ML - Chatham 6/5/84

(Morris Cnty Fair Housing Council v. Boonton)

- pretrial memorandum on behalf of Chatham Twp + amendments

p 8

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Pretrial correspondence file

June 5, 1984

RECEIVED AT CHAMBERS
JUN 7 1984
JUDGE STEPHEN SKILLMAN

Honorable Stephen Skillman
Superior Court of New Jersey
Court House
New Brunswick, New Jersey 08903

RE: Morris County Fair Housing Council, et al v. Boonton Township, et al - Docket No. L-6001-78 PW

Green Village 139 Corp., et al v. Township of Chatham, et al - Docket No. L-29276-78

Dear Judge Skillman:

I am enclosing a copy of a Pretrial Memorandum on behalf of the Township of Chatham which was previously sent to Your Honor with respect to the above-titled matter. Copies are also being sent to all attorneys of record in the Morris County Fair Housing Council case.

I would like to amend the Pretrial Order by adding the following issues to paragraph seven of my Pretrial Memorandum.

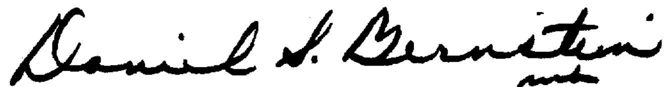
1. Scheduling - It is my recommendation that the Court first take on testimony on region, fair share and allocation. The Public Advocate should first present its proofs on these matters followed by the other plaintiffs and the defendant municipalities. Thereafter, the Public Advocate and the other plaintiffs would present their cases against each municipality, to be followed by the municipalities' presentation. This is the procedure that was followed by Judge Furman in the Urban League case and would have been followed by Judge Muir in this matter, had he kept the case. It has the virtue of permitting counsel not to attend trial dates which are of little concern to their particular client. This would not only be convenient to the attorneys involved, but would result in a considerable financial saving to their municipalities. From the Court's perspective, it would have the benefit of expediting the trial. If attorneys are present who are not directly involved in a contest with a particular defendant municipality, they might feel constrained to ask questions which may have a peripheral impact on their municipality. Their questions will undoubtedly beget other questions. If fewer attorneys are present, fewer questions will be asked. The simplest solution would be to divide the trial as I have suggested, so that the full compliment of attorneys will not be present after the issues of region, fair share and allocation are

presented.

2. Master - The Court will have to determine when a Master should be appointed. I would submit that the Master should not be appointed until the litigation is completed. I have already discussed with the Court my problems with the consolidation of the Green Village 139 Corp. case into the Morris County Fair Housing Council case. I trust that the Court will hear testimony on builders' remedy before the Master is appointed. I would submit that, if the builders' remedy issue is decided in the Township's favor, that the balance of the case should be resolvable.

3. Transcripts - In the Green Village litigation, planner Chadwick had testified on the alleged suitability of the subject property for high density housing. I don't recall whether the Court had determined that the transcripts of his testimony would be entered into evidence. I would suggest that the Court should make this determination, if it has not previously.

Respectfully yours,



Daniel S. Bernstein

DSB:mb
CC: All counsel
w/enc

Cal. No.

Attorney(s): BERNSTEIN, HOFFMAN & CLARK, P.A.
Office Address & Tel. No.: 336 Park Avenue, Scotch Plains, N.J. 07076 (201) 322-2300
Attorney(s) for Defendants

GREEN VILLAGE 139 CORP., GERALD WEIR and JOSEPH GIOVANNOLI,

Plaintiff(s)

vs.

TOWNSHIP OF CHATHAM, THE TOWNSHIP COMMITTEE OF CHATHAM, and THE PLANNING BOARD OF THE TOWNSHIP OF CHATHAM

Defendant(s)

SUPERIOR *COURT* OF NEW JERSEY

LAW *DIVISION*
MORRIS *COUNTY*

Docket No. L-29276-78

CIVIL ACTION

PRETRIAL MEMORANDUM OF

Defendants

1. NATURE OF ACTION:

Complaint in lieu of prerogative writ challenging the zoning of the plaintiffs' property as well as the overall zoning of Chatham Township as being exclusionary and not in accordance with Mount Laurel II.

2. ADMISSIONS AND STIPULATIONS:

The plaintiff Green Village 139 Corp. is the owner of Lots 137.1 and 139 in Block 48.17. The individual plaintiffs are the owners of Lots 44 and 45 in Block 144.

3-4. FACTUAL AND LEGAL CONTENTIONS: (Annexed hereto).

See attached.

5. DAMAGE AND INJURY CLAIMS:

N/A

6. AMENDMENTS:

None

7: ISSUES AND EVIDENCE PROBLEMS:

See attached.

8. LEGAL ISSUES ABANDONED:

The plaintiffs voluntarily dropped the issue of the Township's failure to extend sanitary sewers to their property, and to provide capacity.

9. *EXHIBITS:*

To be submitted.

10. *EXPERT WITNESSES:*

Robert O'Grady	-	Professional planner
Malcolm Kasler	-	Professional planner
Allen Dresdner	-	Professional planner
Thomas Broidrick	-	Member of the Planning Board.
		Helen Fenske
		Anne Morris
		Richard Bradley

11. *BRIEFS:*

As directed by the Court.

12. *ORDER OF OPENING AND CLOSING:*

Usual.

13. *ANY OTHER MATTERS AGREED UPON:*

None

14. *TRIAL COUNSEL:*

Daniel S. Bernstein, Esq., Bernstein, Hoffman & Clark, P.A., 336 Park Ave. Scotch Plains, N.J.

15. *ESTIMATED LENGTH OF TRIAL:*

The length of the trial depends on the number of parties involved and whether or not all issues are determined in a single hearing.

16. *WEEKLY CALL OR TRIAL DATE:* . . .

17. *ATTORNEYS FOR PARTIES CONFERRED ON* VARIOUS DATES IN 1982, 1983, *19*84 .

MATTERS THEN AGREED UPON: SCHEDULING OF DEPOSITIONS IN 1984.

18. *IT IS HEREBY CERTIFIED THAT ALL PRETRIAL DISCOVERY HAS BEEN COMPLETED, except* DEPOSITIONS WHICH ARE SCHEDULED FOR FEBRUARY 6, 1984.

19. *PARTIES WHO HAVE NOT BEEN SERVED:*

N/A

PARTIES WHO HAVE DEFAULTED:

N/A

BERNSTEIN, HOFFMAN & CLARK, P.A.

By Daniel S. Bernstein

Daniel S. Bernstein.

Dated: February 1, *19* 84 .

3 - 4. FACTUAL AND LEGAL CONTENTIONS:

The plaintiff Green Village 139 Corp. is the owner of Lots 137.1 and 139 in Block 48.17. The individual plaintiffs are the owners of Lots 44 and 45 in Block 144.

From an environmental standpoint, both properties have limited potential for development. A substantial amount of both parcels is wet, subject to periodic flooding, contains poor soils for development, has a high water table, and both properties lack good percolation. The plaintiffs originally sought to have their properties contained in the municipal sewer service area and to have the municipal sewer capacity increased. This portion of the case has been abandoned by the plaintiffs' failure to retain a sewer consultant in conformance with a prior Order of this Court. The defendant served interrogatories on the plaintiffs. Interrogatories No. 6 and No. 11 are relevant to the present inquiry.

> "6. Assuming no sewers were available for the plaintiffs, then what uses and what lot sizes do the plaintiffs contend would be reasonable for the properties which the plaintiffs own?
>
> A. None"
>
> "11. Do plaintiffs contend that it would be economically feasible to construct a private sewage treatment facility to serve the plaintiffs' properties? Give the factual basis for the answer.
>
> A. It is not economically feasible to construct a private sewage treatment facility solely for the plaintiff's property."

It is evident that the plaintiffs are in no position to construct multi-family housing on their two parcels, with the exception of a small portion of the southern parcel which is in a zone which permits four dwelling units to the acre. Without sewers, sewer capacity, or the ability of the plaintiffs to provide alternative waste water treatment, it would not be appropriate to provide a builder's remedy.

But that is not all. The plaintiffs' properties are in close proximity to the Great Swamp. They are within the Great Swamp drainage basin. The State Development Guide Plan designates them as being in a conservation area. Any drainage or pollutants from the subject parcels would flow directly to the Great Swamp, a national wildlife preserve. Obviously, this is not an area where high density housing should be constructed.

What the Court stated in Mount Laurel II, 92 N.J. 159, 316 (1983) with respect to Chester Township is applicable to the case at bar.

> "Assuming, pursuant to the remand ordered hereafter, that Chester is required to further amend its ordinance or take other steps to provide a realistic opportunity for lower income housing for its indigenous poor, this denial of a builder's remedy shall not be disturbed. We are satisfied that Chester established very substantial reasons for denying such a remedy. The environmentally sensitive nature of much of Chester's lands, and the location of plaintiffs' property within that sensitive area, were fully documented. We interpret the trial court's decision as a determination not simply that there were better places in Chester for lower income housing, but that plaintiffs' property was unsuitable for substantial environmental reasons. The record adequately supports that determination."

Chatham Township has made a good faith effort to comply with Mount Laurel I. Two multi-family projects have been constructed. There is a potential for 1,458 multi-family units in the municipality. It is admitted that these units would not qualify as low or moderate income units. However, there are no good sites in the municipality for high density housing. Chatham Township constitutes one of those municipalities where low and moderate income housing can not be constructed. However, it has overzoned for "least cost" units which satisfy its fair share and indigenous housing needs. Mount Laurel II, page 277.

7. ISSUES AND EVIDENCE PROBLEMS:

1. Will this Court ignore the testimony which was previously adduced or will it consider it as part of the record?

This issue was already addressed by the defendants in letters of November 19, 1980 and November 24, 1982, copies of which are attached hereto.

The Honorable Robert Muir previously heard a number of days' testimony in the present matter. The plaintiffs had essentially presented its case. The primary thrust of their challenge was with respect to the zoning of the two parcels which they own on Green Village Road. The plaintiffs also contended that Chatham Township's zoning was exclusionary as it failed to comply with Mount Laurel I. Obviously, the testimony on exclusionary zoning will have to be supplemented as it does not address the issues presented in Mount Laurel II. However, the challenge to the validity of the zoning ordinance as it affects the plaintiff's lands is essentially the same today as when the evidence was presented.

It is the defendants' position that the Court should review the transcripts in order to ascertain the plaintiffs' position on the zoning of the affected parcels. The Court should then hear the defendant municipality's testimony on the validity of the zoning and, at a later date, hear the Mount Laurel II issues.

2. How should the Court schedule the proceeding?

The central issue in the present matter is the zoning of the subject parcels.

The New Jersey courts have frequently considered a challenge to the exclusionary character of an entire zoning ordinance which has been brought by eleemosynary institutions such as the NAACP, the Urban League the National Committee Against Discrimination in Housing, or a branch of government such as the Public Advocate. These groups are interested in changing the zoning ordinances of the defendant municipalities so as to permit low and moderate income housing. However, they are not concerned with the location of the land which is to be rezoned, as long as it is suitable from planning and environmental standpoints for high density housing. The only real interest of a private litigant, such as Green Village 139 Corp., is in having the zoning of its land changed. It does the plaintiff no good to have the ordinance revised if its land is not included in a more desirable zone. The plaintiffs presented its testimony on the validity of the zoning of its parcels and the Township should be permitted to address this issue. Hearing this issue as the first matter before the Court would have the following advantages:

(a) It would limit the litigants to the plaintiffs and the defendants. There are a number of intervenors who have been given permission to participate in this litigation. None of them have an interest in

Chatham Township's zoning or in the plaintiffs' allegations as to their property. There is no reason why their attorneys should have to sit through proceedings which do not concern them.

(b) This will undoubtedly be the easiest issue for the Court to determine and its determination might moot the balance of the case.

(c) The defendant municipality will introduce planning and environmental testimony which will prove that the plaintiffs' properties are environmentally fragile, wet, predominately in flood plains, in areas where sanitary sewers are not available and where percolation is poor, have soils with development constraints, are in close proximity to the Great Swamp, and are designated as a conservation area in the State Development Guide Plan. The Court is directed to page 68 of the State Development Guide Plan which says:

> "Accordingly the Plan supports the continued acquision of land around the Great Swamp National Wildlife Refuge in Morris County . . ."

Based on the foregoing, the plaintiff's land should not be developed for high density housing nor should it be considered as appropriate for a builder's remedy in the event that the zoning ordinance is declared exclusionary. This is obviously the threshhold issue which should be initially disposed of by the Court.

3. In the event that the Court hears the Mount Laurel II issues, it should first consider the region and later the issues of regional need and fair share. Presumably the intervenors would not be concerned with the present litigation if they were not included in the region which this Court selects. In order to limit the participants in the trial, the Court should consider region after it has addressed the issues discussed in Point 2 above. After region is established, the Court can then hear testimony on regional need and fair share.

4. What consideration should the Court give to the housing report which has been prepared by Dr. Sternlieb?

It is the defendants' position that the Sternlieb report would constitute heresay evidence unless it was presented by one of its authors. Therefore, the Court should not, on its own, consider that study. The Court might be tempted to call one of the authors of the report as its witness. The defendants do not see any purpose which is served by this procedure. It is just one more study for the Court to consider. Indeed, if the Court were to consider the Sternlieb report then the defendants would feel the need not only to depose the witness, but possibly to retain another expert to counteract any detrimental aspects of the Rutgers report. As it is, each party has a single witness dealing with the indigenous

and fair share housing requirements of Chatham Township. The matter would only be made more complex by the introduction of an additional witness.

Specific objections to the Sternlieb report include the model of population growth which assumes that future growth would reflect past growth. The criteria for establishing the fair share formula which it espouses are not appropriate. It speaks of developable land but apparently includes areas which are not in growth areas. It suggests considering the increase in jobs but not the absolute numbers. It uses affordability, or the income level of the residents of a municipality and the tax base. Neither of these factors will tell where additional housing should be constructed. Lastly, the report suggests credit for prior municipality efforts. However, only subsidized units are counted. This has the effect of punishing communities like Chatham Township which complied with Mount Laurel I and of rewarding recalcitrant communities which only allow single family residences.

5. Will direct testimony essentially be superseded by the introduction of reports in evidence?

The defendants are concerned about this procedure which was originally suggested by Judge Stanton in the Public Advocate case. It would allow all of the reports to be submitted into evidence and then to have the witness subject to cross-examination. The opposing counsel would not know where to begin cross-examination as he would not have heard the witness' explanation of his report. It puts him at a distinct disadvantage. Frequently the Court will indicate those portions of direct testimony which it is concerned with. This will be lost if the report is submitted unless the Court were to advise counsel of those portions of the report which it felt were significant and might have a bearing on the outcome of the case.

6. What credit will be given for housing units which were built in compliance with Mount Laurel I?

Chatham Township is one of the few communities in Morris County which has zoned for a substantial amount of multi-family dwelling units. Two apartment complexes have already been constructed and the Baker Firestone project is being built at the present time. All of this was done in response to Mount Laurel I. There is a limited amount of vacant developable land which exists in the municipality and all or practically all of it is unsuitable for high density housing. It becomes critical for a municipality such as Chatham Township to receive credit for the prior zoning and the units which were constructed in conformance with that zoning. To ignore these units would be to aid municipalities which have ignored Mount Laurel I and to punish those which have sought to comply. In the alternative, the Court may consider these as "least cost" units, for which credit may be given, since there are no suitable areas in the municipality for low and moderate income housing.

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EDWARD SACHAR
OF COUNSEL

November 19, 1980

Hon. Robert Muir, Jr.
Court House
Morristown, N.J. 07960

Re: Green Village 139 Corp. v.
Chatham Township
Docket No. L-29276-78

Dear Judge Muir:

Mr. Earl Carlson called me and asked if I wished to order a copy of the transcript in the above entitled matter, since the original transcript of the proceedings was to be sent to Judge Gascoyne who would be hearing the balance of the case. A few days later, I again heard from Mr. Carlson who advised me that there would be a new trial and that no transcript would be prepared. Thereafter, I first spoke with your secretary and later with Mrs. Hunt. I requested that Mr. Klein and I appear before your Honor to discuss the matter. Mrs. Hunt suggested that I write a letter expressing my opinion and I am following her suggestion.

The principal witness which the plaintiffs had identified in their interrogatories was planner John Chadwick. While the plaintiffs mention other expert witnesses, their secondary importance was illustrated by the fact that their reports contained no more than two pages. Since Mr. Chadwick was subject to extended direct testimony and cross-examination over a number of days, it would seem superfluous to have him testify anew. Zoning cases are particularly susceptible to a review of the record, as is done in appeals involving boards of adjustment. Since Judge Gascoyne is experienced in zoning matters, he would be able to understand the record without further amplification.

This Court is directed to Rule 1:12-2(b) and (c):

(b) "During Trial. If a judge is prevented during a trial from continuing to preside herein, another judge may be designated, as provided in paragraph (a),

to complete the trial as if he had presided from its commencement, provided, however, that he is able to familiarize himself with the proceedings and all of the testimony therein through a complete transcript thereof."

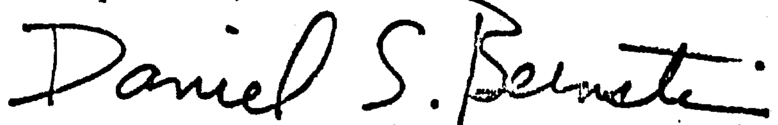
(c) "Disposition of the Interest of Justice. No substituted judge shall continue the trial in any matter pursuant to this rule unless he is satisfied, under the circumstances, that he can fairly discharge his duties, and if not satisfied, he shall make such disposition as the circumstances warrant, as where trial has taken place, by ordering a new trial or, in a case tried without a jury, by directing the recall of any witness."

This rule provides that a transcript will be supplied to the new judge who will be handling the case. In the event that he finds the record to be insufficient, he may have the record amplified or order a new trial. I would have no objection to employing this procedure in the present case.

Raskin v. Morristown, 21 N.J. 180 (1956), is analoguous to the case at bar in that both concern an attack upon the reasonableness of a zoning ordinance insofar as it affects the plaintiff's property. In Raskin, one judge heard the case and another decided the matter. In a remand, a court may utilize portions of a transcript rather than have the prior testimony repeated. In re Guardianship v. R.G. & F., 155 N.J. Super. 186, 196 (App. Div. 1977).

For the foregoing reasons, the defendant municipality urges that Judge Gascoyne review the transcripts rather than hear the entire case de novo. A new trial on all issues would merely increase the cost of the litigation without any benefit to either the Court or the litigants.

Respectfully submitted,



Daniel S. Bernstein
A Member of the Firm

DSB:eag
cc: Norman I. Klein, Esq.
John R. Miller, Esq.

November 24, 1982

Morris County Motions Clerk
Morris County Clerk's Office
Courthouse
Morristown, New Jersey 07960

RE: Green Village 139 Corp., et al. v. Township of Chatham, et al
Law Division, Morris County
Docket No. 29276-78

Dear Sir:

This letter memorandum is written in response to the plaintiff's Motion which is returnable on December 3, 1982.

I. The Court Has Already Determined That It Would Review The Transcripts of Mr. John Chadwick's Testimony.

Professional Planner John Chadwick testified for six days in 1980 on behalf of the plaintiffs. Thereafter, the Honorable Robert Muir, Jr. advised counsel that he could no longer handle the case, which was thereupon assigned to the Honorable Jacques H. Gascoyne. The issue arose as to whether or not the Judge hearing the balance of the case would review the transcripts of Mr. Chadwick's testimony, or conduct a new trial. By means of a letter dated January 6, 1981, the Honorable Jacques H. Gascoyne ruled that he would review the transcripts of Mr. Chadwick's testimony prior to completing the trial. A copy of Judge Gascoyne's letter is attached hereto. The plaintiffs had a right to file an interlocutory appeal with respect to Judge Gascoyne's decision. They chose not to do so. The plaintiffs had a right to file a Motion which would seek an early resumption of the trial. They chose not to do so. At this juncture, the trial in the present matter should proceed with the plaintiffs' completing their case and the defendants presenting their witnesses.

II. Judge Gascoyne's Ruling Became the "Law of the Case." As Such It Should Not Be Disturbed.

The doctrine of the "law of the case" has been discussed in State vs. Hale, 127 N.J. Super. 407, 411 (App. Div. 1974)

> "It has been generally stated that the 'law of the case' doctrine 'applies to the principle that where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the

> suit.' Wilson v. Ohio River Company, 236 F. Supp. 96, 98 (S.D. W. Va. 1964), aff'd 375 F. 2d 775 (4 Cir. 1967). This rule is based upon the sound policy that when an issue is once litigated and decided during the course of a particular case, that decision should be the end of the matter." At p. 410.
>
> "The doctrine of 'law of the case' is also applied to the question of whether or not a decision made by a trial court during one stage of the litigation is binding throughout the course of the action. 5 Am. Jr. 2d, supra at 189. The use of the doctrine in this situation avoids repetitious litigation of the same issue during the course of a single trial." At pp. 410-411.
>
> "Thus, 'law of the case' may be applied in a situation where one judge decides a pretrial motion to suppress, but another judge conducts the trial. In such a case, the decision rendered at the pretrial hearing may be said to be the 'law of the case' during the subsequent trial." At p. 411.

While the doctrine of "the law of the case" is not as binding as res judicata or collateral estoppel, the initial ruling of the Court should be followed unless there is a substantial reason for deviating therefrom.

III. There Is No Reason Why The Plaintiffs' Planner Chadwick Should Be Permitted To Testify Anew.

Mr. Chadwick was subject to direct and cross-examination for six days. There is no good reason why his prior testimony should be ignored. The plaintiffs' principal challenge is to the validity of the zoning of two tracts which they own in Chatham Township. Mr. Chadwick offered testimony and was subject to cross examination on this point. The neighborhood situation has not changed since Mr. Chadwick testified. Indeed, courts in zoning matters frequently review the transcripts of witnesses before Boards of Adjustment which are a number of years old. There can be no valid reason why the Court could not proceed with respect to this claim, as well as the other challenges which are addressed in the defendants Motion for Summary Judgment.

The plaintiff has also made a superficial attack against the alleged exclusionary nature of the Chatham Township's Zoning Ordinance. No serious work was done in this regard. The Court is directed toward Mr. Chadwick's reports. The witness merely offered opinions on the validity of the municipality's zoning ordinance based on his reading thereof. This aspect of the case is also ripe for determination and should not be delayed.

IV. The Plaintiffs Are Not Entitled To Either a Stipulated Statement of Facts, a Mistrial, or Trial De Novo With Respect to the Above-Titled Matter.

The parties to this action prepared a limited stipulation of facts which is before the Court. However, the critical planning issue will come down to a question of credibility. The Court can assess the credibility of Mr. Chadwick's testimony based upon a review of the transcripts. However, the defendants still have to present their case. That can only be done by testimony and the introduction into evidence of exhibits and reports. The planners who will be called upon to testify on behalf of the defendants will offer both factual and opinion testimony. If the plaintiffs' counsel were to stipulate as to the validity of the municipal planners, he would be conceding his case. A partial stipulation as to the defendants' planners would make for a more complex rather than a simpler trial, as the continuity of their testimony would be broken.

There is no basis for the plaintiffs' request for either a mistrial or a new trial. It should be noted that the plaintiffs have submitted no cases and no allegations which would support this claim. It is evident that their motive for requesting a mistrial, new trial, or even a stipulation of facts, is to wipe from the record the unconvincing and inconsistent testimony of Mr. John Chadwick. A review of the transcripts by the trial judge, Kulbacki vs. Sobchinsky, 38 N.J. 435, 445 (1962) will lead to the conclusion that the plaintiffs' Motions should be denied, and that after ruling on the defendants' Motion for Summary Judgment, a date should be set for the conclusion of the trial.

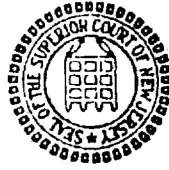
Respectfully submitted,

BERNSTEIN, HOFFMAN & CLARK
Attorneys for the Defendants

By: ______________________
Daniel S. Bernstein

BMH:mb
CC: Norman I. Klein, Esq.

SUPERIOR COURT OF NEW JERSEY



Chambers of
Jacques H. Gascoyne
Judge

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January 6, 1981

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Re: Green Village 139 Corp., et al., v.
Township of Chatham, et al.
Docket No. L-29276-78 P.W.

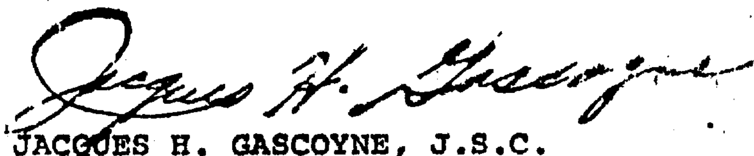
Gentlemen:

Judge Muir has referred your respective correspondence to me for answer. While I can appreciate the frustration of counsel in not being able to complete a case before a judge who has already commenced a matter, certain exigencies do occur which makes completion by a particular judge impossible. I'm sure that Judge Muir, if he felt it at all possible, would have completed this matter. Unfortunately, that is not to be.

In light of the foregoing, this Court deems that R.1:12-2(b) and (c) is applicable. This is particularly true when read in light of Raskin v. Morristown, 21 N.J. 180 (1956). By a copy of this letter I am instructing Mr. Carlson to prepare a copy of the transcript of the proceedings before Judge Muir. In the event I feel that I am unable to decide this matter on the transcript, I, of course, reserve the right either to require additional testimony, a completely new trial, a stipulation of fact with supplementation as requested by Mr. Klein or any combination of the foregoing.

As soon as I have had an opportunity to obtain the transcript and review the same, appropriate steps will be taken to put this matter down for a hearing. If there are any questions with regard to the foregoing, please feel free to contact me.

Very truly yours,



JACQUES H. GASCOYNE, J.S.C.

JHG/dll

cc: Mr. Earl Carlson