ML Morris County Fair Housing Council v. Boonton

February 15, 1979

Brief in support of motion to dismiss complaint for failure to comply with discovery orders

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MOR[redacted] HOUSING CO[redacted]

Plaintiffs,

vs.

BOONTON TOWNSHIP, et als.,

Defendants.

:SUPERIOR COURT OF NEW JERSEY
:LAW DIVISION, MORRIS COUNTY
:DOCKET NO. L-6001-78 P.W.

[redacted]

BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR FAILURE TO COMPLY WITH DISCOVERY ORDE[redacted]

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On the Brief

PRELIMINARY STATEMENT

A. This Motion

This motion seeks a dismissal of the complaint without prejudice for failure of the Public Advocate to comply with the order of this Court dated January 19, 1979, directing disclosure to all defendants of the substance of the plaintiffs' case.

The Advocate's response is wholly inadequate. The Advocate has not complied because he is not able to comply. The Advocate has asserted that the ordinances of the defendant municipalities are exclusionary, but the data necessary to draw that conclusion has never been assembled, let alone passed upon by the Advocate or his experts. His case at this point is factually bankrupt; he has no facts relating to the towns and their land use plans, and he has no ultimate conclusions by experts. Yet the Advocate wants to invoke the expensive and time-consuming litigation process in what he hopes will be a successful hunt. The price we all have to pay, as taxpayers paying for both prosecution and defense, is too high; the price this Court and all defense counsel have to pay, in terms of unnecessary work, is too high. This Court should exercise its discretion to prevent manifest injustice and abuse of its process and rules.

[redacted] of the defendant municipalities have cooperated to form and fund a Common Defense Committee which will prepare the issues

and [redacted] maxi-trial. This motion is made at the request of that Committee. Individual counsel for each defendant will presumably notify the court whether any defendant does not join in this motion and whether they wish to advance any additional grounds in support of this motion.

B. The Complaint

This is an action in lieu of prerogative writ. The Morris County Fair Housing Council, the Morris County Branch of the NAACP, [redacted] the Public Advocate seek injunctive and declaratory relief against twenty-seven municipalities located in Morris County. The purpose of this action is to set aside as exclusionary the land use plans and zoning ordinances of all the municipalities.

The complaint alleges only that defendants have not satisfied their fair share of regional housing needs. It fails to articulate fair share. It fails to identify the applicable region. It fails to specify the alleged deficiencies in defendants' land use plans and zoning ordinances. Additional inadequacies are described in defendant Chester Township's Brief in Support of Motion for More Definite Statement and will not be repeated here. See brief at p. 7-8.

C. The Court Orders for Disclosure of Information, Discovery, and Pretrial Procedure

In response to the Motions for More Definite Statement, the court ordered plaintiffs to respond in detail to three questions:

> [H]ow each defendant is considered to be a member of a region;
>
> [H]ow each fails to provide its fair share of the regional need for housing for persons of low and moderate incomes;
>
> [H]ow, with specificity, each defendant's ordinance fails to meet the requirements of the Municipal Land Use Law and the pertinent judicial decisions.
>
> Order Denying Motions for a More Definite Statement, January 19, 1979.

The Court also established strict guidelines for pretrial procedure in its Order Establishing Procedures and Dates for Discovery and Pretrial Conference, January 19, 1979. Specifically, the Court ordered the Advocate to produce on January 23, 1979 all experts' reports in his possession when the complaint was filed. The Court also ordered the plaintiffs to supply all subsequent experts reports and documents relied upon no later than March 12, 1979. Plaintiffs' experts are to be deposed prior to April 27, 1979.

The obligations of defendants are keyed to the compliance dates assigned to the Advocate: experts reports to be furnished by April 27, 1979, and depositions of experts to be completed by June 29, 1979.

The pretrial conference is scheduled for July 3, 1979. Any significant delay in the plaintiffs' response to any of its compliance obligations will either delay the entire pretrial sequence or place an untenable burden on the defendants to litigate in the dark.

D. [redacted] Inadequate Response to the Disclosure Orders of This Court

1. Public Advocate's January 30, 1979, response.

Under date of January 30, 1979, the attorneys for plaintiffs sent a letter to all counsel, attached to which was a list of proposed experts, fact witnesses, and the alleged data that the Advocate's office had with respect to each municipality's relation to region, fair share number, and ordinance dificiencies. This is set forth as Exhibit C attached to the Affidavit of Alfred L. Ferguson filed in support of this motion.

To evaluate whether this document is responsive to the Court's order, Mr. Bisgaier's letter of January 30, 1979, must be closely scrutinized.

In the first paragraph the following statement appears:

> Also included is our present list of fact and expert witnesses submitted pursuant to Judge Muir's order regarding discovery procedures. [emphasis supplied]

Thus it plainly appears that the Advocate contemplates further expert witnesses whose identity he chooses not to reveal.

The next statement in the letter is even more revealing.

> Please note that no expert reports are being included since none were in plaintiffs possession prior to the institution of litigation.

This statement is made in reply to this Court's order dated January 19, 1979, paragraph 1(c.), which ordered that the plaintiffs serve upon each defendant "Copies of all expert reports in possession of plaintiffs at time suit instituted."

[redacted] will recall the discussion between various defense counsel and the Court at the time this provision of the order was discussed in open court on December 8, 1978. Defense counsel had wanted to get as soon as possible all expert reports which gave the Public Advocate a theoretical basis, or indeed any basis, on which the suit was filed. The attorneys for the Public Advocate agreed that such disclosure would be appropriate. It now appears that there were never any experts' reports in their possession at all.

The attorneys for the Public Advocate were less than forthright. They knew, or indeed should have known, that there were no experts' reports, and yet they failed to inform the Court that there were none, even as the Court was ordering them to produce them. The result of this omission to candidly inform the Court about the status of the litigation is that the discovery schedule set by the Court cannot be followed, since the expert theoretical basis on which the Advocate intends to build his case is not now known. The Advocate intends to develop it over a period of time during the course of the litigation. The defense counsel cannot organize a defense either for the maxi-trial or the mini-trials without knowing what the expert testimony for the Advocate will be. The entire schedule of discovery and pretrial procedures set by this Court will be delayed. This could have been averted by a frank and forthright statement to this Court on December 8, 1978.

Incidentally, a statement by Mr. Bisgaier in his letter of January 30 does not square with the statement of Stanley C. Van Ness, Public Advocate of the State of New Jersey, in his affidavit dated December 19, 1978, which was filed with the statement of items comprising the record on appeal in Docket No. A-919-78. In that affidavit Mr. Van Ness, in paragraph 6, reviewed the steps taken by his office prior to the institution of the litigation. In paragraph 6 he stated:

> Staff also assessed the land use regulations of each Morris County municipality and reviewed this assessment with an expert.

Thus, the staff of the Public Advocate had, in fact, met with an expert and had presumably received some kind of opinion report from this expert prior to the filing of this lawsuit.

This is in direct conflict with what Mr. Bisgaier says in his letter of January 30, 1979. Defendants are entitled, at the very least, to a statement of what expert reports the Advocate had received, and the fact they may have been given orally is irrelevent. The Advocate has a duty to reduce them to writing and disclose it. It may be that the Public Advocate does not want to disclose an expert opinion which he now believes inadequate, based upon inadequate facts and review, or subject to serious challenge because prematurely given. That is no excuse for not complying with the Court order or for making inaccurate statements in discovery.

[redacted]r's letter of January 30, 1979, then goes on to attempt to keep the Advocate's options open and to avoid the thrust of the Court orders of January 19, 1979. Those orders sought to make the Advocate disclose the theory of his case and the substance of his expert testimony. This the Advocate does not want to do, and this is how his counsel attempts to avoid the Advocate's obligations:

> The attached reflects the work product of plaintiffs' attorneys and reflects their opinion as to aspects of t[redacted] defendants' ordinances which are exclusionary. It is n[redacted] meant to be exhaustive. Plaintiffs' will, of course, b[redacted] relying on their experts for detailed critiques of the [redacted] ordinances at the time of trial.

It may be that the Advocate's attorneys cannot comply with the Co[redacted] order because they, in fact, have not done the work necessary to do so, or because it is impossible to do it with the resources at their command within the time ordered by the Court. This is irrelevant. If, in fact, the Advocate's office cannot tell the defendants how the ordinances are exclusionary, then the lawsuit should not have been brought at all. It is an abuse of the rules and the process of this court to file a massive lawsuit challenging the ordinances of 27 municipalities, and then to rely on the discovery process to find out if they even have a case, all the while causing the build-up of large legal costs for each municipality.

Finally, the Advocate makes a gesture towards disclosure of its definition of region and fair share.

> For purposes of evaluating issues relating to 'region' and 'fair share' before filing the complaint, plaintiffs relied on the Revised Statewide Housing Allocation Report for New Jersey, released in May, 1978 and prepared by the Division of State and Regional Planning of the New Jersey Department of Community Affairs. That document and working papers contain an analysis of region and fair share methodologies.

It should be noted that the DCA report of May, 1978, (Exhibit 9 to the Ferguson affidavit) is only given as a historical basis for what the attorneys in the Advocate's office (and perhaps also the undisclosed secret expert) used in "evaluating issues relating to regions and fair share" before the complaint was filed. It is not given as the documentation upon which the plaintiffs will rely at trial. That information the Advocate either cannot or will not disclose.

It should also be noted that the DCA study itself is presumably not enough; "that document and working papers" are offered as containing "an analysis" of region and fair share methodologies. We do not know what these "working papers" are. If they are the working papers of the DCA report, they have not been supplied. If they are the working papers of the Advocate's office, they have not been supplied. If they are the working papers of the Advocate's undisclosed expert, they have not only not been supplied, but their status has also been misrepresented to the Court. Finally, they are offered as "an analysis"; they are not offered as "the" analysis which the Advocate has adopted or upon which they will rely at trial.

[redacted]tion, it should be noted that the DCA report, in bold type on its face, states that it is "FOR PUBLIC REVIEW AND COMMENT." It is no way final or meant to be final by the governmental agency which prepared it. It has not been adopted by the legislature (see the pending Greenberg bill in the Senate), and it has in no way been officially promulgated by any executive agency.

Indeed, the Advocate is not even now content to rely on the DCA report. He did not specify

> How each [defendant] fails to provide for its fair share of the regional need for housing for persons of low and moderate incomes.
> January 19, 1979, Order

but instead gave the following [using Chester Township as an example]:

> Fair share estimate: 1266 or equitable distribution based on regional percentage of low and moderate income households.

The number 1266 comes directly from the DCA report; the source of the "equitable distribution" is unknown; the terms are wholly undefined; and this Court and all defendants are in the dark on this central issue.

There is no attempt made by the Advocate to place each municipality in the region. A town in northeast Bergen County has the same statistical significance as a town in Morris County itself. For the Advocate, Fort Lee is counted the same as Morristown.

[redacted]ublic Advocate Affidavit

[redacted]ppeal in which all municipalities challenge the decision of the Advocate to bring this suit in the first instance, bearing Docket No. A-919-78, the Public Advocate filed an Affidavit dated December 19, 1978, as the record on appeal in addition to the complaint. (Exhibit F attached to Ferguson Affidavit)

In reviewing this affidavit, it is abundantly evident that all the criticism of the Advocate's office in bringing this action based upon inadequate knowledge and inadequate hard data is warranted, and that the suspected inadequate preparation is, in fact, true. The Advocate and his staff presumably debated the issue and examined zoning ordinances and zoning maps. Very little, if any, discussion was had with expert opinion, other than the undisclosed expert mentioned (but not by name) in Mr. Van Ness' affidavit, paragraph 6, referred to above. There is much discussion, many meetings, and much analysis, all of it interoffice.

It is significant that there were no meetings with other branches of government. There were no meetings with the Department of Community Affairs. There were no meetings with any representative of the legislature which was then actively considering the Greenberg bill. There were no meetings with the Department of Environmental Protection which was then, in fact, considering a total ban (subsequently

enacted by executive order) in much of the Pinelands. There was no consultation with the environmental planners who are doing the Section 303(e), 208 and 201 water quality and pollution control facilities planning under the Fresh Water Pollution Control Act Amendments of 1972, as amended by the Clean Water Act of 1977. Millions of State dollars are going into short and long-range planning efforts in the environmental area, and the Advocate did not see fit to even inform those agencies about the bringing of this lawsuit or to solicit their opinion as to the advisability or feasibility of the relief demanded in the complaint.

The long and the short of this bizzare situation is that the Advocate has pled, but cannot prove, a pie-in-the-sky desire to meet an alleged housing need, but he has given no thought or consideration as to how the limited resources available to society can or ought to be marshalled to help meet that need. He seeks to impose on this court and 27 municipalities, at great public expense, the obligation to devise some strategy to solve the problems he perceives. He has not been able to do so, and he therefore throws his lopsided ball in our court. It is questionable whether this particular ballgame should be played in this court at all, but if it is, we should play it according to the rules set down by this Court in its orders of January 19, 1979, and not according to the rules the Advocate would like to have.

The Advocate's Interrogatories

The factual bankruptcy of the Advocate's case is perhaps best shown by the Interrogatories he served on all defendants (Exhibit D to the Ferguson Affidavit). The Advocate would have each defendant do detailed studies of its land use plans and the effect of its zoning ordinance, using the methodology and definitions which the Advocate wants and which the Advocate's expert will presumably use. He seeks to impose upon each of the municipalities the obligation of counting vacant developable acres, using the definition which most appeals to the Advocate and his mystery expert. He would have each municipality count the numbers of acres in different categories. Some municipalities may have already done this in their land use plans, and if so, they can easily comply. That is not the point. The point is that the Advocate himself does not know what the facts of each municipality's land use plan are and did not know them when the complaint was filed. He started from a preconceived notion that every municipality was exclusionary and is now trying to make each defendant assemble the data which will vindicate the Advocate.

The municipal defendants contend that this is an abuse of the discovery process and procedures allowed by the rules of court and should not be countenanced. It will cause undue expense and public distrust, not only of the Advocate and his office, but also of the court and its process. The

towns in Burlington County are being bombarded by "voracious land speculators and developers," So. Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 191 (1975), at every turn. This court is well aware of at least one such case, Caputo, et als, v. Chester Township, Docket No. L-42857-74 P.W., recently tried before this Court. That trial commenced in early October 1977; the parties finished presenting evidence in March, 1978; and judgment was rendered in October 1978. This kind of prerogative writ action should be tried expeditiously, and this Court should exercise its inherent power over the parties before it to compel such public interest litigation to comply with basic principles of economy and effectiveness. It should dismiss the Advocate's complaint at this time without prejudice.

4. Mr. Bisgaier's letter of February 6, 1979

Counsel for the Public Advocate wrote a letter to the court in which counsel attempted to lay the foundations for further non-compliance with the court-ordered pretrial schedule for discovery. In his letter counsel states that the court-ordered discovery

> . . . may be detrimental to my clients and our ability to present their case.

Because of the Advocate's inadequate preparation, this statement is probably true. However, this concern was not stated at the hearing on December 8, 1978, when this court set the discovery schedule. Counsel's protestations come too late.

[redacted]2, counsel states that he anticipates sub-sta[redacted] after the pretrial conference, now scheduled for July 3, 1979. Counsel states that one of the principal reasons for this is the"environmental issue." Because the defendants might raise environmental issues, the Advocate argues, he will need additional discovery of those issues from the defendants.

Counsel wholly misconceives the real world of land use planning. The advocate would have this Court believe that environmental issues are largely "unmeritorious." Yet the Advocate in the first instance relies upon the DCA study to establish the fair share number, and this very study of necessity incorporates significant environmental concerns in its methodology. Thus, the category of vacant developable land (DCA report, Exhibit G, p.16) excludes land at greater than 12 percent slope, and it excludes wet lands, surface waters and floodways which have been maped by the Department of Environmental Protection or the United States Department of Housing and Urban Development. These exclusions were themselves designed to take account of environmentally sensitive areas. The environmental component of the DCA report is of necessity a large-scale and crude planning tool. The DCA report itself recognizes this and defers the implementation of any numerical housing goal for municipalities to other planning programs and documents, such as the State Development Guide Plan. DCA report, pp. 21-22.

[redacted]ocate would have the towns bear the burden of [redacted]ese environmental issues. Fortunately for the defendants, however, the environmental issues are fundamental components of the Advocate's methodology, and the Advocate will have to deal with the environmental issues in the first instance. It is, therefore, all the more distressing to see the Advocate has not addressed any environmental issues at all. His preparation of his case has wholly omitted considerations of water and air quality planning currently being carried out by the Department of Environmental Protection and other governmental bodies under the mandate of Federal and State statutes.

If the Advocate has a problem with environmental issues, it is one of his own making. He should not be allowed to try and escape the consequences of his own inattention by merely labeling this a problem which will be raised by the defendants. Accordingly, when the Advocate's counsel says that his environmental experts "will not be asked to do any substantial work" until he takes discovery of the defendants' environmental experts, he, in effect, has admitted that his theory of land use planning in New Jersey is fundamentally flawed and defective.

The pretrial conference will not "easily resolve such problems" as claimed by Mr. Bisgaier in his letter. The problems raised by the Advocate all stem from his misconception

of t[redacted]is case and what he as a public official who [redacted]ff should do before filing it. The problems will not disappear; indeed, they will become magnified and of more significance as time goes on.

E. THE PROBLEM FACING DEFENDANTS

Plaintiffs' conduct poses serious problems to the course of this litigation. A suit in the nature of prerogative writ should proceed expeditiously. Undue delay is undesirable. Unfortunately, plaintiffs' initial neglect in preparing for suit, and plaintiffs' subsequent failure or inability to comply with court-ordered disclosure, put an unfair burden on the defendants.

Defendants are unable to retain experts, prepare witnesses and develop strategy unless or until plaintiffs provide complete answers to the Court's questions. Given the level of preparation, it is unlikely that plaintiffs can provide a detailed response within a reasonable time. Without this information, it is virtually impossible for defendants to comply with the accelerated pretrial schedule.

While defendants are not able to comply with the schedule, plaintiffs chose not to comply. Recently, plaintiffs have registered objections to the pretrial guidelines. Letter from Carl S. Bisgaier to Honorable Robert Muir, Jr., A.J.S.C., February 6, 1979. Plaintiffs seek to depart freely from the guidelines. Plaintiffs would like to substitute witnesses and experts, without restraints. Plaintiffs also desire to tender preliminary expert reports and refrain from submitting reports of environmental experts altogether.

[redacted], plaintiffs desire a free-form lawsuit in which they discover whether they have a case at all as they go along, and in which the 27 defendants are forced to pay all 27 sets of lawyers to help the Advocate assemble the facts which should have been in hand no later than October 13, 1978, when this action was filed. This Court can further the public interest by dismissing the lawsuit without prejudice so as to avoid the uncalled-for and wasted expense of 27 municipalities working against the Advocate in trying to define the basic terms of the Advocate's own lawsuit.

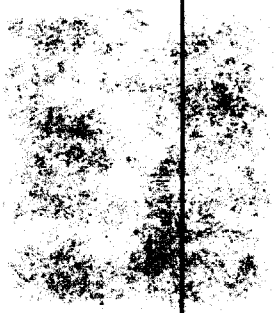
The pernicious effect of the Advocate's failure to adequately research this lawsuit before it was filed is subtle but very significant. Land use planning in New Jersey is in a state of upheaval. The Supreme Court cases of Mt. Laurel and Madison Township, and the growing numbers of lower court opinions in this area, obviously constitute a large part of the problem. The remaining part of the problem is the Municipal Land Use Law, an extensive rewriting of the law of land use planning in New Jersey. All towns were to be in compliance with that statute no later than February 1, 1979, a deadline just recently extended by the legislature and the Governor for four months. All towns in New Jersey have to comply, and compliance means a detailed review of many ordinances, not just zoning ordinances, but site plan, subdivision, road construction, erosion, environmental, and similar ordinances.

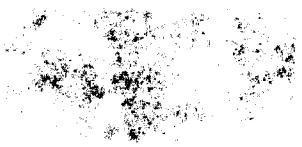
It is clear that no land development regulation (the term [redacted] Municipal Land Use Law) of any municipality in the State of New Jersey can survive intact from a determined attack under either the Mt. Laurel/Madison doctrines or from a rigid scrutiny under the Municipal Land Use Law.

If the Advocate had pointed out to each defendant those provisions which he considers invalid and the reasons for the alleged invalidity, each municipality would then have the ability, and indeed the obligation, to review in good faith the allegations and, if the Advocate is right, make appropriate changes. At the very least, defense counsel could decide which issues are worth litigating. This, of course, would save much time and expense in the litigation process. As it is now, the defendants are being asked to wait until the litigation is almost over before the Public Advocate will consent to have his experts tell the 27 municipalities what is wrong with their development regulations. This is absurd. The municipal officials of all the defendants have the right to be informed of what the Public Advocate considers deficient in their ordinances, and they have the obligation to get advice from their attorneys as to whether changes should be made.

Because of the Advocate's inability to detail his allegations against the defendants, this salutary process is not now possible. This Court should make it possible by

dismi[redacted]plaint and ordering the Advocate to do the requi[redacted]ore instituting it again, if ever.





POINT I

[redacted]AINT SHOULD BE DISMISSED FOR FAILURE OF PLAINTIFF TO COMPLY WITH COURT ORDERED DISCOVERY

Failure to comply with this court's discovery order warrants dismissal of the complaint under R. 4:23-2(b). That rule provides, in pertinent part:

> If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . .

Dismissal under the provisions of R. 4:23-2(b)(3) may be with or without prejudice, in the court's discretion. This sanction is not harsh in the circumstances of this case and is well-suited to this theoretical lawsuit which as yet is totally unsupported by an expert report or testimony.

A. The Standards for Imposing Sanctions for Non-Compliance

This court is free to enter an order of dismissal, under R. 4:23-2(b)(3), where the initial order for discovery strikes at the very foundation of the cause of action. Dismissal is also permitted where the refusal to comply is deliberate and contumacious. See, e.g., Lang v. Morgan's Home Equip. Corp., 6 N.J. 333 (1951); Merck & Co. v. Biorganic Laboratories, Inc., 82 N.J. Super. 86 (App. Div. 1964);

Int[redacted]p. v. Uncas Printing & Finishing Co., 39 N.J. Sup[redacted] (App. Div. 1956); In Re Wozar, 34 N.J. Super. 133 (App. Div. 1955). Compliance, of course, is viewed in terms of the order requiring discovery. See, e.g., Smithey v. Johnson Motor Lines, 140 N.J. Super. 202, 207 (App. Div. 1976).

Under these standards, dismissal is proper. The deliberate inability to answer the questions ordered by this court clearly addresses the foundation of the theoretical complaint. The response is clearly deficient. In this context, support for dismissal is firm. See, e.g., Lang v. Morgan's Home Equip. Corp., supra; Merck & Co. v. Biorganic Laboratories, Inc., supra; Interchemical Corp. v. Uncas Printing & Finishing Co., supra; In re Wozar, supra. These decisions are authority for dismissal for the present action.

In Lang, supra, an employee brought suit to recover commissions and salary from his employer. The employer counterclaimed, seeking to hold plaintiff for inventory shortages. Subsequently, the court ordered the employer to respond to Interrogatories and to permit the employee to examine defendant's books and records. This order was defied and the counterclaim was dismissed under the provisions of a precursor to R. 4:23-2(b). The Supreme Court reversed and remanded, compelled only by the trial court's surprising finding that the defendant's non-compliance was not deliberate. 6 N.J. at 340.

[redacted]arily, failure to answer Interrogatories, along with [redacted] to produce books and records, in disregard of a court order, is "clear evidence of contumacy." 6 N.J. at 340. In Lang, the reviewing court felt restrained by the trial judge's finding as to contumacy. The test, however, was clear:

> The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases where the order for discovery goes to the foundation of the cause of action, . . . or where the refusal to comply is deliberate and contumacious." 6 N.J. at 339.

Chief Justice Vanderbilt realized that reasonable sanctions, including dismissal, were "peculiarly necessary in matters of discovery." 6 N.J. at 338. Without sanctions, the strong policy favoring discovery could never be implemented.

> Liberal procedures for discovery in preparation of trial are essential to any modern judicial system in which the search for truth in aid of justice is paramount and in which concealment and surprise are not to be tolerated . . . Our rules for discovery . . . are designed to insure that the outcome of litigation in this State shall depend on its merits in the light of all of the available facts, rather than on the craftiness of the parties or the guile of their counsel. 6 N.J. at 338.

This statement of policy has been repeated frequently. See e.g., Jenkins v. Rainner, 69 N.J. 50 (1976); Blumberg v. Dornbusch, 139 N.J. Super. 433 (App. Div. 1976); Interchemical Corp. v. Uncas Printing & Finishing Co., supra.

[redacted]f Justice also stated that the power to imp[redacted] sanctions is inherent in the court. 6 N.J. at 338. This too is well settled. See, e.g., Kohn's Bakery, Inc. v. Terracciano, 147 N.J. Super. 582 (App. Div. 1977); Burke v. Central R.R. Co., 42 N.J. Super. 387 (App. Div. 1956).

* * *

Sanctions were successfully imposed in Interchemical Corp. v. Uncas Printing & Finishing Co., supra, and Merck & Co. v. Biorganic Laboratories, Inc., supra. Sanctions were not imposed in In re Wozar, supra.

None of the cited cases are dispositive; this case involving an attack on the zoning ordinances of twenty-seven towns in Morris County, is unique. This court is free to exercise its discretion to accomodate the legitimate interests of all parties. A dismissal without prejudice would avoid the draconian sanction of dismissal with prejudice which the court declined to impose in Lang, supra, and would allow the Advocate to do the expert planning work necessary to its case. The defendant towns would not have to incur large fees in the defense of a suit based on unformed and embryonic theories of planning. When the Advocate's case is ready to proceed, if ever, the Advocate can refile it.

B. Plaintiffs' Failure to Comply with this Court's Orders

In the case sub judice the court directed plaintiffs

to [redacted] questions:

> [redacted]w each defendant is considered to [redacted]mber of a region;
>
> b. [H]ow each fails to provide its fair share of the regional need for housing for persons of low and moderate incomes;
>
> c. [H]ow, with specificity, each defendant's ordinances fails to meet the requirements of the Municipal Land Use Law and the pertinent judicial decisions.
>
> Order Denying Motions for a More Definite Statement, January 19, 1979.

Each question addresses the foundation of the Advocate's planning theory in this very technical and theoretical area of Mt. Laurel compliance and fair share allocations. Each is intended to let defendants know the facts on which the lawsuit is based and which are necessary to prepare an informed defense.

In response, plaintiffs assert the eight county region used by the DCA in its preliminary report. There is absolutely no statement of how each defendant is rationally related to the alleged region. The Advocate might just as well have answered that each defendant is in Northern New Jersey.

The Advocate also assigns a fair share number or "equitable distribution" to each municipality based on the same DCA report. No analysis of the planning and zoning facts of the existing zoning ordinance or land use plan of each

defendant has been presented which would show whether any defendant has or does now make allowance for, its assigned number.

It is painfully apparent that the Advocate has not even assembled the data necessary to comply with the court's order. Indeed, it is apparent that the Advocate does not even intend to do so. He seeks through interrogatories to have each defendant assemble the data that he wants; put it in the desired form; and hand it to the Advocate and his expert witnesses. Then, and only then, does the Advocate plan to subject the data to expert perusal and conclude that the zoning is exclusionary or not exclusionary. The Advocate has not complied with the court order because he is unable to do so; and he never planned to be able to do so until the eve of the trial.

This is not enough, and the effort of the Advocate to rescue an ill-conceived and badly-timed lawsuit comes too late. The court has quite properly set an expeditious schedule of discovery, given the nature of this prerogative writ action. This schedule cannot now be followed because the Advocate himself does not know the facts on which his lawsuit is based. His experts have not reviewed the facts. How can they? No one has yet assembled them.

In addition, plaintiffs have wholly failed to set forth the shortcomings of each ordinance in terms of the

Municipal Land Law or the relevant case law. All the Advocate has done is to give a simplistic overview of a few characteristics (density per acre, mobile home parks, large lot requirements, etc.) of each defendant's zoning ordinance. This is not the disclosure which the court ordered.

The advocate's non-compliance with the court ordered disclosure is overwhelming and significant. It goes to the very heart of his case. The defendants are left to prepare a defense against undisclosed, and probably unknown, planning theories. In such circumstances, dismissal without prejudice is appropriate.

A dismissal without prejudice may also save the Advocate from an embarrassing predicament. The Advocate's experts have not seen any of the data upon which they will opine as to the exclusionary nature of the various ordinances. Yet they have presumably agreed to testify in favor of the Advocate's position. How can they know before they have reviewed the data? A dismissal will at least let the Advocate's witnesses approach their task in a professionally responsible manner.

POINT II

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH R.1:4-8

Rule 1:4-8 states:

> The signature of an attorney or party pro se constitutes a certificate by him that he has read the pleading or motion; that to the best of his knowledge, information and belief there is good ground to support it; that it does not contain scandalous or indecent matter; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or motion had not been served. For a willful violation of this rule an attorney may be subject to appropriate disciplinary action . . .

The Public Advocate is subject to the rule's provisions by the force of N.J.S.A. 52:27E-4e:

> (The Public Advocate shall) institute or cause to be instituted such legal proceedings or processes consistent with the rules governing the courts of New Jersey and the practice of law therein as may be necessary properly to enforce and give effect to any of his powers and duties.

The Appellate Division has relied upon R. 1:4-8 in ruling that a post-conviction application for modification of a sentence which has already been considered on direct appeal is patently frivolous and should have been summarily dismissed. Moreover, an appeal from the denial of the petition should never have been filed. State v. Bass, 141 N.J. Super. 170 (App. Div. 1976). In Bass, the Department of the Public Advocate appeared on behalf of the defendant.

[redacted] disregard of R.1:4-8 can result in diciplinary action. In re Backes, 16 N.J. 430 (1954), involved disciplinary proceedings against an attorney. In his conduct of an action for divorce, counsel was alerted to his client's bigamy. Counsel was also aware of his client's desire to exclude the wife from participating in the client's estate. Still, counsel asserted in defense to a counterclaim for divorce that his client wanted a divorce only to clear [redacted] to property. The defense was frivolous and untrue. By [redacted] own admission, the defense was raised with knowledge of [redacted] lack of merit and truth and solely to discourage his ad[redacted] Justice Brennan concluded that this was a willful violation of former R.R. 4:11 and a fraud upon the court.

Plaintiffs' lack of knowledge of the facts necessary to support the complaint are apparent throughout plaintiffs' responses to the court orders. The point is underscored by even a quick review of plaintiffs' Interrogatories to the defendants, in which the Advocate seeks to utilize the discovery process to make each defendant prepare the data in a form for use by the Advocate's experts.

Significantly, most of the material solicited through interrogatories is already of public record. This strongly suggests that plaintiffs neglected to make the findings required by R.1:4-8 before filing suit. Instead, plaintiffs endeavor now to learn the necessary facts in the first instance through

int[redacted]ffs' failure to comply with R. 1:4-8 is also evident from their recent and very disturbing objections to the court mandated pretrial discovery and scheduling. Letter from Mr. Bisgaier to this court dated February 6, 1979. If the plaintiffs did their homework in the first instance, as they should have, there would be no need now to protest to this court that the ordered discovery is too onerous for them. They would not need to state that they can only give [redacted] "preliminary" expert reports by March 12, 1979. The [redacted] fact is that there are no experts' reports at all, and there never have been.

The same facts which compel a conclusion that the Advocate violated R. 1:4-8 also compel the conclusion that the Advocate has also ignored the mandate of N.J.S.A. 52:27E-31. There, in deciding whether to institute the action, the Advocate failed to adequately consider four questions mandated by the statute: (1) the importance and extent of the public interest involved; (2) whether that interest would be adequately represented without the action of his department; (3) the presence of inconsistent public interests; and (4) the need to engage outside counsel to represent the inconsistent interests. See Statement of Items Comprising the Record on Appeal, Affidavit of Stanley C.

[redacted] 19, 1978 (Exhibit F). These issues are currently pending before the Appellate Division by virtue of the appeals filed by all municipal defendants to challenge the Advocate's administrative decision to bring this action in the first instance. Those appeals do not preclude this Court from entering orders regulating the conduct of this litigation. Accordingly, this Court should not tolerate such a serious violation of R. 1:4-8, and the complaint sho[redacted] dismissed.

[redacted]

[redacted]

POINT III

PLAINTIFFS SHOULD PAY DEFENDANTS' REASONABLE EXPENSES, INCLUDING COUNSEL FEES

Where plaintiffs fail to provide or permit discovery, R. 4:23-2(b) recognizes that reasonable expenses, including attorneys' fees, are recoverable by defendants.

> In lieu of any of the foregoing orders or in addtion thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. R. 4:23-2(b)

As stated above, plaintiffs planned this action so as to frustrate and to render meaningless reasonably anticipated discovery orders and pretrial schedules of this court. Circumstances rendering the award unjust are absent, since the Public Advocate and all defendants are public bodies, and all legal fees, by whomever incurred, will be paid from public funds. The Public Advocate has caused damage to the public treasury, and his budget should bear the burden.

This court can remedy the injustice caused by the Advocate's conduct by requiring plaintiffs to pay defendants' reasonable expenses, including counsel fees, from the institution of litigation through the date of the dismissal.

CONCLUSION

[redacted] foregoing reasons, the complaint of plaintiff should be dismissed without prejudice, and the defendants awarded their reasonable expenses, including reasonable counsel fees.

Respectfully submitted,

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By: _____
Alfred L. Ferguson
A Member of the Firm

February 15, 1979

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