RULS-AD-1979-90
3/30/79

Reply Brief in Support of Motion for Partial Summary Judgment

pgs 62

RULS - AD - 1979 - 90

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-25645-P.W.

THE ALLAN-DEANE CORPORATION, a Delaware Corporation, qualified to do business in the State of New Jersey,	:	
Plaintiff,	:	Civil Action
vs.	:	
THE TOWNSHIP OF BERNARDS, et al.	:	
Defendants.	:	

REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

Plaintiff's brief in opposition to defendant's motion for partial summary judgment in the Allan-Deane case totally fails to defeat defendant's position that the issues of compliance of the Bernards Township Ordinance with Mt. Laurel and Oakwood at Madison obligations have already been raised and determined in the Lorenc action and that precedents exist for applying the doctrines of collateral estoppel and res judicata to bar plaintiff from relitigating these issues.

Plaintiff attempts to argue that the same issues have not been raised and determined by criticising the trial testimony and totally ignoring the pleadings and decisions rendered by the courts. Plaintiff even argues the unfairness of applying the doctrines by stating that Allan-Deane was in no way, directly or indirectly, involved in the Lorenc action.

The record of Lorenc, carefully outlined in defendant's brief in support of the motion, leaves no doubt, however, that Mt. Laurel issues were fully presented. The trial record even demonstrates that, far from being a stranger to the Lorenc action, Allan-Deane was directly involved in placing those issues before the court. If plaintiff's critique of the Lorenc trial testimony could succeed in defeating defendant's motion, collateral estoppel and res judicata could never be applied. Inventive lawyers can endlessly

criticise the choice of witnesses, order of testimony, and substance of evidence presented in a prior case. That, however, is not the proper test for applying the doctrines.

Assertions that the factual and legal context have changed are similarly unconvincing. Plaintiff cannot dispute that the Oakwood at Madison as well as Mt. Laurel issues were before the court. Nor can plaintiff identify any ordinance provisions which are now challenged by Allan-Deane but were not previously challenged by the Lorenc plaintiffs.

Finally, plaintiff's legal arguments do not dispose of the availability of legal grounds for applying the doctrines here. The statutory test for declaratory judgments is totally inappropriate. Defendant's motion was timely. Outdated standards for applying collateral estoppel and res judicata cannot prevent their current use. Precedents cited by defendant for applying the doctrines to public interest matters can be extended to operate in this case.

Plaintiff's arguments are, of necessity, devoid of any real concern with policy considerations. The truth is that, were plaintiff's arguments accepted,municipalities would be endless, fair game for Mt. Laurel attacks. Plaintiffs describe the "fundamentally flexible and changing nature of the fair share concept". Apparently, they view the context as so variable that, within months after one controversy ends, another should ensue. Their arguments would require this matter to be relitigated by an estimated twelve week trial within four months after the Appellate

Division's determination. This unpalatable alternative need not be the court's choice.

SUMMARY OF FACTUAL AND LEGAL CONTEXT

A. The Proper Test, Same Facts and Legal Issues Raised and Determined And Absence of Fraud or Collusion, Is Met.

Defendant's brief in support of the Motion for Partial Summary Judgment outlined in detail the identity of facts and issues raised and determined in Lorenc and the facts and issues raised by Allan-Deane. The plaintiff's brief ignores everything but the trial testimony, and criticises the Lorenc choice of witnesses, order of presentation, and emphasis of testimony. This is not an appropriate test to determine the application of collateral estoppel and res judicata. In fact, the arguments of plaintiff are strange indeed in light of the case they intend to present.

Plaintiff presents no law to support a new test for evaluating the trial testimony. They do not because they cannot. Courts do not critique the experts or the timing of testimony. The record is merely reviewed to determine whether or not facts and legal issues were before the court and the absence of fraud or collusion.

The criticism of the focus in Lorenc on the PRN and BRC zones is similarly curious since the Allan-Deane complaint also singles out these zones for special attention. (See Brief in Support of Motion for Partial Summary Judgment, Exhibit A, §§26(d),30(f),31(a)-(i)). These zones are necessarily treated in more detail since the BRC zone was created to satisfy the

Township's least cost obligations and the PRN zones to fulfill additional multi-family and small single family obligations. Any lawsuit challenging the adequacy of the Township's fulfillment of its Mt. Laurel obligations must of necessity focus on these two ordinances and the feasibility of development under them.

Plaintiff cannot demonstrate that the same facts and issues are not before the court by either ignoring the major part of the record which must be considered: the pleadings and decisions, or by imposing an inappropriate test to evaluate trial testimony.

B. Interrelationship of Lorenc and Allan-Deane Plaintiffs.

Plaintiff suggeststhat great unfairness would result from barring Allan-Deane from relitigating Mt. Laurel and Oakwood at Madison issues because Allan-Deane had no direct or indirect relationship with the Lorenc action. Nothing could be further from the truth.

William Lanigan, counsel for the Lorenc plaintiffs, was counsel for the Allan-Deane Corporation in its companion action in Bedminster Township until August 30, 1977. (See Substitution of Attorney, attached as Exhibit A). The Allan-Deane lands in Bedminster and Bernards Township are adjoining parcels. The development proposal presented to Bernards Township for the Allan-Deane lands is a unified plan involving both townships. While William Lanigan was litigating the Lorenc suit,

therefore, he was counsel for Allan-Deane, actively attempting to secure success for Allan-Deane in litigation involving the parcel of land immediately adjoining the parcel at issue before this court.

It is not surprising, given the close relationship of Lorenc and Allan-Deane, that the second amended complaints in both suits are identical. It is similarly not surprising that the major witness on fair share and least cost obligations in both actions is Alan Mallach. Alan Mallach was also a witness in the litigation brought by William Lanigan on behalf of Allan-Deane against Bedminster Township. Alan Mallach admitted during the course of his testimony on the Bernards Mt. Laurel Ordinance in the Lorenc case that he had analyzed that same ordinance for Allan-Deane at the request of Henry A. Hill, Jr., counsel for Allan-Deane in Bernards Township. During Mr. Mallach's testimony, Mr. Hill was present in court and handed Mr. Lanigan notes during the course of testimony. (See Excerpts from Lorenc Transcript, 11/30/76, T 169-71, attached as Exhibit B).

There is only one possible explanation for this close involvement of Mr. Hill with the Lorenc case. The Lorenc plaintiffs were presenting the Mt. Laurel issues and, if successful, both Lorenc and Allan-Deane plaintiffs could be helped. Mr. Hill was protecting the interests of Allan-Deane by assisting Mr.Lanigan. Rather than an assertion of non-involvement helping the Allan-Deane cause, the actual facts of interrelationship and involvement further support the need to apply collateral estoppel and res judicata

to bar Allan-Deane from relitigating the same issues decided in Lorenc.

C. Facts and Law Are Essentially Identical.

The factual context on which Mt. Laurel and Oakwood at Madison obligations rest is essentially unchanged since the issues were presented and determined in Lorenc. The essential facts and law now operative were before the Lorenc court.

Plaintiff argues that demographic characteristics and employment opportunities have shifted since the Lorenc trial and impose different obligations on the Township. This argument ignores the fact that obligations are based on projected not current population and employment data . The Bernards Township fair share obligation presented at the Lorenc trial involved a six year projected need.

Nor does the example of the publishing of the Statewide Housing Allocation Plan in 1978 support plaintiff's position. A preliminary version of the 1978 document was available in 1976 when the Lorenc trial occurred. The Bernards Township obligation to provide 1400 units by the year 1990, included in the 1978 report, is essentially consistent with the six year projected obligation of slightly over 500 in the William Allen Fair Share formula presented by Bernards Township in Lorenc.

An argument that the legal standards changed and require different testimony is similarly not supported by the record. Counsel for both parties in Lorenc outlined in detail the implications

of the Oakwood at Madison decision for the Lorenc case. Neither counsel nor the court saw any need to take additional testimony. (See Statement of Facts, Defendant's Brief in Support of the Motion for Partial Summary Judgment, at 34-36, and Exhibits Q,R,S, T and U). The decisions evaluated the Bernards Ordinance in the light of Oakwood at Madison as well as Mt. Laurel obligations. (See id. at 37-45, Exhibits V to EE).

Plaintiff does not specify any provisions of the Bernards Ordinance which their complaint puts at issue other than those before the court in Lorenc. Testimony was offered on all the Ordinance provisions before the Lorenc court. Plaintiff can, therefore, not successfully sustain the argument that a changed factual and legal context requires a new trial.

POINT I

THE SUPREME COURT OF NEW JERSEY HAS APPLIED RES JUDICATA TO BAR A TAXPAYER FROM RELITIGATING ISSUES.

Plaintiff's efforts to argue that application of res judicata in taxpayer actions is not a viable model to apply in this case because it is "rarely used" is plainly frivolous. The New Jersey Supreme Court endorsed the doctrine in a decision on February 1, 1979, Roberts v. Goldner, et al., A-60 September Term 1978 (February 1, 1979).

In Roberts, the plaintiff taxpayer challenged the legality of an appointment previously challenged and held valid in Adams v. Goldner, et al., A-61 September Term 1978 (February 1, 1979). The Supreme Court noted that the Adams suit pleaded the same facts, raised the same issues, named the same defendants, and sought the same relief. The court, therefore, held that the complaint was properly dismissed by the trial court as res judicata.

In so doing, the Supreme Court adopted the holding of In re Petition of Gardiner, 67 N.J. Super. 435, 447-48 (App.Div. 1961), cited by defendant in its Brief in Support of the Motion for Summary Judgment at 56-8 as authority for that doctrine. The application of res judicata to bar relitigation of taxpayer suits is clearly the law of the State of New Jersey.

POINT II

THE CONCEPT OF PRIVITY CURRENTLY ADOPTED BY THE NEW JERSEY SUPREME COURT INCLUDES REPRESENTATIVE ACTIONS.

Plaintiff argues that collateral estoppel and res judicata can only apply to a former party or its privy, that the old definition of privity as a "mutual or successive relationship to the same rights of property" cannot apply here, and that the defendant was trying to mislead this court in eliminating the "privity" requirement from its arguments. In fact, defendant did not ground its arguments in any privity doctrine because the meaning of the doctrine is so unclear that its use tends only to confuse the issue. Jefferson School of Social Science v. Subversive Activities Control Board, 331 F.2d 76 (D.C. 1963); "Non Parties and Preclusion by Judgment: the Privity Rule Reconsidered", 56 Cal. L.Rev. 1098 (1968). Since plaintiff chooses to rely so heavily on this doctrine, defendant insists that the currently accepted definition of the doctrine includes a relationship by representation, and can, therefore, apply to this action.

The New Jersey Court in Roberts v. Goldner, supra, the taxpayer suit just described, stated that the doctrine preventing relitigation applies to "parties, or their privies". Since Goldner was clearly not a party to the first action, he could only fit this doctrine if the privity relationship includes that of representation by a party to the prior action.

This definition incorporating relationships other than those based on property has been adopted by the Third Circuit. In Bruszewski v. United States, 181 F.2d 419, 423 (3rd Cir. cert. denied, 340 U.S. 865 (1950), Judge Goodrich defined privity as:

> merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res adjudicata.

In a recent decision in the Fifth Circuit, Judge Wisdom found federal authority basically agreed on this broader definition of privity. The court cited as authority Professor Vestel's explanation that:

> the term privity in itself does not state a reason for either including or excluding a person from the binding effect of a prior judgment, but rather it represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion.

Southwest Airlines Co. v. Texas International Airlines, 546 F.2d 84,95 (1977).

The doctrine of privity can, therefore, apply to this suit if the "representative relationship" between Lorenc and Allan-Deane satisfies the tests of sufficient closeness.

POINT III

THE TEST OF ADEQUATE REPRESENTATION, GROUNDED IN DUE PROCESS, IS MET IN THIS CASE.

Allan-Deane contends that the relitigation of Mt. Laurel issues can only be prevented when the prior action is specifically designated as a class action. This is not the case. Prior decisions, which limit res judicata effects to non-parties in in personam actions, can be distinguished from this case, and other precedents can be applied. The appropriate test to apply here is whether application of res judicata and collateral estoppel satisfies fundamental standards of due process.

Taxpayer actions challenging the validity of an ordinance are not considered in personam actions, but rather are actions in rem. Home Const. Co. v. Duncan, 68 S.W. 15(Ky. App.Div.1902); 74 Am.Jur.2d Taxpayers Actions §2 at 185. The attack on the entire land use ordinance scheme in a Mt. Laurel case should similarly be considered an in rem rather than an in personam action, and only the limitations on application of the doctrines in a taxpayer suit should be imposed.

The cases cited by plaintiff as authority for denying a res judicata effect to the determination of Mt. Laurel issues, none of which are New Jersey law, can be distinguished from this case. O'Hara v. Pittston Co., 186 Va. 325, 42 S.E. 2d 269 (Sup.Ct. 1947), involved litigation of a private right to an appraisal of stock value, not a general public interest question. The non-party plaintiff in the second action had been specifically excluded from the decision in the first action. The holding that

the non-party was entitled to bring a separate action,was largely grounded in the court's interpretation of the statute defining appropriate procedures in stockholder appraisals. The court found that the statute specifically granted each shareholder the right to a separate trial.

Even E.B. Elliott Adv.Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir.1970), cert.den. 400 U.S. 805 (1970), the case cited by plaintiff as most closely on point, can be distinguished from this case. The ordinance challenge involved in the Elliott case was not a broad based challenge to the entire zoning scheme of the Township which affected property rights of all residents of the community. Elliott involved merely a challenge to an ordinance controlling advertising along highways, and arguably only affected the property right of the advertising agencies and property owners whose lands were abutting the highway. No prior challenge had been made to the standing of the first party to litigate the issue. The second plaintiffs were in no way involved in the prior action. Id. at 1148.

There have been decisions in which res judicata effects have been applied to non-parties where individuals not specifically designated as class representatives have raised public interest issues. Defendants already cited one such decision, Stevens v. Shull. (See Defendant's Brief in Support of the Motion for Partial Summary Judgment at 61). McConkie v. Remley, 93 N.W. 505 (Iowa Sup.Ct. 1903) is a similar holding. A citizen in a non-designated taxpayer action brought a suit which required a determination of

the validity of an ordinance restricting the sale of liquor in a municipality. The ordinance was found to bar such sales. When a subsequent plaintiff attempted to relitigate the issue of the ordinance's validity, though the prior citizen was not a designated representative and, in fact, had an interest totally separate from that of the second plaintiff, the prior determination was held res judicata as to the second plaintiff.

There are multiple examples of suits in which a government body litigates a public interest issue, and the holding is found to bar a private plaintiff from relitigating the same question. See, e.g., United States, 224 U.S. 413,445-46(1912). (United States represents interests of American Indians); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (state represents interests of a home-rule county); Berman v. Denver Tramway Corp., 197 F.2d 946 (10th Cir. 1952)(local government represents public interests); Rynsburger v. Dairymen's Fertilizer Cooperative, Inc., 266 Cal.App.2d 269, 72 Cal.Rptr. 102 (App.Div. 1968)(litigation by public authority precluded landowner action based essentially on public nuisance theory).

Though admitting plaintiff's assertion that the Brunetti decision previously cited by defendant is dicta, defendants contest plaintiff's claim that the decision does not show a willingness of the New Jersey Supreme Court to apply res judicata and collateral estoppel to relitigation by successive landowners of public interest issues, though the first action is not an official taxpayer action.

It is true that the Supreme Court made multiple findings on constitutional issues, but the issues decided were apparently not those previously litigated. Costa v. Borough of New Milford, L-13458 (Bergen Cty., July 30, 1974), the prior case, solely involved a challenge to the 1973 rent leveling ordinance. One count of the Brunetti case, Court 2, concerned the 1973 ordinance, and involved a challenge to the preamble. All the other counts concerned the newly enacted 1974 ordinance. (See Brunetti v. Borough of New Milford, L 1823-74 at 1-4 (Bergen Cty. November 11, 1974), attached as Exhibit C). The Supreme Court decision determined the challenge to the one provision of the 1973 ordinance not previously attacked. The other issues were challenges to new provisions, including the variation in the percentage of Consumer Price Index increases which could be used to determine rent increases, and the procedural requirements for notice to the lessee of proposed rent increases. Even if plaintiff could show that issues of constitutionality decided were similar to those decided in the Costa action, determination of those issues could be explained as a result of the incorporation of these provisions in a new ordinance, which the court felt obliged to consider. Since such a change in factual circumstances does not exist relative to the issues for which defendant is trying to bar relitigation here, the court's determination of such issues could not argue against application of res judicata in this case.

Prior holdings on the propriety of applying the holding of a private representative action to bar relitigation

of issues by another private party can best be distinguished by recognizing the special characteristics of a Mt. Laurel action. Mt. Laurel cases involve challenges to the total land use ordinances of a community. Private litigants are permitted to act as private attorneys general, attacking provisions which in no way affect their individual interests. The number of litigants involved is, therefore, potentially endless. The need to consider a broad range of planning questions, including environmental issues and basic economic and sociological factors, makes these cases exceedingly complex.

Here, there is an additional reason which separates this action from other private suits. The standing of the allegedly representative party was specifically challenged by the defendant and upheld by the court. In so doing, it can be argued that the court made a determination of representation by implication. The Lorenc plaintiffs were allowed to raise Mt. Laurel issues on behalf of all those similarly situated, who favored the positions taken by the Lorenc plaintiffs. For all these reasons specific to Mt. Laurel cases and particular to this case, due process considerations should resolve the question of adequate representation not the mere fact of whether the prior case was a class action.

The appropriate test to apply to determine adequacy of representation was defined by the Supreme Court in Hansberry v. Lee, 311 U.S. 32 (1940). Hansberry involved the issue of the application of a judgment rendered in a class action to members of the class who were not formal parties to the suit. Since the non-party was not a member of the class, it is appropriate to apply the

test to a non-party whether or not the first action was a class action. The standard provides in general that, as applied to state court actions,

> there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the absent parties who are bound by it.

Hansberry v. Lee, 311 U.S. at 42. More specifically, the test examines the adequacy of representation, or whether non-parties actually participate in the conduct of the litigation in which members of the class are present as parties, whether interests of present and absent parties are joint, or whether "for any other reason the relationship between the parties present and those absent is such as legally to entitle the former to stand in judgment for the latter." Id. at 43. The court concluded that it would not say that:

> when the only circumstances defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all provided that the procedures were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.

Id. at 43. The Court, therefore, sanctioned application of res judicata against a non-party so long as the test of adequate representation was met.

The Hansberry v. Lee test requires three basic considerations: notice to the bound party, an opportunity to be heard, and representation by a similarly situated party who fully litigates the issues before the court. As previously noted, Allan-Deane

clearly had notice of the Lorenc litigation. They also had an opportunity to be heard, since they could have moved to join or to consolidate their case. They chose instead to take a peripheral position, but were clearly involved in the litigation. The test of full litigation and lack of fraud or collusion has also been met.

Even the key part of the test , whether the interests of the representative and the non-party are joint,is satisfied. The question of joint interests is defined in evaluating taxpayer representation as whether the prior plaintiff's interest is "peculiar". Roberts v. Goldner, supra. This refers to situations where the plaintiffs assert a "purely personal right or redress of a purely personal grievance in which other taxpayers have no interest." Columbus ex.rel. Willits v. Cremean, 27 Ohio App.2d 137, 273 NE 2d 324,331 (App.Div.1971), Accord, Edelstein v. Asbury Park, 51 N.J. Super. 368,387 (App.Div. 1958).

Allan-Deane contends that it has different interests in the outcome of this litigation, but these differences do not fit the definition of "peculiar" above and do not relate to the non-compliance phase of the proceeding. Plaintiff cannot deny that the Mt. Laurel grounds for attack on the Bernards Township Ordinance are identical. Plaintiff can also not deny that the Lorenc and Allan-Deane plaintiffs share a desire for identical changes to increase densities, numbers, and eliminate specific allegedly cost-generating provisions. On the issue of non-compliance, therefore, their interests and outcome desired are identical.

The only difference between these plaintiffs is that Allan-Deane argues for yet another location for higher density housing and wants a building permit for its land. The issuance of a building permit is granted as a reward to a successful litigant for having brought the suit and having won, in certain very limited circumstances. See, e.g., Oakwood at Madison, 72 N.J. at 548-552, and Footnote 50 at 551. The granting of a building permit is not inherent in Allan-Deane's status as a landowner; it attaches, if at all, only upon the completion of successful litigation and then only in certain limited circumstances. The Lorenc plaintiffs have already brought the litigation and were, to some extent, successful. Allan-Deane is naturally trying to minimize the Lorenc efforts in order to be able to claim that it is a deserving litigant and should have a building permit of its own.

One private attorney general is enough; there is no need for two. The doctrines of res judicata and collateral estoppel are, therefore, even more appropriate when the role of the successful litigant as a private attorney general is considered.

POINT IV

THE SUBSTANTIAL PERSONAL STAKE OF ALLAN-DEANE IN THE OUTCOME OF THE LITIGATION OF MT. LAUREL ISSUES DOES NOT PREVENT APPLICATION OF RES JUDICATA AND COLLATERAL ESTOPPEL.

The plaintiff suggests in its brief that the substantial pecuniary interests of the Lorenc and Allan-Deane plaintiffs in the outcome of the litigation and desire to advance their personal interests makes res judicata and collateral estoppel inapplicable in this case. In fact, any plaintiff attempting to bring a taxpayer action to raise Mt. Laurel issues must show a substantial personal stake in the outcome of the action to have standing to bring the suit. When plaintiffs such as Lorenc and Allan-Deane are allowed to bring actions raising the same public interest issues with a similar substantial personal stake in the outcome, lacking only the "taxpayer action classification," there is every reason to apply the doctrines to bind them as well.

Standing to bring a taxpayer's action challenging constitutionality of an ordinance requires proof of personal injury. To entitle a taxpayer to maintain an action to declare a statute unconstitutional:

> he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people.

Sheldon v. Griffin, 174 F.2d 382,384 (9th Cir. 1949). It is immaterial whether the interest of the taxpayer is great or small. See 74 Am.Jur. Taxpayers' Actions §3 at 191. Corporations like Allan-Deane, however, must show a special property interest to

be able to bring a taxpayer action. J.D.L. Corp. v. Bruckman, 171 Misc. 3,11 N.Y.S. 2d 741,746 (Sup.Ct. 1939); see 74 Am.Jur. Taxpayers' Actions at 187.

New Jersey courts, applying liberal standing rules, allow plaintiffs with substantial personal interests to raise public interest issues without categorizing the action as a taxpayer suit. Plaintiffs cited a case in which that occurred. In Walker v. Stanhope, 23 N.J. 657 (1957), the court granted a non-resident house trailer retailer, with a substantial financial interest in the outcome, the right to raise issues of constitutionality of an ordinance regulating trailers. The court found:

> There has been a real and substantial interference with his business and the serious legal questions it has raised should, in the interest of the public as well as the plaintiff, be passed upon without undue delay. (Emphasis added)

Id. at 666.

The argument that a substantial pecuniary interest in the outcome of the litigation should prevent application of res judicata to bar a non-party from relitigating identical issues has recently been rejected by the 5th Circuit. In Southwest Airlines Company v. Texas International Airlines, supra, CAB certified air carriers, not parties to a prior action, argued that "their pecuniary interest in the success of the new airport, surpasses the interests possessed by members of the general public or taxpayers." 546 F.2d at 98. In rejecting the special

pecuniary interest as grounds for not applying res judicata, the court said:

> Besides the CAB carriers, all of the individuals and companies that provide goods and services at the new airport have a pecuniary interest, distinct from that of the general public, not only in the ultimate survival of the facility, but also in the volume of air traffic attracted to the airport. More planes means more passengers, more sales, more jobs, more profits for all of the businesses involved. Furthermore, a pecuniary interest could be claimed by investors, developers, hotels, restaurants, and other retail interests attracted to the vicinity by the new facility. Even the businesses at or near Love Field could claim a similar, although converse, interest. To allow relitigation by all of these parties would surely defeat the res judicata policies identified above.

Id. at 101. After pointing out that not applying res judicata would allow all the evils which the doctrine is designed to prevent to occur: uncertainty, disrespect for the court system, waste of judicial resources and time, harassment, expense to litigants and the possibility of numerous conflicting judgments, the court found:

> we see no reasoned basis on which to distinguish the CAB airlines from numerous parties with pecuniary interests in the Southwest controversy. We can best support the public interest by applying the Restatement's approach to preclude relitigation by all persons, including the carriers, who claim nothing more than a pecuniary interest in the dispute.

Id. at 101.

The same situation feared by the 5th Circuit exists with regard to Mt. Laurel litigation in this state. The claim of

"special pecuniary interest" must not be permitted to prevent application of res judicata in this case.

POINT V

THE DECLARATORY JUDGMENT ACT DOES NOT PREVENT APPLICATION OF RES JUDICATA AND COLLATERAL ESTOPPEL.

Allan-Deane argues that the provisions of the Declaratory Judgment Act prevent application of res judicata and collateral estoppal to bar their identical Mt. Laurel claims. This argument ignores the remedies sought in the Lorenc and Allan-Deane actions, the fact that Allan-Deane was a party to the Lorenc suit by representation, and the court interpretation given to the statute provision regarding prejudicing rights of non-parties.

The Lorenc and Allan-Deane complaints do not only ask for a declaration of invalidity of the zoning ordinances. They also seek the specific remedy of zoning revision to provide for additional units, at greater densities, and without allegedly cost-generating provisions. (See Appendix to Defendant's Brief in Support of Partial Summary Judgment, Exhibits A and O). The zoning cases cited by plaintiff, Washington Twp. v. Gould, 37 N.J. 527 (1963) and Odabash v. Mayor and Counsel, Borough of Dumont, 65 N.J. 115 (1974), do not support plaintiff's arguments that the Declaratory Judgment Act applies here. Both cases dealt only with requests for declaratory relief, neither court stated that the statute applied where other remedies were requested, and the decisions did not deal at all with the appropriateness of applying res judicata and collateral estoppel in a subsequent action.

The New Jersey Supreme Court has now made it absolutely clear that res judicata applies to bar a second taxpayer from relitigating issues decided in a prior taxpayer suit. Roberts v. Goldner, supra. Plaintiff contends that in all significant respects, where a plaintiff developer is granted standing to raise Mt. Laurel issues, the action is a taxpayer action. The Declaratory Judgment Act does not apply, therefore, when a taxpayer was represented in a prior action.

Furthermore, cases interpreting N.J.S.A. 2A:16-57, and a similar provision in the Uniform Declaratory Judgments statute, which prevents harm to rights of a non-party,only find rights of non-parties prejudiced when their position was adverse to the original parties and their interests were not represented at all in the prior proceeding. See, e.g., Quackenbash v. City of Cheyenne, 52 Wyo.146,70P.2d 577, 582-3, (1937) (citizens opposed to real estate sale by city sued to void sale; purchasers of improved property, favoring sale, not before the court); City and County of Denver v. Denver Land Co., 85 Colo. 198, 274 P.743, 744 (Sup.Ct. 1929) (city and citizens opposed to creation of storm sewer district and property assessment sued to end district; citizens in favor of district not parties and not bound). The statute does not prejudice Allan-Deane's rights since they seek the same basic ordinance changes as the Lorenc plaintiffs.

The Declaratory Judgment Act does not, therefore, prevent application of res judicata and collateral estoppel in this case.

POINT VI

THE BERNARDS TOWNSHIP MOTION FOR PARTIAL SUMMARY JUDGMENT IS TIMELY.

Plaintiff argues that Bernards Township should have raised the issues of res judicata and collateral estoppel as affirmative defenses following the Lorenc judgment in January, 1978. Defendant contends that the right to argue these issues did not mature until the Motion for Leave to Appeal the Lorenc decision was denied by the Supreme Court on February 27, 1979, just ten days before this motion was filed with this court.

Plaintiff does not dispute defendant's contention that the doctrines of collateral estoppel and res judicata only apply to a final determination. (See Defendant's Brief in Support of Motion for Partial Summary Judgment, at 50). Although the appeal from the trial court decision only raised "particulars of relief", as admitted by plaintiff, these particulars, which concerned density and numbers of permitted single and multi-family units, involved Mt. Laurel and Oakwood at Madison issues. The trial court stated that Bernards Township's variety and choice obligations were at issue in the PRN zoning. (See Defendant's Brief in Support of Motion for Partial Summary Judgment, at 41).

The Township was not guilty of delay, therefore, in awaiting the completion of the appellate process before bringing thses issues before the court. In fact, by advising plaintiff of the intent to bring this motion at the Pretrial Conference, January 5, 1979, defendant gave notice less than a

month after the Appellate Court decision, December 11, 1978, and over a month prior to the completion of the appellate proceedings. Rather than being guilty of delay, defendant forewarned plaintiff of the grounds for this motion over two months before the papers were filed.

POINT VII

ALLAN-DEANE HAD AN OBLIGATION TO JOIN THE LORENC ACTION

Furthermore, defendant was not obligated to join Allan-Deane in the Lorenc action. The Lorenc complaint was filed October 22, 1974. The Allan-Deane complaint was not filed until March, 1976. The Lorenc trial was originally scheduled to begin June, 1975, and all parties knew in March, 1976, that the trial would be rescheduled as soon as the Township's Ordinance revisions were completed. (See Defendant's Brief in Support of the Motion for Partial Summary Judgment at 18). An effort to join Allan-Deane and delay the start of the Lorenc trial would have been considered excessively prejudicial to the rights of the Lorenc plaintiffs and undoubtedly would have been denied by the court.

Though not formally joined, Allan-Deane participated in the Lorenc trial. Aware that a favorable determination on the Mt. Laurel issues could aid their position, they assisted the Lorenc plaintiffs in their attack on the Ordinance. Allan-Deane was willing to benefit from a decision which helped their cause but now cries foul at the possibility of being bound by a decision which is not favorable.

In justice to the interests of other citizens and taxpayers, this kind of game should not be permitted. Plaintiffs, such as Allan-Deane, should have an obligation to join in a determination of Mt. Laurel compliance if they feel it necessary

to protect their interests. Allan-Deane could have moved to join the Lorenc action under R.4:28-1(a), R.4:29-1(a), or R.4:30, moved to consolidate the actions under R.4:38-1(a), asked leave of the court to file an amicus brief, or provided other types of assistance to assure that their views were before the court. A taxpayer should not be permitted to assert the benefits but not assume the burdens of a fully litigated Mt.Laurel action by a representative party.

CONCLUSION

Since the arguments in plaintiff's reply brief have been successfully refuted by the defendant, the Motion of defendant for Partial Summary Judgment should be granted.

Respectfully submitted,

McCARTER & ENGLISH
Attorneys for Defendant,
The Township of Bernards, et al.

By _____
Alfred L. Ferguson
A Member of the Firm

Dated: 3/30/79

APPENDIX

EXHIBIT A - Substitution of Attorney

EXHIBIT B - Excerpts from Lorenc Transcript, 11/30/76, T169-71

EXHIBIT C - Brunetti v. Borough of New Milford, L 1823-74 at 1-4 (Bergen County, November 11, 1974)

EXHIBIT A

Attorney(s): Law Offices of Lanigan, O'Connell and Hirsh, P.A.

Office Address & Tel. No.: 150 North Finley Avenue, Basking Ridge, N.J. 07920
(201) 766-5270

Attorney(s) for Plaintiff
The Allan-Deane Corporation

THE ALLAN-DEANE CORPORATION, et als, *Plaintiff(s)* *vs.* TOWNSHIP OF BEDMINSTER, et als, *Defendant(s)*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY *Docket No.* L-36896-70 P.W. L-28061-71 P.W. *CIVIL ACTION* *SUBSTITUTION OF ATTORNEY*

The undersigned hereby consents to the substitution of Mason, Griffin & Pierson, 201 Nassau Street, Princeton, N.J.

as Attorney(s) for the plaintiff The Allan-Deane Corporation

in the above entitled cause.

Dated: August 30, 19 77

LAW OFFICES OF LANIGAN,
O'CONNELL AND HIRSH, P.A.

By: William W. Lanigan
Attorney(s) for Plaintiff The Allan-Deane Corporation

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EXHIBIT B

except for that portion of the perimeter which may be made up of common open space shall be one-family houses on lots of a size not less than 60 by 100 feet or twin houses on two such lots."

Q You didn't say anything about twin houses on any such lots, did you? Did you or did you not say anything about twin houses in your previous answer?

A By inference.

Q By inference?

A Every point I made was precisely applicable to twin houses as well.

Q Are you aware that twin houses have been described in this proceeding as a form of multi-family housing?

A I am not aware of how other people may have described them. It's a mis description.

Q Now, you referred to the parking requirements of Paragraph 7k of Ordinance 385, and is it your view that an unpaved parking space totally outside adds to the construction cost?

A An unpaved parking space in and of itself would add relatively little to the construction cost.

Q Thank you. For the purposes of analyzing Ordinance 385 of Bernards Township, were

you originally retained by the Alan-Dean Corporation?

A I was originally retained by the Alan-Dean Corporation for purposes quite other than that.

Q Well, as part of your work for the Alan-Dean Corporation, did you submit to that company or its attorney an analysis of Ordinance 385 dated June 4, 1976?

A Yes.

Q And that attorney was Henry A. Hill, Jr., Esq.?

A Yes.

Q And is it not a fact that Mr. Hill has been present in court today during your testimony?

A That is my understanding.

Q And have you observed him handing notes to Mr. Lanigan during the course of your testimony?

A I suspected something of that effect was afoot.

MR. LANIGAN: Since it is an issue, let me read them. "Bill, Alan has in front of him the county existing sewerage map, just gave it to him. Requirement that no unit shall be constructed over another unit. Alan says precludes apartments and is the single most exclusionary element. Forgot to testify about that."

Those are the two notes that Counsel refers to.

MR. ENGLISH: I have no further questions.

REDIRECT EXAMINATION BY MR. LANIGAN:

Q Is that last statement true, Mr. Mallach?

MR. ENGLISH: Now, wait a minute. I don't think that's proper redirect examination. I didn't ask about that or on cross.

THE COURT: I think you are right.

MR. LANIGAN: I will withdraw the question, your Honor.

Thank you, Mr. Mallach.

(Witness excused.)

MR. LANIGAN: Mr. Sage.

***

EXHIBIT C

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO. L-1023-74

JOHN J. BRUNETTI, t/a BROOKCHESTER SECTIONS V, VII, VIII and IX and JOANN TOSI, t/a BROOKCHESTER SECTIONS III, VI and X,

Plaintiffs,

vs.

BOROUGH OF NEW MILFORD, a body politic of the State of New Jersey,

Defendant.

JUDGE'S DECISION

November 11, 1974
Bergen County Court House
Hackensack, New Jersey

B E F O R E :

THE HONORABLE THOMAS S. O'BRIEN, J.S.C.

A P P E A R A N C E S :

MESSRS. HELLER & LAIKS
BY: HERBERT R. EKOR, ESQ.
For the Plaintiffs

MARIO R. LA BARBERA, ESQ.
For the Defendant

KATHLEEN DABROWSKI, C.S.R.
Official Court Reporter

THE COURT: All right, gentlemen. This is the continued day as established on a return day of an Order to Show Cause in an action instituted by the plaintiff against the defendant Borough attacking the validity of an ordinance enacted by the Borough on August 21st, 1974, being an amendment to Chapter 69 of the Code of the Borough, being Ordinance Number—it looks like 68:14.

MR. LA BARBERA: That is our Code number, yes.

THE COURT: 68:14.

Now, on the return day of that Order to Show Cause, the Court set today as a day for a pretrial in this case and requested that both counsel be prepared on today's date to argue the legal questions presented, at the conclusion of which, if there remained any issues, we would pretry the case.

The complaint alleges that in the first count, the defendant municipality passed the ordinance to which I made reference and that it is arbitrary, unreasonable, and illegal, and that it is unconstitutional.

The second count refers to the preamble to the ordinance which the '74 ordinance was intended to amend and it contends that the finding of fact by the municipality is inaccurate and, in fact, that no facts were indeed found. Therefore, the amended ordinance, which

is the original ordinance incorporating in it the amendments, is unconstitutional.

The third count alleges the impairment of its leases by reason of the ordinance.

The fourth count is something we did not talk about and that is this 90-day question. Mr. LaBarbera, you were going to—

MR. LA BARBERA: I said to Mr. Eror, we originally adopted this time limit with consultation with the landlords, but we would change this if it creates a technical problem. We will concede that.

MR. EROR: Your Honor, I don't know how much can be conceded on this particular point because one of the ways that the ordinance is arbitrary is that the 60 or 90-day figure as contained in the ordinance sets forth a standard of increase in prices over a yearly period prior to those in effect at the time the lease was entered into, either 60 or 90 days before, and that is another one of our contentions as to the arbitrariness of the standard.

THE COURT: All right.

The fifth count has to do with the silence of the ordinance respecting capital improvements.

The sixth count alleges its unreasonableness in the tax carry-through, intending that since it is based

on an increase per room and that the landlord must absorb tax increases attributable to vacant units.

The seventh count deals, again, with the incongruity of the 90-day provision as it relates to the C.P.I.

The eighth count intends that there is a pre-emption in providing for recovery of possession of the premises contrary to the State law which I think is clearly dealt with in Fort Lee, Inganamort case.

Now, as we boil this case down, the essential questions presented are whether or not the landlord, the plaintiff, is out of time in attacking the foundation upon which the municipal action is based in adopting a rent leveling ordinance. The Court is bound by the decision in Inganamort vs. The Borough of Fort Lee, 62 N.J. 521. Whether the Court agrees with that decision or not, the Court has the right to disagree but not to disobey, as they so often say. Inganamort has clearly established the right of a municipality to adopt a rent leveling ordinance, rent control ordinance, whatever name you want to call it, upon a conclusion that there is a need for such an ordinance within that municipality. The dissent in that case points up, and in my judgment, is the better reason, opinion, than the majority, that this should be a matter of State enactment, perhaps adopted as a local option-type of enactment, but

nonetheless, the majority has said that it can be enacted locally and is a matter of home rule, local adoption. The very things that the dissent talks about and which I criticised in Costa vs. New Milford, the circus conducted in the hearing before a rent leveling board, were manifest, to me at least. The rent leveling, it seems to me, if it were standardized, could provide for hearing agencies disassociated from the local zone, perhaps held with a little bit more formality to the end that when a landlord fairly presents evidence before a board, the board may weigh it fairly and impartially and not be looking over their shoulders or out into the audience at a lot of local residents who are voters of the town. Suffice it to say, that in my judgment there is a great deal to be said for the dissent in Ingannmort and the reasoning of that dissent and maybe the next case that gets to the Supreme Court, in view of the experience that at least this Court has had, might cause some rethinking. But, as I said at the outset, I am privileged to disagree with the Supreme Court but not to disobey it and the Supreme Court has concluded that the municipality may enact an ordinance such as the ordinance that was enacted in this municipality, that it may be a matter of local option or local enactment and that all of the machinery such as

rent leveling boards may be within the municipality with all of the shortcomings that this system fosters, applying in the face of human nature. Of course, as the Court pointed out, I think in the Trial Division, decision boards of adjustment do that regularly and generally speaking do a good job and I think that is true.

The question thus presented at this juncture in this case is whether or not this plaintiff is barred by 4:69-6 which provides that "No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by Paragraph (b) of this rule." And 4 under Paragraph (b) says to review an ordinance--I am sorry, that is not it. (a) is also general limitation which would apply to this ordinance. The others were special actions so, therefore, there is a 45-day limitation, 45 days from the time of the enactment of that ordinance.

Now, in this situation, this plaintiff represents the landlord of the remaining multiple dwellings which, together with the other sections which were the subject matter of the Costn action, make up Brookchester, I believe. By virtue of the death of the original owner, the properties were divided among his heirs, one-half,

I believe it was one-half, and it is not essential to this decision, to Costa and the other to Brunetti. There can be no doubt that, in fact, the plaintiff concedes that he had knowledge of the passage of the original ordinance and the attack upon that ordinance by Costa. The issue as to whether or not the preamble was accurate or whether it was based upon a fact finding by the municipal body was not presented in the Costa case; therefore, was not decided by this Court in upholding the Constitutionality of the 1973 ordinance. Should that question now be litigated in this case? Should the Court hear evidence attacking that conclusion by the municipality; that is, the conclusion that there is a need? As I mentioned, the language of the preamble leaves something to be desired in its explicitness or is the plaintiff barred in this case by virtue of the statute of limitations? I have concluded the plaintiff is barred. The plaintiff argues, and it is true, the Court does have the right to enlarge the time under 4:69-6(c) where it is "manifest that the interest of justice so requires." The Court is and was sorely tempted to enlarge the time so that a record would be made of the conclusion that there is a need within New Milford and what, indeed, were the facts upon which the governing body premised that. Did they premise it

because 99% of the voters are tenants, or did they premise it upon a finding in fact that there was a need and is there a shortage of apartments in that municipality because the rents are so low that people come from other areas to move there? We don't know what the answer to that would be, but I have concluded that nonetheless, this issue, if the plaintiff wished to contest it, should have been contested when the ordinance was enacted and not now, particularly where we have been through, and the town has been put to the test of defending this ordinance in another proceeding where it would have been another proceeding of which this plaintiff had knowledge and it would have been a simple matter to join in that suit and, therefore, I think that is the very purpose of the limitations of actions. Accordingly, on that issue, I am going to dismiss the plaintiff's complaint on that ground; that is, the attack on the ordinance on that ground.

Now, actually, the attack is on the ordinance enacted in 1974. Of course, the plaintiff is within time in its attack on that ordinance, but I have recited the various grounds in the complaint and they may, however, be boiled down. Most of them are disposed of in the Inganamort case--I should say Inganamort case and the case that this Court decided in Costa vs. New Milford.

I don't know whether that was appealed or not. It was denied when Mr. LaBarbera--

MR. LA BARBERA: August of--

THE COURT: It must have been the early part of this year. I don't remember, some months ago.

MR. LA BARBERA: Just before the Court recessed.

THE COURT: Yes.

MR. LA BARBERA: August of 1974.

THE COURT: Here is my decision. Yes, rendered July 23, 1974. I don't know what the Appellate status of that case is.

The ordinance of which this ordinance is amended was upheld as Constitutional. The Court applied all of the tests of Ingenmort. The Court read into it, in order to uphold its Constitutionality, some provisions, particularly with respect to the right of the landlord to make a fair profit or fair return on investment and also with respect to capital improvement, one of the arguments that is made here. I see no need to review those issues that have been decided by this Court. We now have a new ordinance, however, enacted in September of '74 and that new ordinance makes certain amendments, principally amendments about which complaint is made is reducing the formula for rental increases from a percentage increase in rent which is greater than the

C.P.I. to one-half of that, 50% of the C.P.I.. There are some other changes in the ordinance; the 90-day provision, which makes perhaps some technical problems; the establishment of the rent leveling board or the re-establishment of the rent leveling board in providing for the appointment of three alternates, very salutary provision in view of what happened in the Costa case where, because of the magnitude of this apartment, I guess it is difficult to get tenants who aren't in some way associated with them, I don't know, or with tenant groups, that this provides alternates and there has been no challenge to that particular clause.

It then incorporates, if the landlord cannot realize a reasonable profit from his investment in his property, there is a provision for appeal to the rent leveling board. The question is, as I see it, whether utilizing the formula one-half the C.P.I. instead of the entire C.P.I. or some other formularization, some other formula, is so arbitrary and unreasonable and capricious, particularly arbitrary and unreasonable, such as to be unconstitutional. The plaintiff would like to have a hearing at which the municipality would have to justify the factual premise upon which is concluded that this was a fair measure of increase that

tenants should have or landlords should have, generally speaking, with provision for the safety valve before the rent leveling board, if, indeed, it was not fair. The landlord really argues, I guess, from the proposition that if 100% of the C.P.I. is reasonable and that is what they adopted last year, 50% of that must be unreasonable. That sounds logical. The problem is: Does that render the ordinance unconstitutional even if it is somewhat arbitrary? I think, as Judge Larner said in the case before him, of course it is arbitrary. Any formula that you pick out is arbitrary, but that this is a recognized service provided by the government to measure consumer price indexes, to measure increases in the cost. Someday I hope they will measure decreases in the cost of living and therefore it is reasonable to turn to that for aid. Well, I don't think it becomes any less reasonable to return to that for aid if you use 50% of it or 75% of it. The question the plaintiff asks is why did you pick 50? Isn't that, on the face of it, unreasonable? Now, of course, here we have a town that the Court will take judicial notice, having gone through the Costa case, where a landlord in the very town presented extensive evidence before the rent leveling board concerning the increase in the cost of fuel, the increase in the cost of maintenance and

painting and all of the factors that went into the operation of their apartments, and they did that by way of seeking a rent increase and the denial of that was the subject of review by the Mayor and Council; so, certainly, this is not a Mayor and Council ignorant of costs of operation of dwelling units of this type. I am told by the Borough Attorney that they made other studies, but what they were going to do today was decide as a matter of law, even if the formula they picked out was arbitrary, does that make it unreasonable? When they make provisions for a safety valve as they do here and they say this is what we will use, you may have an increase of this amount based on this formula without doing anything more than notifying the tenant and the rent leveling board and getting their approval; but without the presentation of any evidence, we will assume that your costs have gone up by at least this much. Now, if, in fact, your costs have gone up by more than this, you come in before our board and you present evidence of that fact and we will grant you a further increase and that is what this ordinance provides. It seems to me that is wholly reasonable and with the addition of that provision for relief in the event that the formula may be arbitrary as to a particular landlord, it seems to me any arbitrariness is

eliminated. What may be reasonable for one landlord by way of an increase may, because of the operation of another landlord, be unreasonable and that is why you have a board, to deal with those inequities. I realize, and I have a fear of the caliber of review that a landlord gets from a rent leveling board based upon the caliber of a review that the landlord got in this very town, and I have expressed my view that because of that I would be inclined to agree with the dissent in the Ingannamort case, but I am not free to do that. The presumption is indulged in that if a rent leveling board is established, that they are going to perform their job properly and that they are going to be fair and that they are going to afford the landlord a fair hearing and let him present his evidence. If the tenants can't behave themselves, lock the door and keep them out, if they can't maintain order. The assumption is they are going to be fair. If they aren't fair, if it's not a fair hearing, then you have a remedy. The landlord always has the right, then, to come to court with the record of what was presented below and say that based on that record, a decision that I am not entitled to a rent increase, is arbitrary and unreasonable and capricious. It seems to me that with the provision in this ordinance for the right to a hearing

that even if 50%, that is, using the 50% of the C.P.I. rather than 100%, is arbitrary in the sense that you have selected one yardstick instead of another yardstick-- In other words, you could use a different yardstick, that is all; but I don't think, in and of itself, as a matter of law, that that renders this arbitrary when you couple that with the relief valve of a hearing before a rent leveling board.

The only remaining factor, it seems to me, that is in issue in this case is the 90-day provision and that comes about, as you read the ordinance carefully, apparently in the preparation of the ordinance a timetable was worked out which would work fine if the Bureau of Labor Statistics, either the ones that—is it Labor who make up the C.P.I.? If they got it out on time, but unfortunately, it is not released early enough and for that reason there is a technical problem as a result of which a landlord would have some difficulty complying with this ordinance. The ordinance provides "Any landlord seeking an increase in rent shall notify the tenant of the calculations involved in computing the increase, including the Consumer Price Index, 90 days prior to the commencement of the tenancy and the Consumer Price Index 90 days before the expiration of the tenancy, the allowable percentage increase, which shall not

exceed 50% in increase of Consumer Price Index aforesaid, the allowable rental increase and the allowable tax surcharge. All notices must be served on the rent leveling board at least 45 days prior to the effective date of any increase."

Now, I am told that the C.P.I. figure, 90 days before the expiration of the lease figure, may not be released 45 days before the effective date of an increase so that, therefore, complying with this provision may not be possible if it isn't received on time. Now, the town has said well, don't worry about it. That is a technical problem; we will correct it. I don't know how you could just say nonchalantly well, we will correct it. If you have an ordinance that a landlord can't comply with, doesn't that make the ordinance at this juncture at least invalid as to this landlord if he can't comply with it? I will hear you on that. This I concede to be an issue.

MR. LA BARBERA: If your Honor please, I think that they have been complying. I know they have been complying. In fact, I think, in fact, we have heard no complaints from any of the landlords with respect to this provision. In fact, I don't know of one instance thus far where they have failed to comply. It is just that there has been a lot of talk. For instance, if

the C.T.I. is 30 days behind, and I understand that it is coming through more rapidly now, that if the landlord submits his list to the Rent Leveling Board with the increases, the Rent Leveling Board gives their approval forthwith. Now, other than the complaints in this ordinance, and I might say that this very provision was in the early ordinance, the ordinance of 1973 which this Court decided contains this 90-day provision, so this is not new and it would seem that first—

THE COURT: I don't think it had the same 90 days before and after, did it?

MR. LA BARBERA: Yes, we did. We have heard no complaints from any of the landlords that they have been unable to meet this. The first time I heard it was when Mr. Ezor raised it. I said if this is a technical problem, we don't want to make things difficult and we will change it. However, no landlord has complained officially to the Mayor and Council or to the Rent Leveling Board.

MR. EZOR: Your Honor, on this particular point, our attack on this particular section of the ordinance is twofold: First, there is the impossibility of performance and I think this present case gives indication to the Mayor and Council that there is at least one landlord in the town who is unhappy living with the

provisions. The ordinance sets forth certain time limitations by which a landlord must comply before he could get a rent increase and in view of the shortness of time it is almost an impossibility or very nearly that. If there have been no complaints thus far in the workings of the ordinance, it may be because the town or the Rent Leveling Board has decided to waive any increases that may have come in late, let's say beyond the 45-day limitation. That doesn't make the ordinance any less void or impossible of performing as it's written. Secondly, by requiring the standard of the Consumer Price Index or 50%, if you will, to be gauged 90 days prior to the expiration of the tenancy, what we are in fact doing is limiting a landlord's rental increase further by not allowing him a full year's increase in costs as of the date of the expiration or beginning of the new tenancy but rather a figure based on a year three months prior and as the Consumer Price Index can bear out, every month sees an additional rise in the consumer price.

THE COURT: Hasn't that been true three months before the tenancy started, too? In other words, it begins a period three months before your tenancy started and it ends three months before your tenancy ends. Wouldn't it come out the same?

MR. ESOR: Not really.

THE COURT: I mean, the fact that there is an increase every month?

MR. ESOR: Not really. One of the things which probably led the Borough to institute the present amendments is that over the past year each month has shown a larger increase in its Consumer Price Index and I think that the Court could take judicial notice that everything is running away and the inflation that the country is in. What has happened is that every month means a greater increase in costs as of the past year whereas, let's say, for instance, from September of '73 to September of '74 you might have a 10% increase in costs. From November of '73 to November of '74, there might be an 11 or 12% because prices have been rising in a greater percentage leap every month. Although there is a one percent figure, I don't have the hard figures before me at this point, if it means, let's say, a two dollar increase per month, then an apartment--it may seem small, but two dollars times 12 is 24 and magnified that times over a few units, you have a substantial amount of money which the landlord is losing and which he would be entitled to.

THE COURT: Anything further that you want to say on this issue?

MR. LA BARBERA: Well, Judge, I think that this particular point on this question of the 90 days before the lease is entered into, this objection to that particular language is disposed of by the same rule that we have adopted a standard, an arbitrary method, call it that, but the profit, the return on the investment is still in that release valve or that safety valve that we have in the ordinance.

I have some of these samplings or these notices that go out to the tenants, just to respond to Mr. Ezor's question about the time limitation. Here is a letter dated June 7, '74, addressed to a tenant advising that the new lease will commence on August the 1st. It says, "You have until July 8th of '74 to notify whether you want to renew the lease." It gives the information on the C.P.I. 90 days before the lease was entered into and 90 days prior to the lease expiration and I see that, for instance, the notices went out on May 1st for leases that were commencing on July 1st; apparently they are having no problem at all. These are the Brookchester sections who are the plaintiffs herein and I also have them for on April the 3rd--

THE COURT: All right. I have heard enough.

I think that this issue is disposed of by the application of the same two principles; the amendment

to this ordinance, 69-5. The amendment is 50% of the Consumer Price Index as opposed to the Consumer Price Index itself. The 90-day provision is the same as was in the '73 ordinance which, as I indicated before, was not challenged by the plaintiff and apparently plaintiff lived with that provision for at least a year from the date of the enactment of that ordinance until the date of the attack on the second ordinance and the provision is identical, as far as time is concerned.

Secondly, if it should work the hardship that the plaintiff contends that it will have, and it may, I think that there is some substance in that argument, again, the Rent Leveling Board is available to hear and determine the extent of the effect of that hardship on the landlord's right to earn a reasonable return on his investment.

Now, I have reviewed all of the other questions in the complaint. I have found that those that have not been disposed of by Ingannmort, such as the preemption issue in the eighth count of your complaint, or not dealt with in the decision of this Court in Costa vs. New Milford in upholding the validity of this ordinance, have been dealt with today. So, accordingly, I am going to grant the motion for summary judgment to the municipality and dismiss the

complaint.

Now, this doesn't mean that the plaintiff is without remedy. The plaintiff has a right to apply to the Rent Leveling Board and to set forth before that Board such evidence as it sees fit to demonstrate that as applied to its operation, 50% of the Consumer Price Index is not a fair increase and does not reflect the increased costs and the factors of increased costs that this plaintiff alleges that it has. If that Board acts as it should act, there will be a fair and a reasonable and just determination of that issue. If the plaintiff is entitled to that increase, he will get that increase. If they don't act the way they should act, then we will look for the plaintiff back in court again to review what they have done. I think that I expressed my view the last time as to what the Court will expect from this Rent Leveling Board on any further actions presented before them.

Do you want to say anything?

MR. EZOR: Yes, your Honor. I just have one question. At the prior date that we were before the Court on the return date to the Order to Show Cause, there was a temporary restraint issued as to rental excesses. In view of the fact that summary judgment has been entered, of course these restraints would

cease. I would just request that reasonable time be given to us in case my client decides that he would like to appeal the decision.

THE COURT: All right.

Any objection to that?

MR. LA BARBERA: No.

THE COURT: All right. Well, this is Monday. Suppose we continue that for one week. That will give you time to make your decision and file your notice. It will expire at the end of one week unless the Appellate Division grants the continuancy.

All right, gentlemen, you may submit an order.

* * * *

C E R T I F I C A T I O N

I, KATHLEEN DABROWSKI, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, certify that the foregoing is a true and accurate transcript of my stenographic notes.

KATHLEEN DABROWSKI, C.S.R.
Official Court Reporter