Cranbury v. UL of Greater New Brunswick 4/4 (1985)

Letter memo in opposition to the petition of Cranbury asking the Supreme Ct to take ~~an~~ original jurisdiction to stay the Cranbury litigation.

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April 4, 1985

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c/o Stephen W. Townsend, Clerk
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CN-970
Trenton, New Jersey 08525

Re: Township of Cranbury v. Urban League of Greater New Brunswick, et al; Supreme Court; Docket No. 23830

Dear Honorable Justices of the Supreme Court:

We represent Lawrence Zirinsky, one of four plaintiff-land owners seeking a builder's remedy in on-going litigation against the Township of Cranbury. Please accept this letter memorandum in lieu of a formal brief in opposition to the Petition of Cranbury asking the Supreme court to take an original jurisdiction to stay the Cranbury litigation, and other litigation now in progress pursuant to Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) ("Mt. Laurel II"). This memorandum will rely upon the Supplementary Affidavit of Michael J. Herbert, Esq., who has participated in all aspects of the on-going litigation before the Honorable Eugene D. Serpentelli. We understand that co-plaintiff Urban League of Greater New Brunswick is filing a detailed affidavit with the Court in opposition to the Petition giving the long and tortuous history of this litigation, which dates back to July, 1974. In view of the comprehensive Urban League Affidavit, we are furnishing only a short Supplementary Affidavit, focusing upon some eggregious omissions in the petition and supporting documents dealing with Mr. Zirinsky's pursuit of a builder's relief, and the fact that one of the major elements of the pending petition, the status of the State Development Guide Plan (SDGP), was the subject of extensive trial testimony and was fully adjudicated by Judge Serpentelli in his letter opinion of July 27, 1984 (See Exhibit A to Herbert Affidavit).

COUNTERSTATEMENT OF FACTS

In the present petition before the Supreme Court, neither that petition, nor the supporting brief, acknowledges that all of the arguments that are being presented about the State Development Guide Plan (SDGP) were fully developed and litigated before Judge Serpentelli in April and May, 1984. Voluminous exhibits were presented into evidence, and several days of testimony were presented, including the testimony of Richard Ginman, the principal author of the SDGP; Middlesex County Planner John Sully; as well as interpretative testimony by Thomas March and George Raymond, planners for Cranbury. Based upon all that evidence, Judge Serpentelli reached the following conclusion:

> As should be evident from the fair share discussion above, I have rejected Cranbury's challenge to the State Development Guide Plan (hereinafter SDGP). Essentially, Cranbury argued that since the 1980 version of the SDGP, the Department of Community Affairs (hereinafter DCA) amended the concept maps, thereby characterizing less of the municipality as growth area. A reduction in growth area would lower Cranbury's obligation somewhat and might impact on the granting of a builder's remedy.
>
> Cranbury's argument fails for two reasons. First, the testimony at trial did not demonstrate that the SDGP was ever formally amended. Apparently, the DCA considered many possibile changes to the May, 1980 SDGP and summarized their comments in a document dated January, 1981. (J-8 in evidence). However, the process never progressed beyond mere general discussion and, in fact, Mr. Ginman did not recall any specific discussion of a change affecting Cranbury with the Cabinet Committee. Second, and more importantly, our Supreme Court has adopted the May, 1980 SDGP - not the subsequent alleged amendments. Indeed, the Supreme Court went as far as giving the 1980. SDGP evidential value. (Mount Laurel II at 246-47) Any informality in adoption of the 1980 edition of the SDGP is overcome by the

> Supreme Court's endorsement of it as a means of insuring that lower income housing would be built where it should be built. (Mount Laurel II at 225) (Exhibit A, p. 2,3).

Sadly, the petitioner failed to even mention this adjudication by the trial judge but instead now asks this Court to take original jurisdiction of the matter and consider evidence fully presented below, but never acknowledged in the moving papers before this Court. What is more troubling is that no attempt was made from the issuance of this decision of Judge Serpentelli on July 27, 1984 to the present time, to seek an appeal on this issue.

In referring to the Zirinsky litigation, petitioners portray a grossly distorted view of our client's position in this case. (See Danser Affidavit, Paragraph 7(d) and Db 6, 7, 42, 43). The petitioners would give the impression to the Court that Mr. Zirinsky has not made any specific proposal for the development of any of his lands and that he is somehow seeking relief on 1,800 acres of optioned property in Cranbury Township. In point of fact, after the issuance of the July 27th fair share decision by Judge Serpentelli, Zirinsky's planning consultants developed a detailed concept plan and narrative proposal for the development of only 144 acres of that level at 8 dwelling units per acre within close proximity to the northwest portion of the Village of Cranbury and entirely within the SDGP Growth Area. That detailed proposal was presented to the Planning Board and Municipal Council of Cranbury by Mr. Zirinsky's attorneys and planners on September 25, 1984. To date, Cranbury has not even addressed that concept plan, even though it has been in their possession for over six months. (See Exhibits B and C to Herbert Affidavit, setting forth the narrative portion of the developer's proposal and the official Minutes of the September 25, 1984 meeting).*

A word must be said about the extraordinary delay that Cranbury has created in this entire litigation. Despite a directive from Judge Serpentelli to develop a complying zoning ordinance by October 27, 1984, Cranbury sought and obtained a

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* Given the short time allowed for a response, the large Concept Plan maps could not be reproduced. However, the September 18 narrative does specify the contents of that proposal (Exhibit B, supra).

delay of 45 days and even ignored that extended deadline when it prepared and filed with the court in mid-December a "compliance Plan". (See Exhibit D to Herbert Affidavit) As noted, that compliance plan did not even address the concept plan presented by Mr. Zirinsky and other plaintiffs in this litigation.

Finally, it should be noted that on March 15, 1985 the very subject of the pendency of legislative action was raised by other plaintiffs in seeking a builder's remedy, before Judge Serpentelli. Even though the voluminous materials comprising this petition were apparently then in preparation, Cranbury never revealed their existence and apparently agreed with the trial judge that the pending legislative action could not be considered in determining whether such relief should be granted.

ARGUMENT

POINT I

I. This Court Lacks Original Jurisdiction Over This Matter.

Respondent Zirinsky believes that the petitioner's attempt to invoke original jurisdiction demonstrates that this proceeding is a political ploy rather than a serious legal effort. There simply does not exist in New Jersey a procedure by which Cranbury may file an original petition to the New Jersey Supreme Court seeking to overthrow an established proposition of substantive law. This is established by the case of In re LiVolsi, 85 N.J. 576 (1981). While Cranbury purports to rely on other portions of the LiVolsi opinion, it fails to mention the clear holding in this case that the Supreme Court exercises only appellate jurisdiction except in very narrow situations dealing solely with judicial procedure:

> "This Court is, of course, primarily an appellate body, N.J. Const. (1947), Art. VI, Sec. II, Par. 2. It could be argued that we are exclusively an appellate body because the only explicit grant of original jurisdiction to this Court comes from N.J. Const. (1947), Art VI, Sec. V, Par. 3, which permits original jurisdiction "as may be necessary to the complete determination of any cause on review." Plainly, this provision grants us original jurisdiction only over matters related to causes already before us." 85 N.J. at 582-583 (emphasis added)

This language completely refutes the petitioner's primary jurisdictional argument, in Point I of its brief, that this Court has jurisdiction over this matter under Article VI, Sec. 5, Par. 3 of the New Jersey Constitution. The Court has definitely held in LiVolsi that the original jurisdiction mentioned in that paragraph can be exercised only incidentally to the disposition to a case already under review. These proceedings which are admitted to be, and are captioned as, an independent petition, rather than a proceeding already under review, do not qualify under this paragraph of the Constitution.

Cranbury's resort to rule rule making powers in Art. VI, Sec. 2, par. 3 of the Constitution is equally without merit. This petition involves nothing more than an attempt to overthrow the substantive holdings in Mount Laurel II. The whole thrust of Cranbury's purported verified petition for original jurisdiction -- a totally unknown procedure in this State -- challenges the wisdom of the Mount Laurel II decision, which is called "disastrous" and "chaotic". Petition, paragraphs 25, 43. Moreover, specific request is made by paragraph 43, for reversal of an entire group of lower court fair share determinations, not just in the Cranbury matter, on the ground that these determinations are substantively inappropriate. Petition, paragraph 43.

Thus, the petition does not deal with the practice of law, as did the LiVolsi proceeding, or even the regulation of the court system. It is not addressed to this Court's legislative power, compare In re Gaulkin, 69 N.J. 185, 188 (1976), but rather to its power to define and enforce substantive constitutional law. Any attempt to shoehorn this petition under the rule making jurisdiction of this Court is therefore baseless.

Further, it is obvious that Cranbury's attempt to confuse rule making powers on the one hand with the definition and enforcement of constitutional responsibilities on the other, will have severe results if accepted. Cranbury's position would have this Court exercise general original juridiction in every case involving attempts to affect the definition of constitutional rights, their enforcement and the remedies therefor. Such a result is totally inconsistent with the limits on this Court's original jurisdiction in LiVolsi. Thus, Cranbury's attempt to use the rule making powers to overthrow a substantive constitutional decision must be recognized as a totally unwarranted grounds for the procedural rule making jurisdiction of the Court.

Cranbury's third jurisidictional basis, the supposed inherent powers of this Court, is equally without merit. The original jurisdiction of this Court is limited strictly to procedural matters or to the exercise of powers needed to decide a case already before the Court on review. LiVolsi, supra. No further inherent power exist in this Court. Such general inherent powers, to the extent they exist, are found in a Superior Court which, under our State Constitution, has alone been given original general jurisdiction to decide all cases. Article VI, Sec. 3, Par. 2.

Based on the above, it is clear that Cranbury's attempt to invoke the original jurisdiction of this Court lacks merit to the point of being frivolous. Simply, no such proceeding exists in New Jersey. It is interesting in this connection to note that, somehow, New Jersey practitioners have in thirty seven years never sought to initiate a proceeding such as this because they always instinctively respected the proper place of the Supreme Court in our 1947 Constitution. It is possible that New York counsel has found something in the New Jersey Constitution that neither the bar or the bench or this Court imagined existed for almost four decades! Nonetheless, it is strong evidence of the insubstantiality of this proceeding that nothing like it has ever been filed in his State since the judicial article was adopted in 1947.

The lack of any precedential or constitutional support for this proceeding is not the only evidence demonstrating Cranbury's resort to this petition is a publicity gimmick without any substance to it whatsoever. In addition, the petition and brief itself utterly misstate Mount Laurel in assserting that the petition was justified because other remedies for trial error were unavailable to Cranbury. Mount Laurel II does not, as petitioner claims, Pb18-1 to 10, bar interlocutory review. The pages cited by petitioner clearly state that in "unusual circumstances stays may be granted either by the trial or appellate courts and interlocutory appeals taken (or attempted)." 92 N.J. at 290-291 (emphasis added). This Court will never know whether the Cranbury situation presented one of these "unusual" cases. That is because Cranbury has never even to this date sought either a stay or leave to appeal. It did not make such an application when, in July 1984, Judge Serpentelli made the fair share determination now so bitterly criticized by Cranbury. Rather, Cranbury sought from the trial court and obtained, over the objections of Zirinsky and the other plaintiffs, additional time to prepare its compliance program. Nor did Cranbury make any effort to seek a stay or leave to appeal after filing its compliance program. To this date,

Cranbury has not taken those steps. Rather, it waited almost until the time that the report of the court appointed master was due, before filing this petition.

Moreover, petitioner never explains why it iqnores the main remedy available to it if the trial court decision is not to its liking, namely, the normal remedy of appeal to the Appellate Division following conclusion of the case. If Judge Serpentelli orders a result which does all the horrible things that Cranbury claims in its petition, then either the Appellate Division or this Court can grant Cranbury a fully adequate redress of its grievances. The presence of this remedy would appear to be patently obvious and sufficient. Yet, Cranbury totally ignores this, in its haste to invoke the jurisdiction of this Court and try this case by affidavit.

It just may be that Cranbury realizes that the facts set forth in its affidavits will not withstand the scrutiny of the trial court based on the report of the master, cross examination of Cranbury's witnesses and the direct testimony of the planning and other experts to be produced by plaintiff Zirinsky and other plaintiffs before Judge Serpentelli. To Cranbury, this normal appeal has a fatal flaw -- it fails to prevent scrutiny of Cranbury's conduct by creation of a trial record. To avoid such scrutiny, Cranbury would turn the constitutional system of this State on its head. It would try this case in the Supreme Court just at the point that this Township will finally be held accountable for its continued violation of this State's Constitution.

It becomes obvious that Cranbury is trying to use this procedure, and the attendant public pressure it hopes that it will generate, to stall trial court action. It does this just at the point at which, after eleven long years of litigation, the trial court may be poised to enter an order which will actually provide for some of the low and moderate income housing that Cranbury has so doggedly resisted throughout this time. In other words, having tried the stall, rezone and reappeal technique now barred by Mount Laurel II, 92 N.J. at 290, and having recognized that it probably lacked any justification to ask for a stay via the existing and still available R. 2:9-5, Cranbury now hopes that after eleven years it still can avoid its constitutional responsibilities by using public pressure and a total unknown original jurisdictional procedure to force the Supreme Court of this state to descend from Mount Laurel.

There is a potential for disastrous mischief in this situation. This petition attempts to demonstrate that this Court

is willing to open new procedural avenues without precedent so that parties backed by powerful political interests can avoid the normal course of trial scrutiny. In effect,the petition seeks to undercut the integrity of the judicial system in this State and chill the enforcement of constitutional rights in New Jersey, by allowing a defendant to avoid a trial. For this reason, therefore, as well as because of the lack of any substantial merit in this petition, the Supreme Court should deny jurisdiction over this matter, and remand Cranbury to its more than adequate remedy before the trial courts specially designated by this court to hear this matter.*

POINT II

Petitioner Has Inaccurately Stated The Law as to Use of The SDGP After January 1, 1985

Both the petition and the brief allege that use of the SDGP is improper since January 1, 1985 has passed. See, e.g., Petition, Paragraph 41 and Brief, Point IV-A. A stay is sought pending revision of the SDGP on the ground that the "outdated" document should not be used. These contentions lack merit.

First, Mount Laurel II clearly anticipated the use of the SDGP after January 1, 1985. See 92 N.J. at 242. Its response was to give the trial courts "considerable discretion" to vary the SDGP's lines after that date. Id. See also 92 N.J. at 248, Note 21. This procedure is clear enough. It provides no justification for a stay pending revision of the SDGP.

Second, the fair share determination in Cranbury was made well before the deadline. Therefore, Judge Serpentelli's use of the SDGP was totally and completely within the guidelines established by the Court. Such timely use of the SDGP provides no basis for a supercession of the proceedings before him by the extraordinary exercise of original jurisdiction.

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* The petition, but not the brief, mentions a so called implied retention of jurisdiction under Mount Laurel II as an additional ground for the court's ability to hear this matter. In any event, Mount Laurel II rebuts any contention of implied retention of jurisdiction. The Supreme Court's opinion concludes that "in all cases the remand is to the trial court for further proceedings consistent with this opinion." 92 N.J. at 353. Given this remand, jurisdiction was not retained.

POINT III

The Many Factual Contentions Made in This Petition Should Be The Subect of Trial Scrutiny Rather Than Appellate Review

As noted, one of the principal contentions made in the petition before the Court is that the 1981 recommended changes to the SDGP should be adopted so as to supervene the July, 1980 document. Even though the extensive petition, and supporting materials to the petition, ignore the fact that this very argument was presented in detail before Judge Serpentelli in the Spring of 1984 and was fully adjudicated by that Trial Judge, they ask this Court to somehow determine that question on the basis of self-serving affidavits.

In addition, the Petition makes a number of other claims dealing with such factors as agricultural preservation; the preservation of historical sites; environmental; sewerage; traffic and other detailed factors, totally ignoring the fact that these very questions are now being reviewed by the Master, who was appointed by Judge Serpentelli. That Master is expected to issue his report momentarily. In addition, the petitioner fails to advise the Court that once that Master's report has been presented, a full adversarial hearing will be conducted by Judge Serpentelli to consider all of these factors. Only after these factors have been considered will the Trial Judge consider and adjudicate the question of builders' remedies among the various plaintiffs before the Court, including Zirinsky. Yet, the Petition askes the Supreme Court to circumvent that process and completely undermine the carefully crafted case management arrangements developed by Judge Serpentelli, with the full concurrence of all trial litigants, including Cranbruy's counsel.*

This petitioner seeks a stay of any builder's remedy even before the trial court has had an opportunity to consider

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* In point of fact, on March 15, 1985, Judge Serpentelli denied a builder's remedy to the plaintiffs in this case, holding that any such relief would have to await the receipt of the Master's Report and a full compliance hearing. Unfortunately, Cranbury does not reveal this previous ruling, which completely undermines pleas for emergent relief to stay a builder's remedy.

any evidence on that question, including the Master's report. It is inconceivable to believe that Cranbury will be harmed in any way, unless it is fearful of having its many predictions of doom exposed to a proper adversarial proceeding and an orderly adjudication by the Trial Judge. If builder's remedies are issued, then this municipality can appeal with a proper trial record. For this Court to take original jurisdiction and to consider such complex matters as traffic and environmental issues based on Affidavits would undo all of the progress in this litigation over the past year and would give Cranbury still further time to forestall meeting its clear constitutional obligation; an obligation it has successfully avoided for over eleven years.

In Mt. Laurel II, the Court observed that there were other municipalities who could be viewed in the same vein as that Burlington County community. This Petition demonstrates why Cranbury should be at the top of that list:

> ...The Mount Laurel case itself threatens to become infamous. After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. ...(92 N.J. 198)

CONCLUSION

For the aforesaid reasons it is respectfully urged that the Court dismiss the Petition for a stay and other relief, so as to allow the Cranbury litigation to proceed to an appropriate compliance hearing before the trial court.

Respectfully submitted,
STERNS, HERBERT & WEINROTH, P.A.

BY: Michael J. Herbert
Michael J. Herbert

DATED: April 4, 1985