

Urban League of New Brunswick
v.
Mayor & Council of Borough of
Carteret

General 11-1-1974

Transcript of motion proceeding

Pages 23

Regarding the constitutionality
of municipal ordinances

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION (Middlesex County)
Docket No. C-4122-73

ML000862S

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3 URBAN LEAGUE OF NEW BRUNSWICK,
Plaintiff,

4 VS.

5 MAYOR & COUNCIL OF BOROUGH OF
6 CARTERET, et als.,

7 Defendants.
8 -----

MOTIONS

New Brunswick, New Jersey
November 1, 1974

10 B E F O R E: Honorable David D. Furman, J.S.C.

11
12 APPEARANCES: Baumgart & Ben-Asher, Esqs.,
13 By: David H. Ben-Asher, Esq.,
-and-
14 Martin E. Sloane, Esq.,
New York Bar,
-and-
15 Daniel A. Searing, Esq.,
16 Maryland Bar,
For the Plaintiff

17
18 Joseph H. Burns, Esq.,
For North Brunswick

19 Edward Sachar, Esq.,
20 For Piscataway

21 Linda G. Alphonso, Esq.,
For Madison

22 Lawrence Lerner, Esq.,
23 For Highland Park

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William C. Moran, Jr., Esq.,
For Cranbury

John J. Vail, Esq.,
For South Amboy

Edward J. Dolan, Esq.,
For Carteret

Richard F. Plechner, Esq.,
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Howard Freeman, Esq.,
For South Plainfield

Edward J. Johnson, Jr., Esq.,
For Middlesex

Kathryn T. Trenner, Esq.,
For Plainsboro

Stanley Grabon, C.S.R.

1 THE COURT: Urban League versus Mayor and
2 Council of Carteret and others.

3 All right. I'm mindful, of course, that the
4 Madison Township ordinance has been declared
5 unconstitutional. Is there any other municipality
6 whose ordinance has been held to be unconstitutional
7 or invalid? Is there any other municipality whose
8 ordinance is now under challenge in any pending
9 Court proceeding? Mr. Moran?

10 MR. MORAN: Yes, Cranbury ordinance is under
11 challenge in a matter pending before this Court.

12 MR. KARCHER: Part of the Sayreville zoning
13 ordinance dealing with planned unit development as
14 well is under challenge. I think it is a December
15 trial date.

16 MR. DOMENICHETTI: We have five suits pend-
17 ing against the Township of Woodbridge challenging
18 various parts of the zoning ordinance of the Town-
19 ship of Woodbridge.

20 THE COURT: Challenging it in toto or just
21 in sections?

22 MR. DOMENICHETTI; Sections.

23 MR. BUSCH: The same would apply to East
24 Brunswick. There are two suits pending that are
25 challenging it in sections.

1 THE COURT: Challenging it in sections?

2 MR. BUSCH: Yes. Specific properties. It is
3 Showcase Properties and the Rowan Corporation.

4 MR. RAFANO: There is a challenge that I am
5 making to the Spotswood zoning ordinance. Just a
6 part of it and not all of it.

7 MR. INGLESE: There is a partial challenge
8 to the Monroe Township PRC ordinance.

9 THE COURT: All right. I will hear you
10 then, Mr. Ben-Asher.

11 MR. BEN-ASHER: My motion, your Honor, is to
12 have Mr. Sloane and Mr. Searing admitted Pro Hac
13 Vice.

14 As the certificates annexed to their affi-
15 davits state, Mr. Sloane was admitted to the New
16 York Bar in 1959 and Mr. Searing was admitted to the
17 Maryland Bar in 1970. Rule 1:21-2 provides that
18 the Court may admit an attorney in good standing of
19 another jurisdiction to stand in a case pending in
20 this court as would a New Jersey attorney, provided
21 that an attorney of this state executes all plead-
22 ings and motions and remains responsible for the
23 case.

24 It would be in that posture that I would
25 ask that your Honor attempt to dispose of that mo-

1 tion at this time.

2 THE COURT: Is there any objection to this
3 application?

4 MR. LERNER: I have a comment, if it please
5 the Court, and that is that the Court, if it so
6 deems that the petition of plaintiff be granted,
7 that mailings still only be directed in New Jersey
8 as opposed to mailings that may be voluminous, be
9 directed to Washington and preventing undue burden
10 upon all of the parties.

11 THE COURT: That would be understood, would
12 it not, Mr. Ben-Asher?

13 MR. BEN-ASHER: I would prefer that the Court
14 deem otherwise. My clerical staff spent a tremendous
15 amount of time in duplicating and forwarding the
16 papers to attorneys in Washington. My major concern
17 is not the administrative office burden for me, but
18 the time that is lost when any papers are served or
19 there are late answering briefs which are filed with
20 myself and in order to enable Washington counsel to
21 properly perform it.

22 I would prefer that if possible the respec-
23 tive counsel simply be required, with service upon
24 me of any papers, to provide an extra copy to the
25 Washington attorneys.

1 MR. VAIL: Your Honor, South Amboy does not
2 consent to the application.

3 THE COURT: Leave is granted to Mr. Martin
4 Sloane and Mr. Daniel Searing to appear Pro Hac in
5 this case. The present order of the Court will be
6 that service upon Mr. Ben-Asher is service upon all
7 attorneys for plaintiffs or upon all plaintiffs.

8 Now, let me ask you a few questions, Mr.
9 Ben-Asher. You will continue to be the spokesman for
10 the plaintiffs, will you?

11 MR. BEN-ASHER: Well, Mr. Sloane was going to
12 begin arguing in opposition to the motions today.

13 THE COURT: Well, as I read the complaint,
14 there is no allegation of a conspiracy or of any
15 common scheme or design. Is that so?

16 MR. BEN-ASHER: Not in terms of intention,
17 your Honor. The complaint addresses itself to the
18 common economic and housing and statistical relation-
19 ship of the area as well as their coordination via
20 county plan and other factual items that do not relate
21 to, as you say, a conspiracy.

22 THE COURT: All right. It seems to me that
23 there would be great difficulty in not having a trial--
24 we don't need to retry Madison--but not having a
25 trial of, say, 22 separate zoning ordinance. It seems

1 to me as to each municipality that there would be
2 matters of factual divergence, and in one munici-
3 pality, for instance, the defense or the argument in
4 favor or support of the ordinance might be some
5 special environmental or ecological factor, and in
6 another municipality it might be the interests of
7 having a balanced community.

8 For example, if a municipality is 90 percent
9 built up in industry and high density housing, it
10 might be contemplate lower density housing in the
11 remaining ten percent.

12 We still have as the law of the state the
13 holding in Fisher v. Bedminister Township that high
14 minimum acreage zoning, low density zoning, is valid
15 where there is an established residential character.
16 That might be so in some built up inner suburban
17 community, whereas it might not be so in some larger
18 township more on the fringes of the housing pres-
19 sures.

20 Now, we don't need to decide this today. As
21 a matter of fact, I don't understand that there is
22 any motion before the Court to sever or to sever for
23 trial, but I think that in fairness to all sides,
24 and particularly to the plaintiffs, I would indicate
25 that it seems to me a very strong possible outcome

1 of this case is that we do have a severance for
2 trial.

3 As far as the motions to dismiss, if I may
4 again, speaking for the guidance of counsel, I would
5 suppose that if the plaintiffs are asserting as to
6 each ordinance that it is invalidly exclusionary or
7 discriminatory, that that would be a cause of action.
8 I would also suppose that Perth Amboy and New
9 Brunswick are not indispensable parties. The asser-
10 tion is apparently that those municipalities are
11 doing perhaps more than their fair share.

12 Is that so, Mr. Ben-Asher?

13 MR. BEN-ASHER: Yes, your Honor.

14 THE COURT: Nor would I suppose that the
15 State of New Jersey was an indispensable party.

16 With those preliminary remarks, I think that
17 it might be appropriate for counsel for any munici-
18 pality who wishes to press today the motion to dis-
19 miss the complaint totally, to offer such an argu-
20 ment.

21 I have read the briefs.

22 MR. MORAN: I would like, your Honor, to
23 address a few comments on the first comment that you
24 your Honor made about the motion to dismiss. There
25 are two prayers for relief in the complaint which are

1 rather unusual in zoning ordinance cases. I think
2 that the unusual nature of them is the reason why
3 this is brought in the Chancery Division rather than
4 in the Law Division. One is for injunctive relief
5 against past discriminatory practices, which are not
6 specifically alleged, but only by implication are
7 they alleged in the complaint.

8 I would submit to your Honor that while it
9 may be true that the plaintiffs may be able to state
10 a cause of action against each individual ordinance,
11 that it is invalid and unconstitutional and unreason-
12 ably excluding certain economic groups, that that
13 cause of action does not set forth in the complaint
14 or at least in the prayers for relief that is inclu-
15 ded in the complaint.

16 The action for an injunction seems to me to
17 be stated in such broad terms that it means to pro-
18 hibit certain discriminatory practices per se in all
19 circumstances and in each municipality, and I would
20 submit that it would place an unreasonable burden
21 on the municipal officials who would operate under
22 such an injunction because they wouldn't know what
23 they could do and couldn't do or could do without
24 coming to court and finding out whether or not it
25 violated the injunction.

1 I don't think that that's what this court
2 would like to have, either. That this suit would be
3 pending indefinitely into the future because every-
4 time a circumstance changed in the municipality, for
5 example, that large amounts of multi-family housing
6 did come in and the municipality stated we now have
7 a balanced community and we want to preserve that, or
8 because of an increase in housing, a point of environ-
9 mental state was reached where it might be crucial
10 to hold the line for a time being until those prob-
11 lems could be solved.

12 I mean, everytime a municipality wanted to
13 make that change, they would have to come back be-
14 fore this Court and say are we going to violate the
15 injunction by doing this?

16 As to the second point, if I gather your
17 Honor's thoughts on it, I think that we would be
18 entitled to at least partial summary judgment on the
19 second count of the complaint which seeks relief by
20 way of Mandamus to compel the municipalities to sit
21 down together jointly and specifically uses the word
22 jointly, to come up with a joint plan for all the
23 municipalities, all of the municipalities to relieve
24 the housing problems of Middlesex County.

25 As it is pointed out in our brief, I think

1 that's beyond the power of this Court to do, to com-
2 pel one municipality to sit down with another one
3 to zone. That's not the scheme that is set forth by
4 the statutes, and I don't believe that this Court
5 can go beyond the scheme set forth by the statutes
6 and compel 23 towns to sit down and come up with
7 zoning ordinances which are going to take care of
8 the housing problems in the entire County.

9 I think in terms of practicality, your
10 Honor can see that something like that wouldn't work
11 to get 23 municipalities to agree on a scheme that we
12 are going to put multi-family housing here and not
13 here, and that is very impractical.

14 At least on that point, I think that we would
15 be entitled to partial summary judgment, and I believe
16 that we would be entitled to summary judgment on the
17 first point also, because it is just impractical for
18 the Court to give the relief which is sought in this
19 case.

20 THE COURT: Well, I tend to agree with you
21 that an injunction, of course, would have to be
22 sufficiently definite to comply with due process of
23 law. To hold something in contempt of court, he,
24 that is, the municipality or municipal officials
25 would have to understand specifically what the injunc-

1 tive order was.

2 I don't think that there is any dispute on
3 the part of plaintiffs with that proposition.

4 An injunction, for instance, against discrim-
5 ination, economic discrimination or possibly racial
6 discrimination in zoning might be too vague to be
7 enforceable, but I don't know that at this stage we
8 would anticipate the remedies supplied, that no
9 remedy could be supplied which would meet the test
10 of due process of law.

11 As far as the Mandamus is concerned, I
12 gather that that's an important aspect of the com-
13 plaint. So that I would ask the plaintiffs to speak
14 in defense of that count.

15 MR. MORAN: Before they start, your Honor,
16 to save the Court's time, and there's one other
17 point that I would like to make, and that's on the
18 indispensable party thing.

19 You didn't specifically indicate your feel-
20 ing about the County of Middlesex as a defendant in
21 this matter, and I think that Mr. Ben-Asher gave the
22 reply to that argument when he first made his pre-
23 sentation this morning, because he talked about the
24 County plan and the County Planning Board's plan
25 that puts some kind of housing in one municipality

1 and some kind in another municipality and developing
2 an area wide thing.

3 Several municipalities do follow it and pay
4 attention to it. I think that it would be impor-
5 tant that the County be declared to be an indispens-
6 able party.

7 MR. SACHAR: With reference to this motion of
8 Piscataway on the question of relief asked and
9 addressed to the Court, one of the prayers for
10 relief, injunctive relief, is to compel the munici-
11 palities, those municipalities which have not adopted
12 a resolution certificate of necessity or set up a
13 public housing authority, which is optional under
14 the State law, that this Court as a matter of law
15 change the legislation of the State of New Jersey
16 which makes it optional, and Piscataway Township has
17 not adopted such a resolution, and to compel them to
18 adopt such resolution.

19 It is our position that this Court has no
20 jurisdiction to legislate, to act on that matter
21 which is a legislative matter, and where the legis-
22 lature has determined that that should be in an
23 optional form, the Court could not, either by
24 Mandamus or by injunctive relief compel Piscataway
25 to do so.

1 In addition to that question on indispens-
2 able parties, speaking for Piscataway, we must read
3 the complaint. If you read it, it sets forth what
4 is wrong as to each municipality, and no two munici-
5 palities have the same question of what they are
6 doing wrong, assuming for the purposes of this
7 motion that that which is said to be part of the
8 complaint is the practice complained of.

9 THE COURT: You are not benefitting the
10 argument this morning by making that point.

11 I have already indicated that I think seri-
12 ously that at some stage in this case there may
13 have to be a severance.

14 MR. SACHAR: I'm not talking about that.
15 I'm talking about indispensable parties. Because
16 in Piscataway, taking the complaint made against
17 Piscataway wherein they in the appendix, they set
18 forth the plaintiff, whose only income, according to
19 the complaint, is --

20 THE COURT: We are really not concerned with
21 those details. That's all, Mr. Sachar.

22 MR. SLOANE: Your Honor, I would like to
23 address myself to the issue of the relief. The
24 relief that we are requesting, your Honor, is two-
25 fold. First our contention is that these 23 defen-

1 dant municipalities have been guilty of discrimina-
2 tion of low and moderate income people, and particu-
3 larly minority group people, and we want first an
4 injunction that would order them to stop discrimin-
5 ating against these people.

6 Secondly, and perhaps more important, we
7 want an order that would require them to correct the
8 effects of the past, of their past discrimination.

9 This second step would involve the develop-
10 ment of a remedial plan.

11 I emphasize, though, that the plan would not
12 be devised by the Court. That would be the defen-
13 dants' responsibility. The Court's function would
14 be the traditional one of reviewing the adequacy of
15 the plan as an effective means of correcting the
16 effects of past discrimination, and we contend that
17 this is well within the traditional area of judicial
18 function.

19 We point out in the recent Mount Laurel case
20 the Court required precisely this kind of relief,
21 ordering the defendants to develop a plan to meet
22 the housing needs of low and moderate income fami-
23 lies.

24 THE COURT: That's one municipality.

25 MR. SLOANE: Yes. There is a difference

1 here. We get in with 23. Our main concern is that
2 whatever relief is provided be effective relief.
3 We are very aware of the fact that we are dealing with
4 23 municipalities, and it is our contention that
5 one of the major problems is that these 23 have
6 adopted a "go it alone attitude" and have ignored
7 the housing needs of people of the County and of a
8 larger region, and we are aware also if the 23 municipi-
9 palities go it alone in terms of providing the
10 developing of their own plan, there is likely to be
11 chaos, and the plan is unlikely to be coordinated or
12 effected.

13 That's why in our prayer for relief we
14 thought it necessary that the defendants first of
15 all secure as much advice and assistance from the
16 experts around as possible and, in fact, in Middlesex
17 County there is indeed a plan which has been adopted
18 by the Middlesex County Planning Commission providing
19 for the distribution of low and moderate income
20 housing throughout the suburbs, and we would hope
21 that the defendant, municipalities, would consult
22 with the Planning Commission and examine the plan
23 very carefully.

24 Secondly, to avoid unnecessary overlap and
25 chaos and inconsistency, we thought it would be the

1 wiser course to have the defendants at least co-
2 operate and consult closely with each other to the
3 extent possible that it would be desirous if a joint
4 plan were developed so that the Court's job would be
5 relatively easy, just examining one plan, and to see
6 if it satisfies and meets the need of the low and
7 moderate income families. If not, then of course
8 the Court can review 23 separate plans.

9 We just thought it was the wiser course to
10 have the defendants at least try to cooperate and
11 come up with a single plan.

12 Again I emphasize that the Court's function
13 would not be to develop a plan itself and would not
14 be to enact zoning laws for these municipalities,
15 but rather to review the plan itself.

16 THE COURT: I think that the decisions this
17 morning will be only as follows: The motion to dis-
18 miss the complaint is denied. The motion for an
19 order for more definite statement is denied and the
20 motion to dismiss for failure to join as indispens-
21 able parties Perth Amboy, New Brunswick, the County,
22 and the State, is denied.

23 Now, the view of the Court is that I have
24 some serious question about the authority of munici-
25 palities to enter a joint plan. I have some serious

1 question as to whether this Court could effectively
2 order the municipalities to sit down together and
3 hammer out, work out some kind of a regional plan or
4 a County plan to provide adequate low and moderate
5 income housing.

6 I will not at this time foreclose the pos-
7 sibility of that type of remedy. I would think that
8 we should move toward a pretrial. That the plain-
9 tiffs would attempt initially to establish some kind
10 of a failure of the municipalities in this County,
11 other than Perth Amboy and New Brunswick, collectively
12 to meet housing needs. Falling short of that, if
13 they fail in that, I would see no alternative to the
14 proceeding but to sever as to each municipality.

15 At that point, Madison Township presumably
16 would have a dismissal because its ordinance already
17 has been held invalid, and municipalities that had
18 cases pending, complaints filed prior to the com-
19 plaint in this case, presumably there would be
20 trials involving their ordinances, and they would be
21 held in abeyance.

22 Now, is there anybody who objects to follow-
23 ing the regular course of discovery under the rules
24 of New Jersey?

25 MR. PLECHNER: Your Honor, the only thing that

1 would concern me is if this is all one case and we
2 have discovery for 23 municipalities, we are just
3 never going to get depositions because we are never
4 going to get 23 lawyers together in one place again.

5 THE COURT: It certainly lies to any and all
6 defendants to make a motion to sever. That has not
7 been done as yet.

8 MR. DOLAN: Would the Court entertain that
9 motion now without filing the formal motion in view
10 of what the Court has discussed?

11 THE COURT: I don't believe that would be
12 fair to the plaintiffs. The plaintiffs are not on
13 notice of it.

14 MR. DOLAN: I take it that the plaintiffs
15 would object to that?

16 MR. BEN-ASHER: Yes, your Honor.

17 MR. INGLESE: If it please the Court, I
18 think that we are going to need more than 150 days
19 for discovery because of the difficulty of deposi-
20 tions which I certainly plan to take, and I know
21 several counsel plan to take depositions, and it
22 will take a day where it would normally take an hour.
23 There are a great deal of problems involved.

24 We have already been served with 23 copies
25 of interrogatories by the plaintiff which creates

1 great difficulty in just answering those interroga-
2 tories and the delivery to all of the counsel in-
3 volved here. The problem becomes monumentous as
4 we get more and more involved in it.

5 THE COURT: I take it that I was really ask-
6 ing the question whether anybody was seeking less
7 than the 150 days.

8 MR. SACHER: May I say to the Court that as
9 far as discovery is concerned, we have already sent
10 out prior to these motions, in September already we
11 sent out interrogatories to the plaintiff, and under
12 the rules we sent 26 copies, so that when they are
13 answered, all the other defendants will get it. I
14 am certain that that will be followed by oral deposi-
15 tions, and we have already been served by the plain-
16 tiff for depositions, and I also believe that the
17 150 days was not going to be enough even as to each
18 municipality in this case because of the questions
19 raised by this complaint.

20 THE COURT: Thank you. I would suggest
21 following Mr. Dolan's inquiry that serious consid-
22 eration be given to a motion on behalf of one or
23 more or all of the municipalities to sever for trial.
24 I think that we should find out from the plaintiffs
25 what there may be by way of a common cause of action.

1 Reading the New Jersey Court Rules as to
2 joinder, it would appear that a strong argument
3 could be made that this is a mis-joinder. In other
4 words, that the cause of action does not arise out
5 of a common occurrence or common transaction or
6 series of transactions.

7 While there may be common questions of law,
8 there are at least in my mind considerable uncer-
9 tainties as to whether there are common questions
10 of fact.

11 Maybe there are common questions of fact
12 with respect to inadequacy of housing opportunity
13 throughout the 23 municipalities and the failure to
14 respond to the housing pressures and housing needs.
15 It would appear that there would be, that there would
16 be separate questions concerning how far each munici-
17 pality had been built up and the type of housing and
18 whether it is high density or low density and whether
19 there was multi-family housing and whether there
20 were ecological interests and so forth.

21 So I would suggest that the next stage of
22 the case might be a motion to sever.

23 MR. VAIL: Judge, would you include in the
24 order a date by which an answer must be filed?
25 I don't know if anyone else hasn't filed an answer.

1 I didn't. I was awaiting the outcome of your ruling
2 today, and for that reason I would like it in the
3 order, if I may.

4 MR. BEN-ASHER: As to the defendants who
5 have not filed answers, I believe that with very few
6 exceptions, they have all. We have all signed
7 stipulations extending time to specific dates, which
8 vary.

9 MR. VAIL: Which have expired.

10 THE COURT: Would you grant an additional,
11 say, 15 days from the date of the order for answers
12 to be filed and served?

13 MR. BEN-ASHER: Yes, your Honor.

14 MR. CUMMINS: I take it, your Honor, that
15 the motion for severance can be accompanied by mo-
16 tions for dismissal? In other words, your order
17 this morning dismissing the motions for dismissal is
18 without prejudice to bringing them up again at the
19 motion for severance?

20 THE COURT: I suppose so, Mr. Cummins.

21 If collectively this group wants to see me
22 and talk about the course of the litigation, I think
23 that I would be free in about half an hour from now.

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CERTIFICATION

I, STANLEY GRABON, a Certified
Shorthand Reporter and Notary Public of the
State of New Jersey, do hereby certify that
the foregoing is a true and accurate trans-
cript.



Stanley Grabon