UL Twp of Tewksbury Sept 16, 1985

Reply Brief to respond to contentions filed by π in opposition to a motion to transfer.

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September 16, 1985

The Honorable Stephen Skillman
Judge of the Superior Court
Middlesex County Court House
New Brunswick, New Jersey 08903

Re: Rivell v. Township of Tewksbury
Mt. Laurel
Docket No. L-040993-84 PW
Letter Reply Brief of Defendant and Support of its Motion for Transfer to the Council on Affordable Housing Returnable September 23, 1985

Dear Judge Skillman:

This Reply Brief is written to respond to certifications filed by Plaintiff in opposition to a motion to transfer this case to the Council on Affordable Housing. Two certifications were filed by Plaintiff, one of Thomas J. Beetel, Plaintiff's Attorney, and the other a joint certification of Robert E. Rivell and Robert Tublitz.

Both the Beetel and Rivell-Tublitz Certifications are substantially composed of matter not within the personal knowledge of the parties making the certifications. In opposition to Plaintiff's motion for partial summary judgment in this matter -- a motion also now pending -- Defendant filed a Brief maintaining that certifications of this nature do not comply with R. 1:6-6 and with settled case law, and should be disregarded. Defendant's argument in this regard, is found in Point I (pp. 3-6) of its just-filed Brief of Defendant, Township of Tewksbury, in Opposition to Plaintiff's Motion for Partial Summary Judgment. The argument is now incorporated by reference in this Letter Brief and will not be repeated. Among the objectionable (and, Defendant believes, inaccurate) statements in the Rivell-Tublitz Certification are those concerning certain land values and concerning a joint venture involving all properties in a Research Office Zone.

Additionally, Defendant now makes the same objection, as detailed in its Brief of Defendant, Township of Tewksbury, in Opposition to Plaintiff's Motion for Partial Summary Judgment (p. 6) regarding the extensive use in Plaintiff's Certifications of characterizations of settlement negotiations.

Plaintiff's claim that a manifest injustice would be dealt him by a transfer of the case to the Council seems to be based on the costs he is allegedly incurring in owning the real property involved and the cost of this litigation (Rivell-Tublitz Joint Certification, ¶ 11). No breakdown of these costs is given and it appears they include all the real estate taxes Plaintiff has ever paid on the property and all the interest ever paid on mortgages on the property.

Also, in the Joint Certification (¶ 11) there is mention of a mortgage due September 24, 1985, which the Joint Certification says was marked D-9 for identification at a deposition. This mortgage, marked D-9 for identification, is furnished to the Court as part of Exhibit A attached to a Certification of Richard Dieterly on this Motion. The mortgage is on the property involved in this suit and was given by Robert and Barbara Rivell to Highview Development Corporation Employees Retirement Trust (Rivell 2/14/85 deposition, p. 84). The mortgage is dated September 14, 1984, some months after the commencement of this litigation. On the same day as the mortgage (September 14, 1985) Robert and Barbara Rivell also gave a so-called Option Agreement on the same property to Harry Olstein (Rivell 2/14/85 deposition, pp. 2-3, 6). The Option Agreement (a copy is found as part of Exhibit A to the Richard Dieterly certification) is in reality a contract to purchase contingent on rezoning of the property and certain approvals. This Option Agreement (on page 1) recites that Rivell has instituted this suit and that Olstein has arranged and provided for immediate financing, and that "Olstein is desirous of purchasing the aforementioned property in the event the premises are rezoned to permit multi-family dwellings or a density of not less than one dwelling unit per acre."

The deposition of Harry Olstein (Exhibit B to Richard Dieterly certification) confirms that Olstein, the party to the Option Agreement on Rivell's property, is sole stockholder of Highview Development Corporation and sole trustee of Highview Development Corporation Employees Retirement Trust, the mortgage holder for the Rivells' property (Olstein 6/12/85 deposition, pp 6, 12-13). Thus, it is plain that Olstein, the "option" holder, and his Retirement Trust, the mortgage holder, are co-speculators with Rivell in attempting to have the property rezoned through this litigation. It is also interesting to note that that the Olstein corporation's Employees Pension Trust holds a

mortgage on the Rivell home (Olstein 6/12/85 deposition, pp. 17-18, 20).

It seems evident that in any Mt. Laurel litigation, no matter what its posture, a plaintiff may be expected to claim that costs he incurs to purchase, or hold, his property, or to finance litigation, are such as to amount to a manifest injustice requiring a court to deny a motion to transfer to the Council. If such an argument is accepted, no case could be transferred. The Legislature must have understood that plaintiffs in all Mt. Laurel cases would have costs with respect to their properties and litigation, and yet the Legislature clearly provided for transfer of pending, as well as future, cases, and plainly intended that transfer be generally available even as to cases pending more than 60 days before the effective date of the Fair Housing Act. In the case at bar, where no issues have been litigated, an argument based on costs to own property and to finance litigation should not be deemed a manifest injustice justifying the Court in precluding a transfer and in thwarting the Legislative intention to have matters involved in this case referred to the Council on Affordable Housing.

Finally, it should be noted that the trial date adjournment in this case was requested by both Plaintiff and Defendant.

With kind regards, I am

Respectfully submitted,

RICHARD DIETERLY

RD/del