

Harris Structural Steel Company's
Brief on Behalf of Plaintiff-Intervenor
in Support of Motion to Intervene

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CA002664B

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
DOCKET NO. C-4122-73

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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.        :
                                     :
                v.                  :
                                     :
HARRIS STRUCTURAL STEEL COMPANY,  :
INC., a New Jersey corporation,   :
                                     :
                Plaintiff-Intervenor. :
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Civil Action

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BRIEF ON BEHALF OF PLAINTIFF-INTERVENOR
IN SUPPORT OF MOTION TO INTERVENE
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On the Brief

STATEMENT OF FACTS

The Court is all too familiar with the facts of this case up to the present stage in the proceedings. Recited here will be only those pertinent facts relating to the interests of Plaintiff-Intervenor Harris Structural Steel Company, Inc., (hereinafter "Harris").

The Borough of South Plainfield has, for some time past, been involved in litigation concerning its obligation to provide its fair share of the regional need of low and moderate income housing. As a result of this litigation, the Borough agreed to provide its fair share of such housing. On May 22, 1984, this Court entered judgment against South Plainfield and ordered it to rezone certain property within the Borough exclusively for housing purposes. Included among the property rezoned was 84.8 acres on New Brunswick Avenue owned by Harris. The Judgment further provided that the ordinance, as it concerned Harris' property, be zoned exclusively for multi-family residential development. No notice or opportunity to be heard was granted Harris at any time prior to the Judgment.

not required

Thereafter, South Plainfield held meetings to discuss and revise its Zoning Ordinance in accordance with the Judgment. Harris appeared at these meetings but could not achieve favorable results; the Borough was restricted in revising its Ordinance to the terms set forth in the Judgment.

The Ordinance was ultimately revised and adopted to accomplish the terms of the Judgment. The Borough is now to come before this Court for a determination as to whether its ordinance meets the standards of Mount Laurel II. Harris has filed the within motion to intervene in an attempt to amend the Judgment and modify the Ordinance.

Harris has owned the property in question since the early 1900s. The property is located next to Harris' steel plant and is surrounded by industrial uses. The property had been within an Industrial Zone prior to the Borough's revision of its Zoning Ordinance. Because of its location, the property is not suitable for development entirely for residential purposes. The property cannot be fully developed for the further reason that a stream runs across it thus raising environmental concerns. The highest and best use of the property, under all of the circumstances, is light industrial use. All of this is documented in the affidavit of Steven E. Barcan, Esq. submitted in support of this motion and in the memorandum annexed thereto which was presented to the Borough in the course of the Borough's consideration of the Rezoning Ordinance.

It is Harris' contention that the failure to give it notice and an opportunity to be heard prior to the entry of Judgment herein denies Harris the due process of the law. Because of this defect, the South Plainfield Zoning Ordinance now presented

to this Court is invalid and void as it affects Harris' property. To protect its interests in the property in question Harris has filed the present motion. Alternatively, Harris seeks amendment of the Judgment herein and modification of the proposed Zoning Ordinance to accommodate non-residential uses, in accordance with the arguments presented in this Brief.

ARGUMENT

POINT I

HARRIS STRUCTURAL STEEL COMPANY, INC. IS ENTITLED TO INTERVENE IN THIS PROCEEDING

A. Harris Structural Steel Company, Inc. Is Entitled To Intervene As Of Right.

Intervention in a court proceeding is controlled by the provisions of R.4:33-1 et seq. R.4:33-1 covers intervention as of right and provides:

Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants' interest is adequately represented by existing parties.

Motions to intervene are to be treated liberally. This approach applies to motions to intervene as of right. State v. Lanza, 39 N.J. 595, 600 (1963); Zanin v. Tacono, 198 N.J. Super. 490, 495 (Law Div. 1984).

The requirements of R.4:33-1 are satisfied here. By order of this Court dated May 22, 1984, the Borough of South Plainfield was required to revise its Zoning Ordinance so as to conform to constitutional standards as established in South Burglington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mount Laurel II). The order required the Borough of South Plainfield to

rezone the 84.8 acre Harris Steel site on New Brunswick Avenue, designated as Block 459 Lot 1, Block 460 Lot 1, Block 461 Lots 1-3, Block 462 Lot 2, Block 465 Lot 1, Block 466 Lot 1, Block 467 Lots 1, 3, 4, 5 and 21, exclusively for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

Now the revised Ordinance of the Borough is to be reviewed by this Court for the purpose of determining its conformity to Mount Laurel II and this Court's order.

However, the order requiring the Borough to rezone precluded it from exercising discretion in drafting the amendment to its Zoning Ordinance and prevented Harris from persuading the Borough to draft the amendment any way other than as provided in the order. Harris was not given any notice of the Court's intention to order the amendment and limit the discretion of the Borough and thus had no opportunity to appear before the Court. Harris has therefore been denied due process of law. Harris has an interest in the property subject to this action and its rights to that property will be impaired should it not be permitted to intervene.

No other party to this action has adequately represented or protected the rights of Harris Structural Steel Company, Inc. Plaintiffs appear on behalf of the public interest and those persons who would benefit by the availability of low and moderate income housing in the Borough of South Plainfield. Their concern

has been and is in insuring that such housing is made available in accordance with the Constitution and Mount Laurel II, but not where that housing is proposed to be built or the rights of owners of property zoned to allow the construction of such housing. Defendant Borough of South Plainfield has demonstrated its displeasure with the requirements of Mount Laurel II and has not and will certainly not make any effort to satisfy those requirements without being forced to do so. The Borough cannot be relied upon to protect the rights of Harris Structural Steel Company, Inc.; this would require South Plainfield to disavow the Judgment or to consent to the partial development for residential use which Harris proposes later in this Brief. The Borough is unlikely to do either of these things.

Therefore, it is submitted that Harris Structural Steel Company, Inc. be permitted to intervene in this action pursuant to R.4:33-1.

B. Harris Structural Steel Company, Inc. Should Be Permitted To Intervene Pursuant to R.4:33-2.

Should it be determined that Harris is not entitled to intervene in this action as of right, then, in the alternative, it argues that it be granted permission to intervene pursuant to R.4:33-2. R.4:33-2 provides in pertinent part:

Upon timely application anyone may be permitted to intervene in an action if his claim or defense and the main action have a question of law or fact in common. . . .

In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As mentioned above, motions to intervene are to be treated liberally. Lanza, supra, 39 N.J. at 600; Zanin, supra, 198 N.J. Super. at 495. Factors to be considered in deciding a motion for permissive intervention include the timeliness of the motion; prejudice to all the parties, including the movant and the court, if the motion is granted; the stage of the proceedings at which the motion is made; and the importance of any public question involved in the action. Evesham Tp. Bd. of Adj. v. Evesham Tp., 86 N.J. 295, 299 (1981); Grober v. Kohn, 88 N.J. Super. 343, 361 (App. Div. 1965), mod. on oth. grds. 47 N.J. 135 (1966); Monsanto v. Alden Leeds, 130 N.J. Super. 245, 252 (Law Div. 1974); Clarke v. Brown, 101 N.J. Super. 404, 410-11 (Law Div. 1968).

The rights of the present parties have been substantially adjudicated. The Borough of South Plainfield has been found to be in violation of the Constitution as interpreted by Mount Laurel II. All that remains to be done is a review of the Borough's revised Zoning Ordinance to determine whether that Ordinance complies with Mount Laurel II. No prejudice to the rights of the current parties will result by allowing Harris to intervene at this point in the proceedings.

The only prejudice any party to this action may arguably suffer as a result of the granting of this motion to intervene is some delay in the final resolution of this action. It is submitted however, that any resultant delay is acceptable as a reasonable by-product of enforcing the Constitution and the rights of all persons affected by this action, which include the citizens of South Plainfield and Harris Structural Steel Company, Inc. Not allowing Harris to intervene would be to deny it due process of the law, a right which is at least as important and sacred as that established in Mount Laurel II. Mount Laurel II did not give the Court the power to violate any citizen's rights; it did not hold that the public hearing requirements and concomitant full public participation in the Municipal Land Use Act (N.J.S.A. 40:-55D-1 et seq.) could be ignored. Mount Laurel II only gave the Court the power to order a municipality found not providing its fair share of low and moderate income housing to revise its Zoning Ordinance in accordance with the Constitution and the standards set out in that opinion. In amending a municipal Zoning Ordinance, it is the municipality and not the court which exercises the discretion deciding what the ordinance should or should not contain. The court may order a municipality to achieve Mount Laurel II compliance, but not at the expense of the due process rights of any property owners involved. Even in a Mount Laurel context, the rezoning process must include public

hearings or otherwise involve the owners of properties to be rezoned. Therefore, any prospective delay is reasonable and necessary and cannot be used as a basis for denying Harris Permission to intervene.

It is therefore submitted that Harris Structural Steel Company, Inc. be permitted to intervene in this action pursuant to R.4:33-2.

POINT II

THE JUDGMENT ORDERING SOUTH PLAINFIELD
TO AMEND ITS ZONING ORDINANCE DENIES
HARRIS DUE PROCESS OF LAW

In ordering the Borough of South Plainfield to amend its Zoning Ordinance so as to rezone the Harris property and other tracts exclusively for multi-family residential development, this Court eliminated any discretion in the Borough's later consideration of the specific contents of the amendments. Although Harris appeared at the public meetings held by the Borough for the purposes of redrafting the ordinance, Harris could not hope to accomplish anything because the Borough was limited by the Court as to what the amendments could contain, i.e. the Harris property had to be zoned exclusively for multi-family residential development. The meetings held by the Borough and Harris' appearances at those meetings were rendered mere formal technicalities.

The only place Harris could have been afforded due process was before this Court prior to entry of the Judgment ordering the Borough to amend its Zoning Ordinance. Harris could have participated and protected its rights in this case. But Harris was never notified of the Court's intention to render its Judgment, nor was Harris granted an opportunity to be heard in this matter. While Harris understands that the Judgment was entered on plaintiff Urban League's motion to enforce the Borough's

stipulation which specified the residential rezoning of lands of Harris and others, for the reasons set forth hereafter the Borough had no right merely to "agree" to rezone such lands, without notice to the property owners and a chance to be heard.

Correct

N.J.S.A. 40:55D-62a. (part of the Municipal Land Use Act) grants the power to adopt or amend a zoning ordinance to municipal governing bodies. The power is legislative in nature, Messer v. Burlington Tp., 172 N.J. Super. 479, 485 (Law Div. 1980), and the act of adopting or amending a zoning ordinance is quasi-judicial and discretionary, Centennial Land & Dev. Co. v. Tp. of Medford, 165 N.J. Super. 220 (Law Div. 1979). Through the Judgment in this case the Court has assumed a legislative power delegated to the municipalities by the Legislature to be exercised only after a public hearing with full opportunity to be heard. Harris has thus been denied due process of law; Harris had no opportunity to be effectively heard by the Borough of South Plainfield. As stated above, this is not a result intended by Mount Laurel II. See 92 N.J. at 281-90.

By preventing Harris from being effectively heard, the Court has circumvented the procedures established by the Municipal Land Use Act (N.J.S.A. 40:55D-9a.,b.) for the adoption or amendment of zoning ordinances. A municipality must follow those procedures and hold a public hearing if the amendment to the zoning ordinance is to be valid and enforceable. Ench v. Mayor

and Council of Pequannock Twp., 47 N.J. 535, 539 (1966); Suski, Jr. v. Mayor & Com'rs of Beach Haven, 132 N.J. Super. 158, 164 (App. Div. 1975); N.T. Hegeman Co. v. Mayor & Council of Borough of River Edge, 6 N.J. Super. 495, (Law Div. 1950).

The power to zone is an exercise of police power which the state has granted to all municipalities. This power must be exercised in a reasonable manner and not arbitrarily, discriminatorily or capriciously; and it must be exercised so as to secure the public health, safety, morals and welfare of the public.

A municipality in exercising the power delegated to it must act within such delegated power and cannot go beyond it. Where the statute sets forth the procedure to be followed, no governing body, or subdivision thereof, has the power to adopt any other method of procedure. Grogan v. DeSapio, 11 N.J. 308 (1953); Giannone v. Carlin, 20 N.J. 511 (1955). [Midtown Properties Inc. v. Madison Twp., 68 N.J. Super. 197, 207 (Law Division 1961), aff'd 78 N.J. Super. 471 (App. Div. 1963).]

Generally, the procedural steps required by statute are regarded as mandatory, and failure to abide by such requirements will invalidate a zoning ordinance. Attempts to exercise the local zoning requirements contained in the enabling statute have been considered to be ultra vires or a denial of due process. See Canton v. Bruno, 282 N.E. 2d 87 (Mass. Sup. Jud. Ct. 1976); also, Kelly v. Philadelphia, 382 Pa. 459, 155 A.2d 238 (Sup. Ct. 1955). [Pop Realty Corp. v. Springfield Tp. Bd. of Adj., 176 N.J. Super. 441, 454 (Law Div. 1980)].

The Judgment avoided entirely the procedures of N.J.S.A. 40:55D-9a.
and b. Although Harris ultimately appeared before the Borough

with respect to the amendment of the Borough's Zoning Ordinance, the Borough Council had surrendered its discretion and the hearing did not satisfy the procedures set forth in the Municipal Land Use Act.

The New Jersey Courts have considered analogous cases. In Midtown Properties, Inc. v. Madison Twp., supra, 68 N.J. Super. 197 (Law Div. 1961), aff'd 78 N.J. Super. 471 (App Div. 1963), the developer Midtown sued the Township of Madison for its refusal to approve a subdivision. 68 N.J. Super. at 202-03. The parties negotiated a settlement by which the necessary approval was guaranteed based on certain conditions. Id., at 203, 205. The settlement was incorporated into a consent judgment entered by the Court which ended Midtown's suit. Id., at 203. Madison thereafter moved to have the Judgment set aside. Id., at 201, 206. The Court held that the procedure followed by Madison was improper and not in accordance with the statutory method for exercising the zoning power. Id., at 207.

Another consent judgment directing a municipality to exercise its zoning power was entered on similar facts in Suski, Jr. v. Mayor & Com'rs of Beach Haven, N.J. Super. 158 (App. Div. 1975). That judgment was set aside, the court saying that "An ordinance cannot be amended, repealed or suspended by any act of a governing body of less dignity than that which created the ordinance in the first place. V.F. Zahodiakin, etc. v. Summit

Zoning Bd. of Adj., 8 N.J. 386 (1952); 6 McQuillin, Municipal Corporations (3 ed. 1969), §21.04 at 199." Id., at 164.

For the above reasons, Harris Structural Steel Company, Inc. submits that the amended Zoning Ordinance of the Borough of South Plainfield is invalid and must be set aside by this Court.

POINT III

SOUTH PLAINFIELD'S ZONING ORDINANCE AND THE
JUDGMENT OF THIS COURT SHOULD BE AMENDED TO
PERMIT THE CONSTRUCTION OF OFFICE BUILDINGS
ON THE HARRIS PROPERTY AS A BUFFER BETWEEN
THE HARRIS PLANT AND THE PROSPECTIVE LOWER
INCOME RESIDENTIAL DEVELOPMENT

Alternatively, Harris could be given an opportunity to be heard at this time. Harris has no objection to low and moderate income housing on its property should it decide to build there. But Harris objects to being restricted exclusively to the construction of a multi-family residential development. It is Harris' contention that the property is not entirely suited to residential development of any type and that the South Plainfield Zoning Ordinance amendments should permit the construction of office buildings as a buffer between the Harris steel plant and any prospective residential development. Specifically, the office building -- and not market rate housing -- can and would subsidize the Mount Laurel units. This would be consistent with Harris' development plans and the recommendations of Harris' planning consultants and would be more consistent with the industrial character of the area.

The property in question has been owned by Harris since the early 1900's. It is immediately adjacent to the Harris steel plant and receives the undesirable benefits of being located next to such a use. The Harris property was, prior to the Zoning Ordinance amendment, within an Industrial Zone and is surrounded

by industrial uses. In addition, a stream cuts across the property. The entire area of the property is not buildable because of wetlands and flood plain restrictions and because of restrictions due to poor soil conditions. In fact, environmental controls prohibit building on all of the property. Sound land use planning directs that residential development not be permitted on the entire area of the Harris property.

Mount Laurel II did not dismiss principles of sound land use planning when ensuring a realistic opportunity for the development of low and moderate income housing. Chief Justice Wilentz made the point

that sound land use planning and Mount Laurel should remain compatible both at the state and municipal level, and that, in particular, where fully developed municipalities are involved, great care may be required to assure that the benefit of Mount Laurel is not offset by damage to legitimate zoning and planning objectives. . . . A satisfactory resolution of the occasionally conflicting interests may at times require creativity and co-operation. [Mount Laurel II, 92 N.J. at 240n.15.]

Indeed, the Municipal Land Use Act permits zoning for the purposes of protecting the public health and welfare, promoting "a desirable visual environment through creative development techniques," and encouraging development incorporating "the best features of design and relat[ing] the type, design and layout of residential, commercial, industrial and recreational development to the particular site." N.J.S.A. 40:55D-2a., i. and k. See also

N.J.S.A. 40:55D-62a. ("The zoning ordinance shall be drawn . . . to encourage the most appropriate use of land."); State v. Miller, 83 N.J. 402, 409 (1980) ("a zoning ordinance may accommodate aesthetic concerns" (footnote omitted)); Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 610 (1980) ("aesthetic considerations are appropriate desiderata of zoning"); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 622 (1977) (Schreiber, J., concurring in part and dissenting in part) ("Environmental, ecological, geological, geographical, demographic, regional or other factors may justify exclusion of certain types of housing, be it two-acre or multi-family. See N.J.S.A. 40:55D-2c., i., j., k."). No one, not the rich, the poor nor those in between, would want to live directly next-door to a steel plant. It is suggested that the Court and the Borough of South Plainfield use the creativity afforded them in Mount Laurel II to prevent a residential development from being placed where no one cares to live.

This problem can be avoided in this particular case. Harris has been intending to construct office buildings on a portion of the property in question for some time but has no plans for entirely residential use. If the Court permits, these office buildings would act as a buffer between the steel plant and the residential development. Moreover, the office buildings could be planned so as to be appropriate for location next to a

residential development with respect to such aspects as height, set back, etc. Safeguards to insure that this housing would be built, such as a phase-in requirement, see Mount Laurel II, 92 N.J. at 270, could be employed. Thus, both plaintiff and the Borough of South Plainfield would be fully protected.

However, the mandatory set-asides included in the existing Judgment should also be changed if the Zoning Ordinance and the Judgment are to be modified. As it stands now, the Ordinance permits twelve units per acre on 84.8 acres making a total of almost 1,018 units. A twenty percent mandatory setaside of low and moderate income units results in almost 204 units reserved for those income groups. Harris asserts that the density and resultant setaside figures should be figured only on the property that remains available for residential development after elimination of the office and stream corridor areas. This is the proper calculation for Mount Laurel II purposes because the density should be figured only on the factor of the site which can be developed. Harris suggests two alternatives for lower income housing: units could be built on this site or they could be built off-site through such techniques as a contribution for rehabilitation of sub-standard housing, a contribution to the local Housing Authority or "piggybacking" on another project. In either case, Harris would subsidize its lower income housing effort with industrial/office buildings to be built on its site.

By modifying the judgment and ordinance as proposed, Harris will be afforded its right of due process in the rezoning of its property. Harris will then have participated as the Legislature intended in the rezoning process. It is therefore submitted that the Judgment herein and Zoning Ordinance of the Borough of South Plainfield be amended and modified as aforesaid.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Court (1) grant the motion of Plaintiff-Intervenor Harris Structural Steel Company, Inc. to intervene in this action, (2) declare the revised Zoning Ordinance of the Borough of South Plainfield invalid insofar as it limits the use of the Harris property exclusively to multi-family residential development, and (3) in the alternative, amend the Judgment herein and the Zoning Ordinance in accordance with the arguments set forth in Point III, above.

Respectfully submitted,

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Harris Structural Steel Company, Inc.

By: 

STEPHEN E. BARCAN, ESQ.

DATED: