CA-North Brunswick

3/7/86

Brief in support of application to intervene + for transfer / appear as amici curiae on behalf of intervenors - TTs Jack Moolman + Theodore Mellin

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Rec'd 3/7/86

URBAN LEAGUE OF GREATER NEW BRUSNWICK, et al.,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiffs,	:	CHANCERY DIVISION MIDDLESEX/OCEAN COUNTY
vs.	:	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	:	CIVIL NO. C 4122-73 (Mount Laurel)
Defendants.	:	

BRIEF IN SUPPORT OF APPLICATION TO INTERVENE AND FOR TRANSFER, OR, ALTERNATIVELY, TO APPEAR AS AMICI CURIAE, ON BEHALF OF INTERVENORS-PLAINTIFFS JACK MAILMAN AND THEODORE N. MELLIN

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STATEMENT OF FACTS

Plaintiffs-intervenors hereby incorporate by reference the allegations of the complaint and the certifications of plaintiffs-intervenors Jack Mailman and Theodore N. Mellin in support of the within application.

Two components of the certifications of Jack Mailman and Theodore N. Mellin must be highlighted at this point. The first item concerns the efforts of intervenors-plaintiffs to obtain information about this litigation from the Township so that their concerns could be voiced. At best, the Township's attitude toward divulging information about the litigation can be described as uncooperative. Even submissions made to the court (which upon submission become matters of public record in the absence of any confidentiality order) were withheld by the Township Council. The reasons given by Council members and the council's attorney for this practice were that the matter was "in litigation" and thus could not be discussed publicly, since the Council was engaged in settlement negotiations. It was not until the summer of 1985 that intervenors-plaintiffs were able to obtain a few of the Township's submissions to this court, as well as the Consent Order which was entered nearly a year before.

This "history" is set forth so that the intervenors-plaintiffs may show their good faith efforts to participate in the Mount Laurel deliberations through their elected representatives in the first instance. Leaving aside the verbal acts and over admissions of the Township Council and its attorney (which are not hearsay and are therefore admissible under Evid. R. 63(7) and 63(8)), this history is

also intended to set forth the information and belief upon which intervenors-plaintiffs base their need to intervene in the present matter.

The second component which must be highlighted is the "list of reasons" to intervene which are set forth in the certification of Theodore N. Mellin. This is merely a delineation of the issues and concerns which intervenors-plaintiffs wish to raise in the event intervention to appear as either parties or as _amici_ is granted. Neither this court nor the Council on Affordable Housing (in the event transfer is granted) are being asked at this time to adopt or reject this list of issues and concerns as either findings of fact or conclusions of law. In this respect, the statements are not testimonial hearsay (since the truth or falsity thereof is not now an issue) and are not arguments of law inpermissibly made in an affidavit or certification (_R_.1:6-6).

LEGAL ARGUMENT

POINT I

INTERVENORS SHOULD BE GRANTED PERMISSION TO INTERVENE IN THE ABOVE-CAPTIONED MATTER PURSUANT TO R. 4:33-2.

Pursuant to the holding of Crescent Park Tenants Association v. Realty Equity Corporation of New York, 58 N.J. 98 (1971) and its progeny, the issue of standing is liberally approached, particularly in public interest litigation. A party's status as a resident and taxpayer of a municipality has repeatedly been held sufficient to grant standing in an action involving the interests of the community at large. See, e.g. Allen v. Planning Board of Evesham Township, 137 N.J. Super. 359, 362-63 (App. Div. 1975); Silverman v. Millburn Township Board of Education, 134 N.J. Super. 253 (Law Div. 1975)(permitting residents to challenge a change of use of a school building). In Evesham Township Board of Adjustment v. Evesham Township, 86 N.J. 295 (1981), a taxpayer and resident of the municipality was held to have standing to intervene in a jurisdictional dispute between the Township Council and the Board of Adjustment regarding the Municipal Land Use Law.

There is no question that Mount Laurel litigation is public interest litigation of the most far-reaching kind. In recognition of this fact, the Supreme Court has held that "any individual demonstrating an interest in, or any organization that has the objective of, securing lower income housing opportunities in a municipality will have standing to sue such municipality on Mount Laurel grounds." Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 337 (1983) (Mount Laurel II). It is in this spirit that intervenors-plaintiffs wish to

appear as parties in the present litigation.

The standards for permissive intervention are controlled by R. 4:33-2. The court is ordinarily to be liberal in its grant of the motion. State v. Lanza, 39 N.J. 595 (1963). The factors the trial court must consider are the promptness of the application, whether or not the granting thereof will result in further undue delay, whether or not the granting thereof will eliminate the probability of subsequent litigation, and the extent to which the grant thereof may further complicate litigation which is already complex. Grober v. Kahn, 88 N.J. Super. 343, 361 (App. Div. 1965), modified, 47 N.J. 135 (1966); c.f. State Farm v. Zurich American Insurance Company, 62 N.J. 155 (1973); and see Pressler, Current New Jersey Court Rules, comment R. 4:33-2 (1986).

The application of these standards to the present application for intervention can be best demonstrated by analogy to the decision in Evesham Township Board of Adjustment v. Evesham Township, supra. In that litigation, a variance application had been denied by the Board of Adjustment but was granted upon appeal by the Township Council after de novo review of the record before the Board of Adjustment. The Board filed its own complaint in lieu of prerogative writs charging that the Council's action violated the Municipal Land Use Law. After motions to dismiss were filed, the Board decided to withdraw the action and a stipulation of dismissal was executed by the parties but not filed. This occurred some 8 months after the Board's suit had been instituted. Before the dismissal could be filed, a member of the Board moved to intervene individually as a party plaintiff asserting his status as a taxpayer and resident of the municipality. The Supreme Court upheld the trial court's

grant of the motion to intervene permitting the individual to proceed as a party plaintiff. Evesham Township Board of Adjustment v. Evesham Township, 86 N.J. at 298-99.

The present application to intervene is in many respects similar to that made in the Evesham Township Board of Adjustment case. Intervenors-plaintiffs base their application on their status not only as residents and taxpayers of the Township of North Brunswick, but as residents having a considerable long-standing interest in Mount Laurel zoning and planning issues in North Brunswick. The present litigation has not concluded and it is not forseen that the interests asserted by intervenors-plaintiffs will produce any significant delay, as extensive discovery will not be required (in any event, discovery can be limited by the court). Whether the matter proceeds in this court or before the Council on Affordable Housing, plaintiff-intervenors will be utilizing the record already established before this court to a very great extent. Accordingly, no undue delay should result from a grant of intervention, nor will it impermissibly further complicate litigation which is already complex.*

The promptness of intervenors' application in light of their efforts to become involved in the Mount Laurel zoning process cannot be disputed seriously. The Township Council has made no secret of its efforts to prevent public access to the documents and factual records submitted to this court, and to prevent public participation in the zoning revision process. The specious reasoning for these actions by

*Intervenors-plaintiffs are not seeking to re-litigate ab initio the record established before this court during the prosecution of the present litigation since its inception, nor are they attempting to assert that any or all of the plaintiffs should be prohibited from constructing any Mount Laurel development. They merely wish to assert their objections to those portions of the ordinances adopting the September 13, 1984 Consent Order and the proposed affordable housing ordinance (January, 1986) which they believe are inpermissibly weighted in the developer plaintiffs' favor and do not adequately protect the interests of present or future low and moderate income residents of the Township.

the Township Council was that the matter was in litigation, settlement negotiations were being conducted, and thus no facet of the litigation could be publicly discussed. Under this "umbrella of secrecy", ordinances were enacted and other official actions taken which otherwise would be subject to the Open Public Meetings Act, and access to matters of public record (submissions to this court) was denied.

The "final straws" which have forced intervenors to make the present application are matters already established before this court. The passage of the Fair Housing Act, L. 1985, c. 222 and the Supreme Court's upholding thereof in Hills Development Company v. Township of Bernards, ---N.J.--- (1986) (decided February 20, 1986) are matters of public record. It is likewise undisputed that, in light of these developments, the North Brunswick Township Council is deadlocked on the issue of concluding the litigation before this court or seeking transfer of this litigation to the Council on Affordable Housing pursuant to the Fair Housing Act. The Township Council does not have the four (4) votes needed to pass the enabling ordinances which would conclude this matter before this court; nor can the Council garner the three (3) votes' voting majority needed to pass a resolution requesting transfer to the Council on Affordable Housing. Because of the Township Council's inability to act one way or the other, a set of zoning ordinances which intervenors believe would be ultimately detrimental to the very people it is intended to benefit may be imposed by this court. In that event, neither this court nor the Council on Affordable Housing would have the benefit of the valuable input which intervenors hope will result in the enactment of Mount Laurel ordinances which will permit expeditious

development of low and moderate income housing while protecting the interests of present and future low and moderate income residents, as well as all of the taxpayers of the Township of North Brunswick. The complete impotence of the Township Council to act one way or the other in the present matter has only been established within the past few days. It is for these reasons that intervenors have brought this application now, before any final orders are entered in the present litigation.

Certainly the Township cannot assert any prejudice by the present application, since the deadlock in the Township Council is the result of very recent events. Nor can the Township Council's prior conduct in attempting to prevent public discussion of its efforts to enact Mount Laurel ordinances be ignored in this regard. The Township Council cannot be heard to argue that intervenors (who are not attorneys) were under an obligation to enter this litigation at an earlier time, when the Council was trying to prevent all public access to information concerning this litigation and the Mount Laurel rezoning process.

The intervenors submit that any discussion of "prejudice" to the developer plaintiffs and of the Urban League must take into account the provisions of the Fair Housing Act and the Supreme Court's definition of "manifest injustice" and the Hills Development Company (Mount Laurel III) opinion. This will be addressed infra.

POINT II

IN THE EVENT INTERVENTION IS PERMITTED, THE COURT IS OBLIGATED TO TRANSFER THIS MATTER TO THE COUNCIL ON AFFORDABLE HOUSING FOR FURTHER ADJUDICATION.

Section 16 of the Fair Housing Act, supra explicitly provides that:

> "Any party to the litigation may file a motion with the court to seek a transfer of the case to Council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation."

(L. 1985, c. 222, Section 16.)

The Supreme Court in the Hills Development Company (Mount Laurel III) decision supra has read this provision to be a mandate; "transfer must be granted unless it would result in manifest injustice to any party to the litigation." (Slip Op. at 66-67).

Accordingly, if intervention is permitted, the intervenors will have to be deemed "parties" within the meaning of Section 16a and the case must be transferred to the Council on Affordable Housing unless manifest injustice would result.

The Supreme Court has defined "manifest injustice" explicitly, and intervenors submit that it is this standard which must be applied in determining not only whether transfer should occur, but whether the present parties to this litigation would be unduly prejudiced by the grant of intervention. The rationale for this is simple: Since intervention will result in transfer unless manifest injustice is shown, that "manifest injustice" is the prejudice which will be suffered by

the other parties if intervention is granted.

The Supreme Court has defined "manifest injustice" to mean a combination of circumstances, "unforseen but nevertheless possible, that render transfer so unjust as to overcome the Legislature's clear wish to transfer all cases." Manifest injustice is clearly held not to be delay in the production of housing, loss of expected profit, loss of the builder's remedy, substantial litigation expenses, permit applications, on and off-site tract improvements, or contractual commitments. Slip Op. at 74-75. The one instance which the court did consider to be "manifest injustice," namely, a transfer that does not merely delay the creation of a reasonable likelihood of lower income housing but renders it practicably impossible, clearly does not exist in this case. The intervenors do not seek a complete relitigation of this matter, but merely wish to assert concerns and issues which they feel should be included in any overall compliance package, including any enabling ordinances enacted pursuant thereto. Intervenors do not assert that any of the developer plaintiffs should be denied the opportunity to construct low and moderate income housing in the Township of North Brunswick. They do object, however, to a procedure whereby implementation of the September 1984 Consent Order and any final compliance order which may be entered by this court might constitute a builder's remedy explicitly prohibited by the Fair Housing Act and the Hills Development Company Supreme Court decision (Slip Op. at 55-56). It is hornbook law that parties may not do indirectly that which they cannot do directly, and intervenors submit that any compliance remedy which might be imposed by this court due to the Township's inability to proceed would produce just such a result. In other words,

the result would be a builder's remedy imposed in the form of a "consent decree".

Intervenors are unaware of any circumstances by which the other parties can demonstrate that "manifest injusitce" will result if this matter is transferred to the Council on Affordable Housing. In the absence of any such showing, if intervention is permitted, intervenors submit that this matter must be transferred to the Council on Affordable Housing for further proceedings.

In the alternative, intervenors have requested that, should intervention be denied, that they be given leave to appear in this matter as amici curiae in order to address their concerns to this court prior to the entry of any final order of compliance.

Respectfully submitted,

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A Professional Corporation
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Plaintiffs Jack Mailman and
Theodore N. Mellin

DATED: March 7, 1986

BY:
TIMOTHY J. KORZUN