CA - Cranbury 4/10/84

Letter in Lieu of formal brief in opposition to motion of Twp of Cranbury for recusal

+ affidavits of Carl Bisgaier + Geoffrey Weiner

p 10

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BISGAIER AND PANCOTTO
ATTORNEYS AT LAW
510 PARK BLVD.
CHERRY HILL, N.J. 08034
TEL. (609) 665-1911

CARL S. BISGAIER
LINDA PANCOTTO

April 10, 1984

HONORABLE EUGENE D. SERPENTELLI, J.S.C.
Ocean County Court House
118 Washington Street
Toms River, New Jersey 08753

Re: Cranbury Land Company v. Cranbury Tp.
(Docket No. L-070840-83 PW)
Monroe Development Associates v. Monroe Tp.
(Docket No. L-076030-83 PW)
Motion for Recusal

Dear Judge Serpentelli:

Please accept this letter[1] in lieu of brief in opposition to the motion of the Township of Cranbury for recusal. Plaintiffs Cranbury Land Company and Monroe Development Associates strongly object to the motion on the grounds of lack of merit and that granting the motion will result in inordinate delay. The last point is mentioned because I am concerned that even if the motion is deemed unmeritorious the court may be persuaded, out of an excess of caution, to grant it. Such an action would be unjustified under the facts and would be extremely prejudicial to the plaintiffs. In the minds of some, merely bringing a recusal motion in a public interest case could raise the spectre of ultimate prejudice against the movant even if none existed prior to the motion. I urge the court not to permit such a result here.

These cases need immediate disposition. Such was called for by the Supreme Court. It would be an incredible perversion of justice and the explicit directions of the Supreme Court for the prior actions of this court, undertaken with the consent of counsel and for the purpose of expedition, to now be used as a basis for unduly prolonging the start of the trial.

[1]Also enclosed please find the affidavits of myself and Geoffrey Weiner.

Re: Cranbury Land Company v. Cranbury Tp.
Monroe Development Associates v. Monroe Tp.
Motion for Recusal

NATURE OF THE ISSUES INVOLVED

The recusal motion is based on the court's alleged intrusive, pre-trial involvement in conferences held by experts for the parties and others during which the issues of region, regional need and fair share were discussed. The peculiar nature of these issues must be understood in order to assess the recusal motion.

Region, regional need and fair share are generic issues. Whether couched as issues of fact or law, they are not specific to any given municipality or case except where particular facts, otherwise unaccounted for in the methodology, are ultimately deemed relevant. Thus, the conferences were not held to discuss factual nuances peculiar to a given defendant. They were held to aid in the early resolution, among experts, of generic issues.

ROLE OF THE COURT

The role of the court on these generic issues is clear. The Supreme Court is seeking an early resolution of these issues and uniformity of application. Certainly, as to region and regional need, the appointment of three judges was designed to ultimately eliminate them from litigation. Mount Laurel II, 92 N.J. 158, 253 (1983). The Court's expectation was that, in a relatively short time, regional patterns would emerge and, at least within the venue of each judge, even fair share might be resolved for all municipalities. 92 N.J. at 254.

Toward this end, the Supreme Court did two things over and above the appointment of the judges: institute the presumption of validity to the court's rulings on region and regional need (92 N.J. at 216) and counsel that:

> (t)he trial court should use any aids that may sensibly dispose of this litigation fairly, practically, promptly and effectively. 92 N.J. at 293.

Re: Cranbury Land Company v. Cranbury Tp.
Monroe Development Associates v. Monroe Tp.
Motion for Recusal

The relevance of the presumption of validity is that there is a heavy burden on the court to try to do the right thing early on in the process. While it is inapplicable to the Urban League case per se, 92 N.J. at 254, fn. 23, it could affect that case if the presumption arises from an earlier decided case. In that regard and in light of the litigation now being conducted regarding Warren Township, the parties in Urban League and the consolidated cases actually had a great advantage in having their experts conference prior to the completion of that litigation. The thoughts expressed at the conference clearly had an impact on those experts testifying in Warren and was the only way these parties took the opportunity to effect the result in that matter. None of the parties chose to intervene in the Warren case as was their right under Mount Laurel II, 92 N.J. at 254.

The relevancy of the Supreme Court's directive to use "any aids" to properly dispose of these issues is significant. The Court itself understood that this was an area of expertise, requiring experience, education and as much input, adversarial and independent, as possible. Thus, the Court cited its expectations of the growth of experience on the part of its trial judges, 92 N.J. at 293, and called upon them to freely use independent experts, particularly on the issues of region, regional need and fair share. 92 N.J. at 292. Further, the Court directed its trial judges to become actively involved early in the litigation in order to expeditiously resolve these issues.

THE ROLE OF THE EXPERTS

Cranbury's motion raises the spectre that the court's handling of the conferences has implicated its expert in such a way as to diminish his effectiveness. The fact that these allegations are unsupported by affidavits is sufficient to warrant their being disregarded. However, the role of the expert as it interplays with that of the court further belies this contention. Experts, presumably, are not adversarial in their testimony. They are not told what to say by counsel. They render opinions based on professional expertise. Certainly, they act within the parameters of legal doctrine and must respond to developing legal judgments. In fact, since many of the experts are involved in many different cases in differing capacities before the same judge, it is likely, if not desirable, that they will be better able to address the concerns of the court.

Re: Cranbury Land Company v. Cranbury Tp.
Monroe Development Associates v. Monroe Tp.
Motion for Recusal

Cranbury's expert is a good example of this point. He is the court-appointed expert on the Bedminster case, expressing opinions on region, regional need and fair share before the same judge who will hear this case in which he appears as the expert for a defendant. Some of the experts in this case are also before the court in Warren, Manalapan and other matters.

In short, the role of the experts for the parties and the court-appointed expert is to assist in the education and development of expertise of the trial judge. This education and development of expertise is not confined to a single case; nor was it expected to be so confined by the Supreme Court.

THE CONFERENCES AND THE COURT-APPOINTED EXPERT

The conferences in Urban League were undertaken at the suggestion of counsel, not the court. They went ahead with the unanimous consent of counsel. Everything which occurred was fully reported to counsel. No counsel ever called for a termination of the conferences. The recusal motion effectively warps what, in fact, occurred and what we all anticipated would occur.

All counsel knew that the court was developing its thoughts on these issues. No one believed for a moment that we would be confronted with a clean slate at trial. If anything, the conferences were a fantastic opportunity to impact on the court-appointed expert and to hear the concerns of the trial judge and be responsive to those concerns.

THE "CONCENSUS" REPORT

The so-called "consensus" report is really no such thing. Ms. Lerman's report of April 2, 1984, while embodying the views of many planners is, in the end, her report. As she states: "I assume full responsibility for the accuracy and validity of materials and information presented herein". (page 3).

Each party has been given the opportunity to accept or reject the report, to introduce testimony and other evidence, to produce a separate plan or plans. The goal is to derive the best

plan possible at this stage in time. Everything which occurred was in aid of that goal and not a single event occurred in derogation of it.

CONCLUSION

The court's actions were well within the parameters of acceptable judicial conduct as outlined by the Supreme Court. Further, counsel explicitly consented to the conferences and the opportunity by the planners to hear the court's concerns and questions. No party has been or will be prejudiced. In fact, we all benefitted from the opportunity of having the input to the court-appointed expert. The motion should be denied.

Respectfully submitted,

Carl S. Bisgaier

CARL S. BISGAIER

CSB:emm
cc: all counsel of record

AFFIDAVIT OF CARL S. BISGAIER

STATE OF NEW JERSEY:
SS
COUNTY OF CAMDEN :

CARL S. BISGAIER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am an attorney-at-law of the State of New Jersey and am the attorney for the plaintiffs in the within actions.

2. The following is my recollection of events which occurred regarding the planners' conferences:

a. during an early meeting of the Court and counsel for all parties, there was mention of the fact that in another Mount Laurel II case, progress had been made in reaching agreement among the planners on the issues of region, regional need and fair share when a recess had been taken allowing the planners to meet privately to attempt to reach agreement on the issues. I do not recall who first mentioned this occurrence;

b. my recollection is that Michael Herbert, Esquire, asked if that procedure might be used in this case;

c. a discussion ensued among counsel and the court. It was clear that the court would agree to the procedure only if counsel unanimously agreed. Counsel did reach unanimous agreement to try the approach. It was explicitly agreed that the planners would meet without counsel being present in order to minimize adversarial posturing. It was agreed that the court would be available to the planners to raise issues and concerns with any aspect of the methodology which was being evaluated. It was agreed that after the planners met, counsel would meet to hear what progress had been made and to comment or further discuss specific issues;

d. the first meeting of planners was scheduled for the morning of February 2, 1984, but lasted all day. In light of progress being made, a subsequent meeting was held on February 13, 1984;

e. after these two meetings, all counsel met with the court, at which a presentation was made by Carla Lerman, the court-appointed expert, on the status of the planner's meetings;

f. after listening to Ms. Lerman's report, counsel were given the opportunity to raise whatever questions they had as to substance or procedure. Furthermore, while it was made clear that Ms. Lerman appeared to be accepting of the approach taken in the report, the court itself had not adopted a fixed view; and, in fact, raised questions and expressed concerns. It was stated that Ms. Lerman, if she ultimately was satisfied with the report, would introduce it through her testimony and that all parties would have the opportunity of cross-examination and the introduction of their own reports through their own experts;

g. a subsequent meeting of the planners was held in March to address certain issues;

h. On March 7, 1984, Ms. Lerman submitted her revised report which indicated that while a concensus had been attempted, she assumed full responsibility for the report; that is, it was in the nature of her revised report. On April 2, 1984, she submitted her final pre-trial report indicating the same point as to it being her work product;

i. on March 9, 1984, a pre-trial conference was held, during which the report was discussed. The court asked if the report would be acceptable to any of the parties. Opinions were then expressed, for the first time, by counsel as to whether their client would accept Ms. Lerman's conclusions. I then indicated my own reservations and retained the right to seek higher allocations based on factors peculiar to a given municipality which had not been accounted for in the formula;

j. my own experts who participated in the aforementioned process indicate that at no time did the court express an opinion as to a preferred methodology; the court only acted as "devil's advocate" asking questions, raising issues and articulating concerns;

k. at no time during the course of this process was an objection raised by attorneys representing any of the defendants; nor did any counsel seek to terminate the process prior to the filing of the recusal motion on April 4, 1984, almost a month after the last meeting of the planners and the pre-trial conference and on the eve of trial. In fact, had the trial commenced as scheduled, the recusal motion apparently would not have been filed; and

1. at the pre-trial conference, the court reiterated its position that the process was not meant to, nor would it, foreclose any party from introducing whatever testimony or other evidence it deemed relevant to the issues of region, regional need and fair share, and that the court remained open to the receipt of such testimony and evidence.

3. George Raymond is the planner on fair share for Cranbury. During his deposition, he indicated general professional agreement with the Lerman report and was open as to his criticism. He is also the court-appointed expert in Bedminster and appears to have completely retained his professional independence from the court and has never indicated that his ability to freely state his professional opinion has been affected. He and counsel seem to be upset with the result; while the motion is an attack on the process which led to Ms. Lerman's conclusions.

Carl S Bisgaier L.S.
CARL S. BISGAIER

Sworn to and Subscribed
Before me this 19th day
of April, 1984.

Eileen M. McCloskey
EILEEN M. McCLOSKEY
A Notary Public of New Jersey
My Commission Expires Oct. 7, 1987

AFFIDAVIT OF GEOFFREY WIENER

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GEOFFREY WIENER, being duly sworn, deposes and says:

I am a Vice President of Abeles Schwartz Associates, a planning and development consulting firm, and am a licensed Professional Planner in the State of New Jersey. I was retained by the New Jersey Department of the Public Advocate as an expert witness on fair share housing allocation in Morris County Fair Housing Council, et. al. v. Boonton Twp., et. al.

In late January I received a call from Carl Bisgaier informing me that there would be a meeting of planning experts involved in Urban League of Greater New Brunswick et. al. v. Borough of Carterel, et. al.. The purpose, as described to me, was to discuss issues relating to the determination of fair share housing allocations under the Mount Laurel II decision (92N.J.158(1983)) and to arrive at a consensus on as many such issues as possible. Mr. Bisgaier asked if I would participate in this meeting in order that the fair share concepts and methods developed for the Public Advocate in the Morris County case would be represented. In connection with this I prepared a report for Mr. Bisgaier which derived fair share housing allocations for Cranbury and Monroe Townships, two communities in which Mr. Bisgaier represented Mount Laurel plaintiffs. This report was submitted to the court for consideration on behalf of Mr. Bisgaier's clients.

The initial planner's meeting was held on February 7th and because more time was needed subsequent meetings were held on February 13th and March 2nd. I attended the February 7th and March 2nd meetings, being out of town the week of February 13th.

During the two meetings I attended in Toms River, Judge Serpentelli left the courtroom prior to the start of the

day's substantive discussions on fair share issues and stayed in his chambers except when called on to answer questions or receive reports of our progress. On the first day, Judge Serpentelli also greeted the assembled planners and discussed the purposes of the meeting in opening remarks.

Several times the group requested that Judge Serpentelli clarify the intent of the Mount Laurel II decision with regard to specific fair share issues. In response to these questions Judge Serpentelli indicated concerns raised by various fair share approaches. He never stated an opinion as to which approach was the correct one, nor did he indicate that he had decided which approach should be used. Judge Serpentelli was also asked to join the planners at the end of each day in order to hear a report from Carla Lerman on the day's discussions and the issues on which consensus was reached. During these briefings the judge asked questions about the points made either in support of, or in opposition to a particular approach. However, at no point did he indicate he had made up his mind with regard to the issue under consideration.

Geoffrey Wiener

Geoffrey Wiener

Subscribed and sworn to
before me this 9 day
of April, 1984.

Marie Ann Bracco

Notary Public

MARIE ANN BRACCO
Notary Public, State of New York
No. 43-4633349
Qualified in [illegible] County
Commission Expires March 30, 1985