RULS - AD - 1983 - 50

8/5/83

- Notice of Cross - Motion to Transfer Motion to Amend to Judge Serpentelli;
- Letter to Judge re: opposition to P's Motion to Amend and in support of Cross - Motion
- Letter to court re: opposition to P's motion

Pos - 12

S-7364

RULS - AD - 1983 - 50

FILED

AUG 8 9 54 AM '83

SOMERSET COUNTY
L.R. OLSON, CLERK

Entered ✓ Indexed

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ATTORNEYS FOR Intervenor-Defendant Hills Development Company

Plaintiff

LEONARD DOBBS

vs.

Defendant

TOWNSHIP OF BEDMINSTER

and

THE HILLS DEVELOPMENT COMPANY, ROBERT R. HENDERSON, DIANE M. HENDERSON, HENRY E. ENGLEBRECHT and ATTILIO PILLON

Intervenors-Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY

Docket No. L-12502-80

CIVIL ACTION

NOTICE OF
CROSS MOTION TO TRANSFER
MOTION TO AMEND TO
JUDGE SERPENTELLI

TO: WINNE, BANTA & RIZZI
25 East Salem Street
Hackensack, New Jersey 07603

McCARTER & ENGLISH
550 Broad Street
Newark, New Jersey 07102

VOGEL & CHAIT
Maple Avenue at Miller Road
Morristown, New Jersey 07960

SIRS:

PLEASE TAKE NOTICE that on August 12, 1983 at 9:00 A.M.

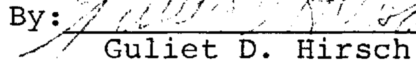
grant - BZ 9/26/83

or as soon thereafter as counsel may be heard, the undersigned attorney for Intervenor-Defendant Hills Development Company will apply to the Superior Court of New Jersey, Law Division, Somerset County at the Court House in Somerville, New Jersey for an Order Transferring Plaintiff's Motion to Amend and Supplement his Complaint to the Honorable Eugene D. Serpentelli, sitting in Monmouth County as a designated Mt. Laurel II Judge for Somerset County.

In support of the within action, Intervenor-Defendant Hills Development Company will rely upon the annexed letter memorandum.

BRENER, WALLACK & HILL

Attorneys for Intervenor-Defendant
Hills Development Company

By: 
Guliet D. Hirsch

Dated: August 5, 1983

REC'D AT CHAMBERS
AUG 8 1983
JUDGE LEAHY

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Ltrs from counsel for Δ-intervenors in opposition to motion to file amended complaint 8/5/83

August 5, 1983

The Honorable B. Thomas Leahy
Law Division, Somerset County
Somerset County Court House
Somerville, New Jersey 08876

Re: Dobbs v. Township of Bedminster
Docket No. L-12502-80

Dear Judge Leahy:

Please accept the following on behalf of Defendant-Intervenor-Hills Development Company in opposition to plaintiff's Motion to Amend and Supplement his Complaint, and in support of Hills' Cross Motion to transfer plaintiff's Motion to Judge Serpentelli. We understand that plaintiff's Motion is scheduled for a hearing before Your Honor on August 12, 1983.

The Hills Development Company opposes plaintiff's Motion to file an Amended Complaint on the grounds that the proposed Amendment and Supplement states an entirely new cause of action which sounds an exclusionary zoning/Mt. Laurel II cause of action. Plaintiff's Motion must be considered in light of the following:

1. The New Jersey Supreme Court's directive in Southern Burlington NAACP v. Township of Mount Laurel, 93 N.J. 158 (1983) that all exclusionary zoning litigation be handled by the three judges appointed by Chief Justice Wilentz, including Judge Serpentelli whose jurisdiction includes Somerset County.

2. The Appellate Division's recent decision on the Public Advocate's appeal of the final judgment in Allan Deane Corporation v. Township of Bedminster, (App. Div., August 3, 1983; copy enclosed).

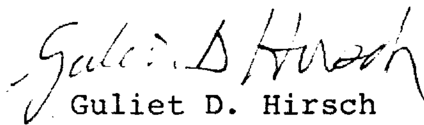
The Appellate Division decision in the Allan Deane case remands all issues to Judge Serpentelli, and not just the issue raised by the Public Advocate concerning the validity of the fair share provisions of the Bedminster Ordinance. On remand, Judge Serpentelli will necessarily have to look at the question of the appropriate region and fair share for Bedminster Township and the question of whether the zone plan and land use regulations of Bedminster Township require sufficient low and moderate income housing to satisfy Bedminster Township's Mt. Laurel II obligation. We believe that Plaintiff Leonard Dobbs' Motion should also be remanded to Judge Serpentelli for his decision on the following questions:

1. Whether or not the Bedminster zoning scheme is protected for six years from any Mt. Laurel II attack, including plaintiff's, in accordance with the Mt. Laurel II decision, 92 N.J. 158 at 291 (1983);

2. If Your Honor's judgment of compliance is not to be given res judicata effect, is Plaintiff Leonard Dobbs estopped from raising a Mt. Laurel II claim becuase of his failure to intervene in the longstanding Public Advocate appeal of the final judgment in Allan Deane v. Township of Bedminster.

We therefor respectfully request that this Motion be transferred to Judge Serpentelli for decision.

Respectfully submitted,



Guliet D. Hirsch

GDH/pb
Enclosure
cc: Joseph L. Basralian, Esquire
Herbert A. Vogel, Esquire
Alfred Ferguson, Esquire
Henry A. Hill, Esquire
John H. Kerwin

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538-3800
AREA CODE 201

August 5, 1983

L-12502-80

Superior Court of New Jersey
Office of the Clerk
P.O. Box 1300
Trenton, NJ 08625

RE: Dobbs v. Township of Bedminister

Dear Sir/Madam:

This firm represents Robert R. Henderson, Diane M. Henderson, Henry Englebrecht and Attilio Pillon, defendants in the above matter. On behalf of our clients, we are submitting this letter memoranda in opposition to the plaintiff's motion to amend and supplement plaintiff's complaint. Said motion is returnable on August 12, 1983. I would note at the outset that plaintiff's proposed amended complaint is in the nature of a Mt. Laurel II challenge to the zoning ordinance of the Township of Bedminister and, therefore, this motion would appear to be within the jurisdiction of the Mt. Laurel II judge for the central portion of New Jersey. It is noteworthy in this regard that the original complaint in this matter did not in any way raise a Mt. Laurel fair share housing complaint against the Township of Bedminister; rather, the original complaint only raised issues of whether plaintiff's land should be rezoned to permit a regional shopping mall.

I. STATEMENT OF FACTS

Plaintiff is a developer of regional shopping centers who filed a complaint against the Township of Bedminister on November 5, 1980, seeking rezoning of 200 acres of property located along Route 202-206 in the Township of Bedminister so as to permit use of the 200 acres for a regional shopping mall. See attached complaint in lieu of prerogative writ. Plaintiff's complaint did not make any claims regarding low and moderate or least cost housing and did not seek any relief pursuant to Mt. Laurel I or

Oakwood at Madison. Defendants, Henderson, Englebrecht and Pillon are property owners residing in single-family houses directly adjacent to the 200 acre tract which plaintiff proposed for a shopping mall. The defendant residents, with the exception of Attilio Pillon, were permitted to intervene in the matter by the Superior Court, Law Division. By Consent Order dated July 6, 1983, the Appellate Division ordered that the Hills Development Company, Robert R. Henderson, Diane M. Henderson, Henry Englebrecht and Attilio Pillon be permitted to intervene.

Plaintiff seeks to amend his original complaint to add entirely new causes of action which for the first time seek to obtain a rezoning to permit use of his property for a planned unit development including "high density multi-family" housing which supposedly complies with Mt. Laurel II. Plaintiff did not raise such causes in the original complaint, did not seek to intervene in the case of Allan-Deane Corp., et al. vs. Bedminister Township, et al. (Docket No. L-36896-70PW and Docket No. L-28061-71PW) and did not challenge the rezoning of his property within 45 days of adoption of the latest revision of the zoning ordinance of the Township of Bedminister.

II. LEGAL ARGUMENT

POINT I: PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS COMPLAINT SHOULD BE DENIED IN THE INTEREST OF JUSTICE

Rule 4:9-1 relating to amendments to pleadings indicates that amendments should only be granted if the leave to file will be "in the interest of justice". See R. 4:9-1. See also, Wm. Blanchard Co. v. Beach Concrete Co., Inc., 15 New Jersey Super 277 (App. Div. 1977). It is clear from the attached original complaint in this matter and proposed amended complaint, that plaintiff is seeking to add an entirely new series of causes of action which in essence seek a rezoning for a planned unit development including a high density housing component, directly adjacent to our clients single-family houses in the R-3 or 3 acre plus zoning district of Bedminister. The proposed amendments to the complaint are substantially different than the original complaint and are, in fact, inconsistent with the initial allegations set forth in the original complaint. Indeed, the original complaint contended that a regional shopping mall was the highest and best use of the 200 acre tract. The proposed amended complaint contends

that a planned unit development consisting of multi-family housing and a regional shopping mall is the highest and best use. The original complaint had also contended that the property was not suitable for residential use. Considering the substantial changes in the causes of action raised in the amended complaint, it would clearly not be in the interest of justice for the Court to grant plaintiff leave to amend the complaint. In such circumstances, the New Jersey Courts have upheld the discretion of the trial court to deny requests for leave to amend. See Wm. Blanchard Co. v. Beach Concrete Co., Inc., 15 New Jersey Super 277 at 299-300 (App. Div. 1977). Plaintiff's motion would clearly prejudice the defendants in this matter by permitting plaintiff to raise causes of action which should have been raised in the original complaint and which plaintiff is merely seeking to raise now in order to eliminate manifest defects in his original causes of action.

In addition, it is apparent from plaintiff's amended complaint that he is improperly seeking to ultilize the builder's remedy provisions of Mt. Laurel II as a "bargaining chip" in violation of the Supreme Court's decision in Mt. Laurel II. See So. Burlington County N.A.A.C.P. v. Mt. Laurel Twp. 92 N.J. 158, at 280 (1983). The Supreme Court specifically condemned the use of Mt. Laurel II and the builder's remedy provisions of Mt. Laurel II as a bargaining chip in a builders negotiations with a municipality in stating as follows at Page 280:

> "Care must be taken to make certain that Mt. Laurel is not used as an unintended bargaining chip in a builder's negotiations with the municipality, and that the courts not be used as the enforcer for the builder's threat to bring Mt. Laurel litigation if municipal approvals for projects containing no lower income housing are not forthcoming. Proof of such threats shall be sufficient to defeat Mt. Laurel litigation by that developer."

Clearly, it would not be in the interest of justice to prejudice the defendant residents of the Township of Bedminister by permitting plaintiff to amend his complaint adding Mt. Laurel II claims merely because he sees that such claims will add "leverage" to his prior regional mall rezoning demand.

In addition, contrary to plaintiff's assertions in his brief in support of his motion, plaintiff's complaint and amended complaint are barred by the 45-day rule relating to prerogative writ complaints. See R. 4:69. Plaintiff did not challenge the zoning of his property within 45 days of the adoption of the existing land use ordinance of the Township of Bedminister. Thus, plaintiff's amended complaint is barred by the Rule of Limitations set forth in R. 4:69 relating to prerogative writ actions. In addition, plaintiff failed to intervene or to seek to intervene in the action of Allan-Deane v. The Township of Bedminister which resulted in the Court ordered and Court approved zoning ordinance of the Township of Bedminister. This ordinance specifically designated plaintiff's property within the R-3 zoning district. Plaintiff's novel case of Mt. Laurel II related causes of action is therefore, in essence, barred by the doctrines of res judicata and collateral estoppel. To permit plaintiff to amend his complaint at this stage would clearly prejudice the defendant residents of the Township of Bedminister.

III. CONCLUSION

For the reasons set forth above, we respectfully request that Your Honor deny plaintiff's motion for leave to amend his complaint.

Respectfully yours,

VOGEL AND CHAIT
A Professional Corporation

THOMAS F. COLLINS, JR.

TFC:mtb
Enclosures
cc: Raymond R. Wiss, Esq.
Alfred L. Ferguson, Esq.
Guliet F. Hirsch, Esq.
Clerk of Somerset County
Robert R. Henderson
Diane M. Henderson
Henry E. Englebrecht
Attilio Pillon

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PETER V. KOENIG
JEFFREY W. MORYAN
DANIEL L. RABINOWITZ

REC'D IN CHAMBERS
AUG 1983
JUDGE LEAHY

August 5, 1983

Re: Dobbs v. Bedminster Township
Docket No. L-12502-80

Honorable B. Thomas Leahy
Superior Court of New Jersey
Somerset County Court House Annex
Somerville, New Jersey 08876

My dear Judge Leahy:

This letter brief is submitted on behalf of defendant Township of Bedminster in opposition to the motion of plaintiff Dobbs for leave to file amended pleadings in the within action.

It is our position that the Amended and Supplemental Complaint which plaintiff proposes to file should be more accurately characterized as a new complaint which replaces the prior complaint. A comparison between the document which plaintiff proposes to file and the original complaint reveals that it represents a total revision and re-writing of the complaint. R. 4:9-1 provides that leave to amend shall be freely given; however, that Rule should not be construed as a license to re-draft the original complaint *in toto*.

Briefly stated, we object to Mr. Dobbs' tactic of instituting a lawsuit challenging Bedminster Township's zoning ordinance and then, before that challenge has been heard, changing his legal theories and the nature of the relief requested in order to suit his latest development scheme. Mr. Dobbs initially argued that Bedminster was obligated to zone for a fair share regional shopping mall. Next, without awaiting a judicial decision on that issue, Dobbs proceeded to propose a planned unit development with

ltr from Bedminster counsel in opp to motion to file amended complaint

8/5/83

housing and a scaled-down shopping mall, or perhaps a corporate office park. Now, Dobbs proposes to provide Mt. Laurel housing as a justification for a shopping mall or office park which he seeks to build. We can only speculate as to what he may propose next.

In short, it it our position that if Mr. Dobbs has abandoned his original development proposal and zoning challenge, then the complaint should be dismissed. Similarly, if he wishes to assert new claims, then they should be presented as such. Mr. Dobbs should not be permitted to assert new claims under the guise of supplements or amendments to the prior complaint.

For example, Mr. Dobbs proposes to assert an entirely new cause of action based upon the Mt. Laurel doctrine by way of amendment to the complaint. This claim has been incorporated into the first count of the complaint. That count previously asserted a conventional zoning claim alleging that the zoning of the property which Mr. Dobbs had contracted to purchase was arbitrary, capricious and unreasonable. The original complaint contained no allegations with respect to the Mt. Laurel obligation of Bedminster Township, nor did it seek residential re-zoning. At most, it suggested reliance upon Mt. Laurel by analogy for the proposition that Bedminster Township was obligated to provide for a fair share regional shopping mall.

Mr. Dobbs attempts to side-step this issue now by portraying the decision in Mt. Laurel II as a significant new development which justifies an amendment to the complaint. Although the Mt. Laurel II decision may have clarified the Mt. Laurel doctrine, it did not create a new cause of action. The Mt. Laurel doctrine existed when this action was instituted, and nothing precluded Mr. Dobbs from asserting a Mt. Laurel claim at that time. Consequently, the inclusion of a Mt. Laurel claim in the proposed amended complaint clearly constitutes an entirely new cause of action.

Similarly, a careful reading of the proposed amended complaint also reveals that Mr. Dobbs has taken the opportunity to assert a collateral attack upon the judgment in the Allan-Deane case. This new claim has been inserted as an additional sentence in paragraph 6 of the First Count. No justification is presented for the failure to originally assert such a claim. This action by Mr. Dobbs is just one example of the innumerable modifications to the complaint which have been made under the guise of amendments which are purportedly necessary to reflect new "developments."

Bedminster Township also objects to Mr. Dobbs characterization of his various development proposals as subsequent

"developments". Mr. Dobbs has by choice utilized the time during the stay to resubmit revised informal development proposals. By such action, he has in effect, attempted to create a record showing a pattern of allegedly unreasonable treatment by the Planning Board. Such allegations and inferences are unwarranted. None of Mr. Dobbs' informal proposals changed the total incompatibility between his proposals and the Township's zoning and land use plan. Throughout this period, the Township has remained convinced of the soundness of its zoning and land use plan. The Township has therefore been content to await a judicial decision on Mr. Dobbs' claims.

Thus, the Township has adhered to a consistent policy in rejecting Mr. Dobbs' subsequent proposals. Under such circumstances, Mr. Dobbs' action during the stay simply indicate his unwillingness to await the adjudication of his claims. Therefore, these unilateral actions should not be characterized as subsequent "developments" which should be incorporated into the complaint by amendment.

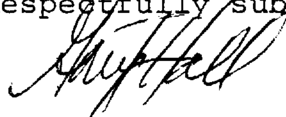
In summary, we believe that Mr. Dobbs is relying upon the passage of time while proceedings were stayed pending appeal as an excuse to totally revise and re-write the complaint. New claims are now being asserted and the original claims have been substantially altered. The practical effect of the proposed amended complaint would be the institution of new proceedings, requiring a complete answer to the entire amended complaint. Defendant would be unable to respond only to the supplemental and amended allegations, since they are completely interwoven with the allegations originally asserted. We therefore believe that this litigation should be given a fresh start by treating the amended complaint as a new complaint and beginning all discovery anew. The only exception is that the rights of the intervenors should not be re-litigated, in view of the order entered by the Appellate Division. Also, Mr. Dobbs should be required to produce his contract for the purchase of the property in question pursuant to the outstanding order of August 7, 1981, so as to avoid the necessity for new motions on that issue. In all other respects, this action should be treated as a new action, and the original complaint should be dismissed.

If the original action is not dismissed, then, at a minimum, Mr. Dobbs should be required to submit a different proposed amended complaint, which does not liberally edit and revise the original complaint, interweaving old and new allegations. New claims,such as the belated Mt. Laurel claim, should be clearly set forth in separate counts as new causes of action. Similarly, any supplemental allegations with respect to subsequent events should be set forth in separate paragraphs and not incorporated into the original allegations. This procedure would enable defendant to specifically respond to any supplemental allegations and to any

new claims, rather than having to respond to the amended complaint in its entirety.

In addition, discovery should begin anew in view of the total transformation of Mr. Dobbs' complaint. Finally, this court should fix a date in the near future for the in camera inspection of Mr. Dobbs' contract for the purchase of the property in question, pursuant to the outstanding Order of August 7, 1981.

Respectfully submitted,



Gary T. Hall

GTH:ctw
cc: Donald A. Klein, Esq.
Guliet D. Hirsch, Esq.
Herbert A. Vogel, Esq.