigned to the Court, without a formal assignment by the Chief Justice. If the Court deems it necessary or appropriate, however, Urban League plaintiffs would be willing to seek a formal assignment of Oakwood at Madison from the Chief Justice.

consideration of complex and extensive expert testimony. The Court will have to review the same legal, economic, zoning, and technical engineering and planning issues in all cases. Three of the four cases have already been consolidated for this purpose. The resolution of the fourth will directly affect the resolution of the other three, and vice versa. Thus, in order to avoid multiplicity of litigation, duplication of judicial labor, and unnecessary extra expenses, these cases that arise out of common questions of law and fact should be consolidated.

B. Intervention

Rule 4:33-1 of the New Jersey Court Rules provides for intervention as of right where those who seek intervention claim an interest relating to the subject matter of the action that may, as a practical matter, be impaired or impeded by disposition of the action, that interest is not adequately represented by the existing parties, and the application for intervention is timely. Because all the requirements are satisfied here, Urban League plaintiffs are, alternatively, entitled to intervene in this action as a matter of right. Township of Hanover v. Town of Morristown, 118 N. J. Super. 136, 286 A.2d 728 (Ch. Div. 1972).

1. The Urban League interest in prompt construction of Old Bridge's fair share could be seriously impaired by the disposition of Oakwood at Madison

The developer in Oakwood at Madison has final subdivision approval for 1750 housing units. Fourteen hundred of these units will be sold at market rates without bearing the cost of subsidizing Mount Laurel low and moderate income housing and there is no obligation to build the 350 lower income units. This will create an unfair competitive advantage in favor of Oakwood at Madison and against the sale of market rate housing by developers who will bear the Mount Laurel subsidy costs. This will render unrealistic the development of Mount Laurel low and moderate income housing in Old Bridge. If the developers who will bear the Mount Laurel subsidies cannot compete with the prices of Oakwood at Madison, they simply will not build low and moderate income housing.

Therefore, if the interest of the Urban League is not taken into consideration before Oakwood at Madison is allowed to construct any of its market units, the construction of low and moderate income housing in Old Bridge would be set back at least four years, and would seriously frustrate the possibility of meeting any of the Township's significant fair share of the regional need by 1990.

2. The interest of the Urban League is not adequately represented

This case is a perfect example of the vital need for a public interest representative in Mount Laurel litigation. The Urban League's interest is to expedite construction of low and moderate income housing. On July 13, 1984, this Court determined that the Township of Old Bridge's fair share of the regional need of low and moderate income housing through 1990 is 2,135 housing units. None of those 2,135 housing units has yet been built. The Stipulation of Settlement submitted by the developer Oakwood at Madison and the Township of Old Bridge on May 31, 1977 purports to provide a contribution to Old Bridge's fair share of the regional need for low and moderate income housing. Yet, Oakwood at Madison has received final approval to build 1400 market units and needs only administrative clearance for construction of those units to begin, without any requirement assuring construction of genuine Mount Laurel units.

The fact that the eight years of negotiations between Oakwood at Madison and the Township of Old Bridge have not produced a contribution to meet the need for Mount Laurel housing in the Township makes it most important that the Court allow the Urban League to intervene in this action now. It is evident that the Urban League will add to these proceedings a vital perspective not represented by the original parties to this action.

3. The motion to intervene is timely

There is no single fixed standard for deciding whether one has timely applied to intervene in a lawsuit. The court must take

account of all circumstances involved in the litigation. United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (D.C. Cal. 1967), aff'd sub nom. Thrifty Shoppers Co. v. United States, 389 U.S. 580 (1968). Courts do not consider simply the amount of time that may have elapsed since the relevant action warranting intervention, but rather examine primarily whether the granting of the motion would entail appreciable prejudice to the other parties or to the Court. See, e.g., Clarke v. Brown, 101 N.J. Super. 404, 244 A.2d 514 (Law Div. 1968).

In the case at hand, even though Oakwood at Madison was filed in 1970 and the Supreme Court remand was issued in 1977, no action had been taken by the developer since obtaining final subdivision approval in 1979, until its recent submission of plats regarding the first 120 units. Meanwhile, the appeal of the Urban League case was pending from 1976 to 1983. This Court did not invalidate the new zoning ordinance until July 1984 and only in November 1984 ordered commencement of the formal remedial process. In late February 1985 it became apparent that voluntary compliance by the Township, even assisted by the Master, was not to occur and the Urban League plaintiffs became aware in late March that Oakwood at Madison was prepared to move towards construction at an early date. This motion was brought promptly thereafter.

The parties in Oakwood at Madison can hardly claim prejudice with a straight face. The Township of Old Bridge has managed to lose 15 years' worth of zoning litigation and yet has still not enacted, or been forced to enact, a constitutional ordinance. Oakwood at Madison was granted a Supreme Court judgment in January

1977, obtained the Town's Stipulation of Settlement in May 1977, and the Planning Board's preliminary and final subdivision approvals in June 1978 and August 1979, respectively, and then stopped dead in its tracks. It took no further action in more than five and one-half years of its 10-year approval, until its sudden recent submission. Moreover, the parties adopted a settlement that purported to comply by producing "low and moderate income" units but in fact evaded the Supreme Court's mandate, by allowing construction of all the market units without any lower income units. Both parties would be hard put to oppose intervention by one seeking to make them comply with the mandate of their state's highest court.

In order to avoid significant impairment of the interests of the Urban League, and thereby the public interest, the motion for consolidation or intervention should be granted.

II. TEMPORARY RESTRAINTS

By this motion, the Urban League plaintiffs seek to preserve their opportunity for adequate and appropriate relief against defendant Township of Old Bridge by restraining the Township, its Council and Planning Board from taking action that would irreparably harm the Urban League's opportunity for the development of housing for low and moderate income families. Developer Oakwood at Madison has final subdivision approval on 1750 units, 1400 of which can be constructed first, after only administrative approval, and sold at market rates without bearing the cost of subsidizing Mount Laurel II low and moderate income housing. This will create a competitive disadvantage against the sale of market rate housing forced to bear such subsidies and, thereby, undermine the key Mount Laurel II principle that the opportunity for the development of housing for low and moderate income families be realistic.

The familiar standard that plaintiffs must meet to obtain temporary relief has recently been restated by the Supreme Court in Crowe v. DeGioia, 90 N.J. 126, 447 A.2d 173 (1982). Plaintiffs must show (1) a valid legal theory and a reasonable probability of ultimate success on the merits, (2) irreparable harm not adequately redressable by money damages, and (3) a relatively greater harm to the plaintiffs if relief is denied than to the defendants if relief is granted. Id. at 133. Plaintiffs amply meet this test.

Probability of Success. In light of the decision in Mount Laurel II, 92 N.J. 158, 456 A.2d 390 (1983) and this Court's Orders of July 13 and November 13, 1984, it is clear that the plaintiffs

will succeed in obtaining Mount Laurel compliance even by the Township of Old Bridge. The exact nature of that compliance is, obviously, not yet determined. Yet, it is reasonable to assume that with only five years remaining in this fair share period, the Court will look to two key factors: the Township's existing zoning for Planned Unit Developments (PUDs) and the availability of ready, willing and able landowners or developers. The Oakwood at Madison site, as well as the O&Y and Woodhaven Village sites, is already part of the Township's PUD zone. Moreover, these are the only three developers with active large proposals in the PUD zone, and the only three to have filed Mount Laurel actions. We respectfully submit, therefore, that it is very probable that Oakwood at Madison's site will be part of the ultimate Court-ordered Mount Laurel remedy for Old Bridge.

Moreover, rezoning of the Oakwood at Madison site is not only not precluded by the Supreme Court's decision in Oakwood at Madison v. Madison Twp., 72 N.J. 481, 371 A.2d 1192 (1977), but is affirmatively required by that opinion. In Oakwood at Madison, the Supreme Court directed issuance of construction permits subject to the guarantee that the developer would provide 20 percent of the units for "low and moderate income" families. Id. at 1227. Furthermore, the Oakwood at Madison Court specifically defined "low and moderate income" by reference to the Statewide Housing Allocation Report. Id. at n. 49, a standard substantially the same as that used in Mount Laurel II. In the May 31, 1977 Stipulation of Settlement, the Township of Old Bridge and Oakwood at Madison agreed to provide 350 units for "low and moderate income" families.

Furthermore, under both the Supreme Court decision and the Stipulation the Superior Court was to retain jurisdiction. Clearly Oakwood at Madison cannot complain if its land is rezoned to effectuate the remedy it won.

Rezoning of the Oakwood at Madison PUD to comply with Mount Laurel II is also not barred by the Planning Board's final approval. First, the Stipulation of the parties, in conformance with the Supreme Court's opinion, assured continuing Superior Court jurisdiction for purpose of subdivision as well as site plan, water and other normal approval processes. Yet, neither party ever submitted either the preliminary or the final subdivision approval of the Oakwood at Madison project to the Court as mandated by their own Stipulation. Thus, the approvals are not "final" in the sense of vesting any nondefeasible rights to zoning or construction. More importantly, the Supreme Court in Mount Laurel II expressly held that, where necessary to effectuate the constitutional obligation, even subdivision approval may be rescinded or modified.

> It is one thing to exclude in a fair share calculation land that has actually been developed for middle and upper income people - land with houses on it - but a totally different thing to exclude land that may in some sense be said to be "committed" to the same exclusionary uses even though not even one single home has been built. Our society may not be willing to rip down what we now have in order to right the wrongs of the past, but we certainly will not allow what are no more than present intentions - in the form of an approved subdivision to be developed over the next 20 years - to perpetuate these wrongs. 92 N.J. at 301, n.51, 456 A.2d at 464, n.51.

Not a single home has been developed by Oakwood at Madison. Oakwood at Madison has now, as it has had for 15 years, no more

than present intentions to build, and, as currently formulated, those intentions are to develop for middle and upper income people and to exclude any fair share obligations. The developer has done nothing for five and a half years since getting the Planning Board's approval. Now it appears interested in building 120 market units. But the Supreme Court clearly said that it will not allow what are at best present intentions to develop to perpetuate a wrong. Rezoning of the Oakwood at Madison PUD will correct the perpetuation of the exclusionary wrong. Furthermore, the fact that not a single home has yet been developed and no site plans have yet been submitted for lower income units, makes the rezoning of Oakwood at Madison a viable, indeed, a probable remedy.

Irreparable harm. Satisfaction of the Mount Laurel doctrine -- creation of a realistic opportunity for low and moderate income housing -- depends on affirmative inducements. The affirmative inducement in the Township of Old Bridge is the builder's remedy. It is clear that the creation of housing for low and moderate income families is made possible by the subsidizing profit a developer can earn on the Mt. Laurel-linked market rate housing. However, because of the competitively less attractive housing market and higher infrastructure costs in Old Bridge, developers face a far less profitable market to start with.

If Oakwood at Madison units can be sold without the subsidy costs of a true low and moderate income set-aside, their sale price would be substantially lower than that of the market rate units in a true inclusionary development. This market disadvantage will offset the delicate market balance and undermine the Urban League

plaintiffs' realistic opportunity for the development of low and moderate income housing. The central theory of Mount Laurel II is that if the builder's remedy cannot be profitable, the incentive to build is lost. If the defendants are not restrained from granting site approval, the construction of low and moderate income units will become economically infeasible, and the builder's incentive will almost surely be lost. As a result, low and moderate income units will not be constructed and the Urban League plaintiffs will be irreparably harmed.

Balancing the Harms. The defendants as public bodies would suffer little if any harm should temporary relief be granted. First, their proper role is that of regulator rather than of landowner or principal. The Township has already zoned the Oakwood land as a PUD with higher densities and provision for "affordable housing." The proposed injunction would not impair but rather implement that scheme. Second, in this context the defendants' only legitimate interest is in enacting zoning ordinance revisions to comply with the Court's July 13 and November 13, 1984 Orders, not to mention all the other Court orders concerning the Township's invalid zoning ordinances over the last 15 years of litigation. The restraints sought by plaintiffs seek only to permit the rezoning of the Oakwood at Madison PUD to comply with the Township's Mount Laurel II fair share requirement. In fact, rezoning of the Oakwood at Madison PUD will credit the Township of Old Bridge with 350 low and moderate income housing units, and assist the Township in meeting its fair share obligation without subjecting more vacant developable land to set-aside requirements,

or requiring additional construction. Fifteen years without a constitutional zoning ordinance is enough.

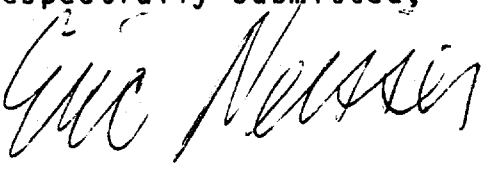
Even when the developer's interests are considered in the balance, the balance still remains overwhelmingly in the Urban League plaintiffs' favor. The public interest in getting housing built for low and moderate income families in Old Bridge weighs heavily in favor of the plaintiffs. If Oakwood is allowed to proceed with its present proposed project, not only will its promised 350 lower income units not be built, but its competitive advantage will seriously undermine the likelihood that any other developer, subject to a true Mount Laurel set-aside, will proceed to build any other units in the next four years. The injunction would certainly cause Oakwood to lose the possibility of a quick-sale market windfall. But it was certainly not the intention of the Court to make low and moderate income families suffer for the windfall benefit of the Oakwood at Madison developer. Oakwood at Madison convinced the Supreme Court, and agreed with defendant, that 350 "low and moderate income" units should be built in the Oakwood at Madison PUD. The developer has not kept its word and can hardly complain of prejudice or harm from being forced to accept no more than it won in a considered opinion of this state's highest court. It is clear that Urban League plaintiffs will suffer a substantially greater harm if relief were denied than Oakwood at Madison would suffer if relief were granted.

Plaintiffs thus submit that they fall amply within the requirements of Crowe, having shown a probability of success on the merits, irreparable harm, and a balancing of interests that is

overwhelmingly in their direction. Accordingly, plaintiffs respectfully move for entry of an order that restrains any approval necessary for construction at the Oakwood at Madison site, unless such approval is conditioned upon construction of "low and moderate income" units as defined in both the Oakwood at Madison and Mount Laurel II decisions, or until this Court approves a comprehensive compliance remedy for Old Bridge, after 15 years of noncompliance.

Dated: April 3, 1985

Respectfully submitted,



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