ML - Morris County Fair Housing Council v. Boonton

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Brief in opposition to motion of Mt. Hope Mining for Consolidation and in opposition to motion of Mt. Hope Mining to intervene

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MORRIS COUNTY FAIR HOUSING COUNCIL, et al. Plaintiffs, v. BOONTON TOWNSHIP, et al. Defendants.	SUPERIOR COURT OF N.J. LAW DIVISION MORRIS/MIDDLESEX COUNTY DOCKET NO. L 6001-78 P.W.
MT. HOPE MINING COMPANY, etc., et al. Plaintiff, v. TOWNSHIP OF ROCKAWAY, etc. et al. Defendant	SUPERIOR COURT OF N.J. LAW DIVISION MORRIS/MIDDLESEX COUNTY DOCKET NO.

BRIEF IN OPPOSITION TO MOTION OF MT. HOPE MINING FOR CONSOLIDATION AND IN OPPOSITION TO MOTION OF MT. HOPE MINING TO INTERVENE

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STATEMENT OF THE CASE

In 1977 the New Jersey Public Advocate commenced an action on behalf of himself, The Morris County Fair Housing Council and the N.A.A.C.P. against The Township of Rockaway and twenty-six other municipalities alleging that the municipalities had not complied with their constitutional obligation, under Mount Laurel I, to allow zoning for the construction of low and moderate income housing. See Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 152 (1975); Borough of Morris Plains v. Department of Public Advocate, 169 N.J. Super 403 (App. Div. 1979), certif. den. 81 N.J. 411 (1979). Six years of litigation, and the vast expenditure of finite judicial and governmental resources, ensued. In 1983 the New Jersey Supreme Court reaffirmed its Mount Laurel I holding that the state constitutional requirements of substantive due process and equal protection demand that municipal land use regulations provide an opportunity for the construction of low and moderate income housing. South Burlington N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158 (1983) (Mount Laurel II). The Court expressed its' frustration with the almost incredible expense and duration of

Mount Laurel litigation and with the concomitent delays in implementing constitutionally sound zoning regulations. The Court declared that:

> [T]he obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals. [92 N.J. at 199]

Extensive negotiations between Rockaway Township and the Public Advocate's office followed this decision, throughout which detailed municipal zoning plans were proposed, studied, reviewed and submitted to the Public Advocate for its input and approval.

In addition, the site-specific zoning proposals contained in the settlement were fully incorporated in the Township's proposed 1984 Master Plan. The new Master Plan was made available to the public in December 1983 and subjected to extensive public hearings before the Rockaway Township Planning Board on January 30 and February 13, 1984. Mt. Hope Mining was represented by Mr. Einhorn at these public hearings and Robert Catlin, the Township's Planner, answered numerous questions posed by Mt. Hope Mining regarding the details of the proposed zoning of its tract. At no time did it raise any objection to the proposal. The zoning proposals, including density provisions,

contained in that Master Plan are identical to those contained in the proposed settlement which is before the Court.

These negotiations and hearings resulted in an agreement for settlement between the Township of Rockaway, and the Public Advocate designed to ensure a realistic opportunity for the construction of the Township's fair share of lower income housing. As part of the settlement, the Township agreed that 1,135 units of low and moderate income housing constitute its fair share of indiginous and regional need. The implementing zoning ordinance, to the extent it is reasonably possible to do so, ensures that this housing will be constructed. The ordinance does so while attempting to retain fidelity to other legitimate zoning concerns, including sensitivity to the hazards of environmental degradation. The Public Advocate and the Township of Rockaway applied to this Court, in accordance with procedures established by it for approval of settlement agreements, so as to secure the entry of a "judgment of compliance" in favor of Rockaway Township upon which the settlement is conditioned.

On May 25, 1984 the Court in a written opinion established the procedural framework by which it would proceed in order to determine whether or not to enter a judgment of

compliance on the basis of an agreed upon settlement. [1]

On July 24, 1984 this court entered an order setting a hearing date and approving a means of notice of the settlement to other interested parties. By the terms of that order, any person wishing to object to the proposed settlement was required to submit written objections and materials by August 31, 1984. Prior to that date, Mt. Hope Mining Company requested and obtained and extension of that deadline to September 30, 1984.

On September 21, 1984, Mt. Hope Mining Company instituted an action in lieu of prerogative writs alleging, among a host of other things, that the settlement agreement does not provide a reasonable opportunity for the construction of low and moderate income housing units in Rockaway Township and, more specifically, that the settlement does not provide for construction of a sufficient number of units on their property. Mt. Hope Mining Company then moved to consolidate their prerogative writ action with the already settled Morris County Fair Housing case and, alternatively, moved to be permitted to intervene.

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1 The entry of a judgment of compliance is important to municipalities, which require assurance that settlement will provide a respite from litigation and permit the long range planning "required to implement compliance with Mount Laurel" (May 25, 1984 opinion at 7). It is the vindication of rights of low and moderate income persons that is the issue in Morris County Fair Housing and the issue to be decided at the hearing on the judgment of compliance. Neither Mount Laurel I or II recognized any constitutional right of developers or landowners to maximize profits or to use their lands to the greatest possible extent regardless of whether housing considerations require it.

POINT I

THE MT. HOPE MINING ACTION SHOULD NOT BE CONSOLIDATED WITH THE MORRIS COUNTY FAIR HOUSING CASE

Subsequent to execution of the settlement agreement between Rockaway Township and the plaintiffs in Morris County Fair Housing Council, et al. v. Boonton Tp., et al. (hereinafter "Morris County Fair Housing"), Mt. Hope Mining Co. and its parent company, Halecrest Company, instituted an action against the Township of Rockaway and various officials alleging interference with economic advantage, deprivation of property, conspiracy to violate various civil rights, unconstitutionality and arbitrary application of tree removal and soil removal ordinances, and exclusionary zoning under Mount Laurel. Mt. Hope Mining has now moved to have their recently filed action consolidated with the already settled Morris County Fair Housing case.

Mt. Hope Mining maintains that their action falls within the purview of permissive consolidation of actions permitted under R. 4:38-1. Rule 4:38-1 permits consolidation of actions "involving a common question of law or fact arising out of the same transactions or series of transactions...." The object of the rule is to foster the interests of justice and judicial economy by permitting litigation of an entire controversy as a single unit, thereby expediting conflict resolution while minimizing duplication of effort. see 2

Schnitzer and Wildstein, N.J. Rules Service AIV - 1499.[2] In order to make certain that the underlying purposes of the rule are served, the decision as to whether to consolidate actions is discretionary. see Hammer v. Hammer, 36 N.J. Super 265, 273 (App. Div. 1955); Chatham Condominium Ass'n v. Century Village, Inc., 597 F.2d 1002, 1013-1014 (5th Cir. 1979). see generally, Mutual Life Insurance Co. v. Hillman, 145 U.S. 285, 292 (1892). Both the purpose and the letter of R. 4:38-1 would be violated by consolidation of these actions.

A. The Motion To Consolidate Should Be Denied Because It Raises Legal And Factual Issues, Unrelated To The Main Action, Resolution Of Which Would Result In Substantial Delay.

The New Jersey Court Rules permit a court to consolidate actions involving a common question of law or fact. However, consolidation should not be ordered when "the result will be to bring about a complication of issues of fact, ... delay in the trial, [or would create] difficulty in presenting or applying the law to the evidence...." 1 Am. Jur. 2d, Actions §158 at 670.

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2 Rule 4:38-1 is similar to Fed. R. Civ. P. 42(a). Therefore, federal case law under this rule, while not dispositive, may provide guidance in applying the New Jersey rule. Cf. Riley v. New Rapids Carpet Center, 61 N.J. 218 (1972). Federal cases will be cited, when appropriate, throughout this brief.

In the first count of its complaint, Mt. Hope Mining alleges that there is "no realistic possibility" that the 1,135 units of low and moderate income housing units will be constructed in Rockaway Township, and requests, inter alia, that the court declare the settlement null and void, appoint a Special Master to develop zoning and land use regulations for Rockaway Township, and grant Mt. Hope Mining a "builder's remedy."[3] This is only part of the first count of an eight count complaint. The other counts include allegations that

- The proposed zoning amendment constitutes a public taking of the Mt. Hope Pond area owned by Mt. Hope Mining, and that Rockaway's action is arbitrary, capricious and unreasonable (Second Count).

- Restriction of the use of the Mt. Hope Mining property has been perpetrated "through discriminatory enactment and enforcement of zoning ordinances" as part of a "conscious plan to prevent and thwart plaintiffs from making any reasonable use of the premises..." (Third Count).

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[3] Parties asserting Mount Laurel rights "are granted standing not to pursue their own interests, but rather as representatives of lower income persons whose constitutional rights allegedly have been violated by exclusionary zoning." (May 25, 1984 opinion, at 5-6). Insofar as Mt. Hope Mining might wish to assert its own "right" to a builders remedy, it is apparant that a builder who brings an action after settlement of a Mount Laurel action did not "succeed" in vindicating Mount Laurel rights. See May 25, 1984 opinion, at 14. Accordingly, Mt. Hope Mining is not in a position to assert entitlement to a builder's remedy.

- The zoning amendment "as well as the aforesaid Soil Removal Mining and Tree Removal Ordinance...represent an illegal and improper use of the zoning power...represent an illegal delegation of municipal power, are void for vagueness, forbid conduct far beyond the public need for protection, are incapable of being enforced on a uniform and equal basis...[and are] in violation of the...due process and equal protection clauses of the United States Constitution" (Fourth Count).

- Rockaway's refusal to rezone Mt. Hope Mining's property "after numerous requests over the years by plaintiffs, constituted public taking" in violation of New Jersey and federal law (Fifth Count).

- Enforcement of the zoning, soil removal, mining and tree removal ordinances should be temporarily and permanently enjoined (Sixth Count).

- Mt. Hope Mining's rights under 42 U.S.C. §1983 have been violated (Seventh Count).

It is apparent that seven of the eight counts are completely unrelated to the substance of the Morris County Fair Housing action. The hearing provided for in this Court's May 25, 1984 opinion will provide Mt. Hope Mining with an opportunity to object regarding the only related count.

Litigation of these issues, many of which raise claims involving complex issues of law and fact, would prolong judicial consideration, and substantially delay implementation, of Rockaway's Mount Laurel obligation. While such delay is in itself sufficient ground upon which to deny a motion to consolidate, such additional delay would be particularly

egregious in this case, as it would undermine the express goal of the Supreme Court in Mount Laurel I and II that the constitutional right to housing opportunity be realized as soon as possible. As forcefully stated by the Court, "[t]he obligation is to provide a realistic opportunity for housing, not litigation." 92 N.J. at 199. Any objection Mt. Hope Mining has to the proposed settlement can be presented at the hearing on the propriety of entering a judgment of compliance. The other legal and factual issues are wholly extraneous and will substantially delay a judicial decision on the merits. Consolidation is therefore improper.

B. Mt. Hope Mining's Motion Should Be Denied As Untimely

It has long been held that an untimely motion to consolidate actions, or one that would result in substantial delay to one of the actions, should be denied. see, e.g., Tucker v. Arthur Anderson & Co., 73 F.R.D. 316, 317-318 (S.D. N.Y. 1976); Shooters Island Shipyard Co. v. Standard Shipbuilding Corp., 4 F.2d 101 (3rd Cir. 1925). In La Chemise Lacoste v. Alligator Company Inc., 60 F.R.D. 164 (D.C. Del. 1973), the court declined to consolidate a three year old case which was close to trial with a recently filed action because the disposition of the earlier case would have been delayed. 60 F.R.D. at 176.

Mt. Hope Mining's motion to consolidate is untimely in two ways. First, it is untimely in that it would result in delay of approval or denial of entry of final judgment in the *Morris County Fair Housing* case (see Point IA, above). It is also untimely because the action with which they seek to consolidate has already been settled; the parties to that action having settled months before the Mt. Hope Mining action was instituted. Consolidation of an already settled action with a pending one is inappropriate. All that remains for this court in the *Morris County Fair Housing* action is to evaluate whether the settlement conforms the Township's zoning regulations to the constitutional mandate set forth in *Mount Laurel II*.

POINT II

MOUNT HOPE MINING SHOULD NOT BE AFFORDED TRADITIONAL INTERVENOR STATUS UNDER RULE 4:33

Mt. Hope Mining has also moved to be permitted to intervene in the Morris County Fair Housing action, either as of right under R. 4:33-1, see Vicendes v. J-Fad, Inc., 160 N.J. Super. 373, 378-379 (Ch. Div. 1978), or as a permissive intervenor under R. 4:33-2.

A. Mt. Hope Mining's Interests Are Adequately Protected

Under R. 4:33-1 an applicant shall be permitted to intervene only where the applicant claims an interest in the property involved in the litigation and "disposition of the action may as a practical matter impair or impede his ability to protect that interest." Where the applicant's interest is adequately represented or protected, however, he does not have the right to intervene. see, e.g., United States v. State of Louisiana, 669 F.2d 314, 315 (5th Cir. 1982).

Pursuant to this Court's ruling of May 25, 1984, a special hearing will be held to determine whether the settlement adequately protects the interests of the persons on whose behalf the action was brought. (May 25, 1984 opinion at 11). Mt. Hope Mining, as well as other members of the public, have been notified of the settlement. Mt. Hope Mining will

have an opportunity to be heard, to present evidence and to record its objections. The court will then decide whether the evidence presented supports a determination that the proposed settlement is "fair and reasonable." Id. at page 12. Whatever arguments Mt. Hope Mining wishes to present relative to the vindication of the rights of low and moderate income persons may be presented at that time. Because Mt. Hope Mining's rights are adequately protected in it's capacity as an objector at the judgment of compliance hearing, it has neither the right nor the need to intervene under R. 4:33.

B. Mt. Hope Mining's Application To Intervene Should Be Denied Because It Is Not Timely.

Rule 4:33 grants interested persons the right to intervene in an action, but only "upon timely application." The conditioning of the right to intervene upon timely application is based upon considerations of judicial economy and upon considerations of fairness. In Hanover Tp. v. Morristown, 118 N.J. Super. 136 (Ch. Div. 1972) the court stated:

> An essential prerequisite to intervention is timeliness, which should be equated with diligence and promptness. One who is interested in pending litigation should not be permitted to stand on the sidelines, watch the proceedings and express his disagreement only when the results of the battle are in and he is dissatisfied. [at 142].

See also Clarke v. Brown, 101 N.J. Super 404, 411 (Law Div. 1968). Accord, Merin v. Commonwealth Edison Co., 74 Ill. App. 3d 964, 30 Ill. Dec. 923, 393 N.E. 2d 1269 (1979); Inryco Inc. v. Helmark Steel, Inc., 451 A.2d 511 (Pa. Super. 1982).

The Federal courts have articulated a number of factors to be considered in determing whether an application to intervene is timely. Culbreath v. Dukakis, 630 F.2d 15, 20-24 (1st Cir. 1980). These factors include the length of time during which applicants should have known of their interest before they petitioned to intervene, the prejudice applicants would suffer if not permitted to intervene, prejudice to existing parties due to applicants failure to intervene promptly, and other unusual circumstances militating for or against intervention. Garrity v. Galler, 679 F.2d 452 (1st Cir. 1983) (in a class action context).

Each of these factors militates against permitting Mt. Hope Mining to intervene in the Morris County Fair Housing case. Mt. Hope Mining has no legitimate claim that it will suffer prejudice through denial of permission to intervene. It's claims unrelated to the Mt. Laurel action can be litigated separately and, insofar as Mt. Hope Mining purports to assert the rights of low and moderate income persons, Mt. Hope Mining has already been granted this right. Perhaps the most important factor is the prejudice which existing parties

would suffer due to the applicants failure to intervene promptly. If Mt. Hope Mining were permitted to intervene at this point pursuant to R. 4:33 the delay this would occasion would be substantial. The parties could be forced to try all the issues relevant to Mount Laurel litigation including delineation of region, determination of present and prospective housing needs (both indiginous and regional), methodology of allocating the need for housing and suitability of the Township to accomodate housing (as well as site specific zoning decisions).

Further, Mt. Hope Mining would, at this late date, have the right to prepare reports, accumulate expert testimony and conduct discovery. The parties would essentially be placed in the position of having to begin the litigation again from square one. This would be prejudicial to all parties, most particularly to the rights and interests of low and moderate income persons.

Courts denying intervention as untimely have also considered the time lapse which has occured from the inception of the suit, see generally, Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. App. 1972), and the possibility that the delay in seeking intervention may have been a tactical one, Moten v. Brick Layers, Masons and Plasterers, 543 F.2d 224, 228 (D.C. Cir. 1976). Both of these factors militate against Mt. Hope Mining in this case.

Mt. Hope Mining has been aware of the ongoing Morris County Fair Housing litigation for a long time. Furthermore, it has been aware of the zoning ramifications for its own property, at least since last December when the Township's proposed new master plan was made public. Indeed, Mt. Hope Mining appeared through it's counsel at public hearings on the proposed new zoning plan in January and February and made detailed inquiries of the Township's planner concerning the zoning proposed for its property - the same zoning regulations contained in the ordinance at issue here. Nevertheless, Mt. Hope Mining waited until after the settlement had been reached to move for intervenor status. This status should be granted only upon timely motion.

The Township of Rockaway would have no objection to this Court's granting Mt. Hope Mining a status akin to that of an intervenor, not pursuant to R. 4:33 but rather for the limited purpose of objecting to the proposed settlement with Rockaway Township under the standards and in accordance with the procedures outlined in this Courts opinion of May 25, 1984.

<u>CONCLUSION</u>

For the foregoing reasons, Defendant Township of Rockaway requests that the motions brought by Mt. Hope Mining Co. and Halecrest Company to consolidate under Rule 4:38-1 and to intervene under Rule 4:33 be denied.

Respectfully submitted,
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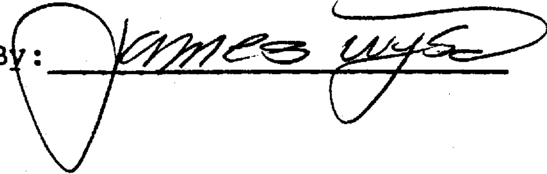
By: 

Dated: October 10, 1984