ML Piscataway 1-May-84

Memo in Support of Motion for Leave to file amended Complaint and for temporary restraining order and Interlocutory Injunction.

pgs = 8

notes: "Use new brief from ~~Riedhahl~~ Riedhahl", "not this one"

MLCC0535D

ML000535D

5/1/84 brief

ERIC NEISSER, ESQ.
JOHN PAINE, ESQ.
Constitutional Litigation Clinic
Rutgers Law School
15 Washington St., Newark, N.J. 07102
201/648-5687

BRUCE S. GELBER, ESQ.
JANET LA BELLA, ESQ.
National Committee Against
Discrimination in Housing
733 - 15th St. NW, Suite 1026
Washington, D.C. 20005
202/783-8150

ATTORNEYS FOR PLAINTIFFS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-MIDDLESEX COUNTY

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, et al.,

Plaintiffs,

vs.

THE MAYOR AND COUNCIL OF
THE BOROUGH OF CARTERET,
et al.,

Defendants.

Docket No. C 4122-73

Civil Action

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT AND FOR TEMPORARY RESTRAINING ORDER
AND INTERLOCUTORY INJUNCTION

In this motion, the Urban League plaintiffs seek to preserve their opportunity for adequate and appropriate relief against the defendant Township of Piscataway, by restraining the township's Planning Board from taking action that might irrevocably divert vacant and developable land in the township to non-Mount Laurel purposes. Such action is threatened as early as May 9, 1984.

Background. Both the court-appointed expert, Catla Lerman, and the plaintiffs[1] expert, Alan Mallach, have determined that Piscataway's fair share obligation is in excess of 3,000 units of low and moderate income housing. Affidavit of Alan Mallach, K 2 . There is insufficient vacant and developable land in Piscataway to completely satisfy an obligation of this magnitude. Mallach Affidavit, If 4 .

Notwithstanding these facts, and despite the township's frequent assertion of its inability to meet the experts' fair share numbers, the township has undergone substantial growth in the recent past, and continues to experience substantial growth at this time. None of this growth has provided low and moderate income housing opportunities; indeed, by concentrating on commercial and office structures, it has served to exacerbate the need for affordable housing in the township. The township's growth policy, which has required the active participation of the governing body and the planning board, vividly demonstrates Piscataway's insensitivity to its Mount Laurel obligations.

The Planning Board of the Township of Piscataway now has before it several development applications that concern vacant and developable land suitable for low and moderate income housing development. Affidavit of Bruce Gelber, Esq.,1(1f 7,12 & 17.The planning board has scheduled public hearings for May 9 and June 13 involving one or more of these applications, and could act upon the applications as soon as the hearing has occurred.

Against this background, the Urban League plaintiffs submit that

approval of the pending applications will cause it irreparable harm. They ask that the Court restrain all action with respect to these applications pending the completion of the Urban League trial, and that the complaint in this action be amended to add the Piscataway Planning Board as a necessary party, R. 4:28-l(a), in order to achieve this just and equitable result.

Temporary restraints. The familiar standard which plaintiffs must meet in order to obtain the temporary relief sought was recently 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", id. at 133, 447 A.2d at 177; [an]<*

2. Irreparable harm, not adequately redressable by money damages; and

3. A relatively greater harm to the plaintiff if relief is denied than to the defendant if relief is granted.

Plaintiffs amply meet these tests.

Probability of success. Even in this disputatious litigation, it presumably goes without saying that plaintiffs[1] Mount Laurel theory is legally valid. It is virtually as certain, moreover, that plaintiffs will prevail on the merits after trial and that Piscataway will be found still to be in non-compliance with Mount Laurel II. The township has acknowledged, indeed has vigorously asserted, that it has very little land available to satisfy low and moderate income housing needs. Both the court-appointed expert and plaintiffs[1] expert have concluded that Piscataway[T]s numerical fair share obligation is in excess of 3,000 units, a number so large that any modifications in the fair share methodology are highly unlikely to result in a number so much lower that it would relieve Piscataway of all further compliance obligations.

Irreparable harm. Given the probable size of Piscataway's fair share number and the limited amount of vacant and developable land, it is obvious that any action taken to remove otherwise suitable land from the remedial reach of the Court and its Master in the compliance phase of this action will undermine the Urban League plaintiffs* ability to achieve complete relief. Moreover, alternative money damages are wholly inappropriate in a case of this sort.

Approval of the pending applications will for all practical purposes make these parcels unavailable for Mount Laurel purposes. N.J.S.A. 40:55D-49(a) provides:

> a. That the general terms and conditions on which preliminary approval was granted shall not be changed, including but not limited to use requirements; layout and design standards for streets, curbs and sidewalks; lot size; yard dimensions and off-tract improvements; and, in the case of a site plan, any requirements peculiar to site plan approval pursuant to subsection 29.3 of this act; except that nothing herein shall be construed to prevent the municipality from modifying by ordinance such general terms and conditions of preliminary approval as relate to public health and safety.

This language vests a developers right to the approved "use," thus precluding a rezoning from commercial to residential, or from a single-family to multi-family, uses. It would also apparently preclude any revision of the approval to include low and moderate income housing as a component of the proposed developments or to require a financial contribution to other housing development elsewhere in the township in lieu thereof. Although the statute speaks to "general terms and conditions," this language has been interpreted to mean any basic or fundamental aspect of the project for which preliminary approval is granted. The theory is that the central purpose of

the vesting requirement is financial, and prohibits the municipality from upsetting the developer's legitimate investment expectations thereafter. See Hilton Acres v. Klein, 64 N.J. Super. 281, 165 A.2d 819 (App. Div., 1960), aff'd, 35 N.J. 570, 174 A.2d 465 (1961)^(increase in minimum lot size prohibited). Although there is no case law directly in point, whether a proposed development is a Mount Laurel or non-Mount Laurel one would seem to fit within the Hilton Acres concept of a "basic" or "fundamental" aspect of the developer's thinking, since the Mount Laurel development ordinarily requires the developer's willingness to provide an internal subsidy to the below-market Mount Laurel units.

Plaintiffs recognize the "health and safety" exception to §49(a), and agree that a change in the conditions of preliminary approval, if justified on Mount Laurel grounds, could arguably fit within this exception, since Mount Laurel II establishes a general welfare obligation of constitutional dimension. Indeed, plaintiffs will vigorously join issue on this question at an appropriate time, if necessary, but submit that the novelty and difficulty of the question makes it inappropriate to decide in the context of the request for immediate and temporary relief that is now before the Court. There is no case law guidance on this issue, the facts are speculative at this time, and the issue deserves substantial briefing. It is manifestly inconsistent with the theory on which temporary relief is available to deny such relief because an as-yet untried theory might at some indefinite future time afford plaintiffs an alternate mechanism to avoid irreparable harm. Within any reasonable time frame, the harm done to plaintiffs should preliminary approvals now be granted and rights vest is harm that is manifestly irreparable.

Balaneing of harms. The defendants, as public bodies, would suffer little, if any, harm should temporary relief be granted, since their role is that of a regulator rather than a principal. Their only possible claim would be that the failure to approve or disapprove the pending applications within the 45 or 95 day periods specified in the Municipal Land Use Law subjected them to the statutory sanction of mandatory approval. See N.J.S.A. 40:55D-48(c). This procedure was incorporated into the MLUL to prohibit municipalities from effectively denying applications by not acting on them, an abuse that had led to much difficulty under the prior laws. A court-mandated hiatus in the approval process would obviously not serve as a basis on which to invoke the automatic approval language of the MLUL.

Assuming that the developer-applicants are entitled to have the possible harm to them also considered in the balance, the balance still remains overwhelmingly in the plaintiffs' favor. As a matter of law, the applicants are not entitled to approval simply because their applications are complete and pending, and they could be disapproved by the planning board on grounds unrelated to the present action. More importantly, however, trial is already underway in this action and the temporary restraints are likely to last for at most a period of several months, until judgment is reached and a compliance order determined. While any delay represents a realizable cost when financial issues are at stake, plaintiffs submit that such harm is no more than a tiny fraction of the harm done by the total and complete destruction of plaintiffs* interest in securing the maximum degree of compliance with Piscataway's fair share obligation.

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 interest that is overwhelming in their direction.

In order to prevent the substantial injustice that Piscataway's pending approvals would create, it is necessary that the underlying Urban League complaint be amended to join the Planning Board of the Township of Piscataway as a necessary party pursuant to R. 4:28-l(a). While leave to amend is properly placed in the discretion of the Court, Kent v. Borough of Mendham, 111 N.J. Super. 67, 267 A.2d 325 (App. Div., 1970), leave should be liberally granted, Gibson v. 1013 North Broad Associates, 172 N.J. Super. 191, 195, 411 A.2d 711 (App. Div., 1980). Nor should the unusual length of time that has elapsed since the initial complaint in this matter deter a reasonable amendment.

"[The discretion of the court is to be] exercised in light of the factual situation actually existing at the time the application is made." Associated Metals v. Dixon Chemical, Inc., 52 N.J. Super. 143, 150-151, 145 A.2d 49, 53 (Ch. Div., 1983). "Thus, to enable the court to do complete justice, new matters existing at the time of filing the bill may be inserted, new parties added, irrelevant matter stricken out, and unnecessary parties omitted" Codington v. Mott, 14 N.J. Eq. 430, 432, 82 Am. Dec. 258 (Ch. Div. 1862). See also Jersey City v. Hague, 18 N.J. 584, 115 A.2d 8 (1955), "formal amendments in the prayer of the bill, to meet the exigency of the case, will be made up to and after the final hearing." Codington, supra, at 432. It is the very passage of time, in light of the protracted procedural history of this litigation, that makes it both necessary and equitable to now join the planning board as a party for the limited purpose of securing for the plaintiffs the relief to which they are amply entitled under the remand order in Mount Laurel II,

The planning board's status as a necessary party under Rule 4:28-1(a) is amply demonstrated by the Amended Complaint, the supporting affidavits, and the arguments in this Memorandum of Law. The necessity of temporary restraints is equally demonstrated by the pattern of indifference to its Mount Laurel obligations that Piscataway has shown.

Bated: May 1, 1984

BRUCE GELBER
JANET LA BELLA
ERIC NEISSER
JOHN PAYNE
15 Washington Street
Newark, New Jersey 07102
201/648-5687
ATTORNEYS FOR PLAINTIFFS