RULS-AD-1983-70

8/22/83

Letter memo re: response by D to P's motion to amend.

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SOMERSET COUNTY
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RULS - AD - 1983 - 70

August 22, 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:

The following letter memorandum is in reply to the response by defendant Township of Bedminster and by the intervenors (hereinafter "defendants") to plaintiff's motion to amend and supplement his complaint and, further, is in response to the cross-motion by intervenor Hills Development Company to transfer plaintiff's motion to the Honorable Eugene D. Serpentelli, who is sitting in Monmouth County as a designated Mt. Laurel II Judge for Somerset County.

The response of defendants to plaintiff's motion rests on the assumption that plaintiff has, in his amended and supplemental complaint, pleaded a new cause of action. Not only is

this argument erroneous, for the reasons hereinafter noted, but such argument (i) ignores the fact that the principal changes to plaintiff's complaint were to supplement plaintiff's pleading because of developments which had taken place since imposition of the stay of this matter, which had been initiated by defendants, (ii) ignores, in any case, the prevailing law that the pleading of a new cause of action is not a basis for barring an amended pleading (see authorities cited in plaintiff's Memorandum of Law in support of his motion), and (iii) ignores the fact that defendants who requested the stay immediately after the individual intervenors had intervened and before any discovery has taken place in this matter, have not demonstrated and indeed cannot demonstrate prejudice from plaintiff's amended and supplemental pleading.

Defendants strenuously argue that plaintiff has totally revised and rewritten his complaint to "state an entirely new cause of action" predicated on Mt. Laurel II grounds. This is simply not true. The gravamen of plaintiff's complaint and of plaintiff's amended and supplemental complaint is that the zoning and master plan of defendant municipality as applied to plaintiff's property was arbitrary and capricious at the time of the original litigation and remains so even after substantial changes to the zoning and master plan of the municipality as a result of the Allan Deane litigation. The proposed changes to plaintiff

complaint do not represent a Mt. Laurel II attack on the ordinances and master plan of defendant municipality. Contrary to defendant's protestations, plaintiff is not seeking a regional mall as a developer's remedy in a Mt. Laurel II challenge nor is plaintiff using a Mt. Laurel II threat as a "bargaining chip." Rather plaintiff has incorporated in his proposed plan to develop his property a housing element which meets not only the PUD requirements of defendant municipality's master plan, enacted after the imposition of the stay in this matter, but also meets the requirements of the Mt. Laurel II decision, decided after the imposition of the stay in this matter.

Plaintiff proposed in a development proposal to defendant municipality and in its original complaint development of his property as a regional mall, a proposal which plaintiff believed reflected not only the highest and best use of his property but also enabled defendant municipality to meet its regional responsibilities. Since the regional mall would utilize approximately 100 acres of the total 211 acres, the question of how the remaining portion would be developed was left open for future discussion with the municipality. Thereafter, defendant municipality modified its master plan to provide for Planned Unit Development which would affect all vacant parcels of 10 acres or more, but failed to so zone any property within the municipality. Relying on the Master Plan so enacted, plaintiff, in a revised

submission, modified his development proposal, in August 1982 before the Mt. Laurel II decision, to include, in addition to the commercial development, provision for a hotel/conference center (based on the unanimous recommendation of the Planning Board as a desirable use within the community), municipal facilities, open space, and residential use. After the Mt. Laurel II decision, plaintiff defined the residential component to provide for low and moderate income housing which met the requirements of the Mt. Laurel II decision.* Such a residential component, plaintiff believed, (i) enhanced the reasonableness of plaintiff's proposed commercial development, (ii) addressed any potential argument that the commercial development created any need for low and moderate income housing, (iii) assisted defendant municipality in meeting its Mt. Laurel II obligation (which, at the time of

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*Defendants have argued that plaintiff in his original complaint has alleged that the highest and best use for the subject property is as a regional shopping mall, and that this assertion is somehow inconsistent with his current development proposal and the allegations of the Amended and Supplemental Complaint. Defendants' argument fails to recognize that plaintiff has consistently urged that the highest and best use for the subject property is for commercial development and not for single family housing with a three (3) acre minimum lot area.

While development of plaintiff's property for three (3) acre single family housing is environmentally unsound and economically impractical in light of subsurface conditions impacting upon the installation of individual septic tank systems, waste treatment facilities may be installed, on a reasonably economical basis, in a PUD which is developed in conjunction with the proposed commercial development and the waste treatment facilities which are a part thereof.

plaintiff's motion, and in light of the remand, at the present time, is an open question), and (iv) demonstrated how a private commercial development could without public assistance subsidize low and moderate income housing. In light of the foregoing, defendant's characterization of plaintiff's Amended and Supplemental Complaint as creating a new Mt. Laurel II challenge is simply unfounded.

The essential changes to plaintiff's complaint reflect the foregoing factual developments since the imposition of the court-ordered stay and are properly the subject of plaintiff's supplemental Complaint.* It should be noted that the stay in this matter, initiated by defendants, has effectively halted the litigation before any discovery has taken place in this matter and immediately after the individual intervenors were granted intervention. Any claim of prejudice is totally baseless and unsupported by defendants.

Plaintiff agrees with defendants that discovery must start afresh in this matter, but this is dictated by the status of this matter at the time of imposition of the stay. It is important, however, that discovery and future proceedings in this matter go forward on the basis of the facts as they presently

*So too are the continued manifestations of defendant municipality's indifference to plaintiff's development proposal, admitted in defendants' response.

exist. While plaintiff's legal theories remain substantially the same, certain facts have and are properly the subject of plaintiff's Amended and Supplemental Complaint. Defendants' convoluted suggestions as to bifurcation of plaintiff's original pleading and his amended and supplemental pleading miss the whole purport of plaintiff's proposed changes.* Plaintiff continues to argue that the zoning of his property is arbitrary and capricious, that it amounts to a de facto confiscation of his property, that defendant municipality has failed to meet its regional obligations with respect to the provision of commercial and ancillary uses, and that, in light of the foregoing, that plaintiff's property should be zoned for commercial use. The fact that plaintiff has, during the pendency of the stay, modified his development proposal to provide for such a development in a PUD zone with a housing element which meets Mt. Laurel II requirements does not create a new cause of action, or, even assuming arguendo that it does, warrant dismissal of plaintiff's motion to amend and supplement.

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*Moreover, defendants' reference to the 45-day limitation period contained in R. 4:69 is misplaced, given the constitutional and public interest issues raised by plaintiff's pleadings. See Schack v. Trimble, 28 N.J. 40, 48 (1958); East Rutherford Industrial Park v. State, 119 N.J. Super. 352, 360 (Law Div. 1972); Home Builder's League, etc. v. Evesham Tp. 174 N.J. Super. 252 (Law Div. 1980); Wolf v. Shrewsbury, 182 N.J. Super. 289 (App. Div. 1981); Wayne Tenants Council v. Wayne Tp., 180 N.J. Super. 128, 132 (Law Div. 1981).

With respect to the cross-motion to transfer plaintiff's motion to Judge Serpentelli, plaintiff does not, in light of the foregoing, believe that it is appropriate on the basis proferred by defendants: that plaintiff has mounted a Mt. Laurel II challenge to the zoning ordinance and master plan of defendant municipality. For this reason, plaintiff opposes the cross-motion. Plaintiff does, however, recognize that Judge Serpentelli must in the Allan Deane remand make determinations, including determinations as to region, fair share, and corridor definition,* which will impact upon the ability of plaintiff to develop his proposed PUD plan. We understand that Judge Serpentelli's review

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* Defendants' suggestion that plaintiff is barred by the doctrines of res judicata or collateral estoppel from challenging the corridor definition is baseless, since plaintiff was not a party to the litigation in which such determination was made. Moreover, defendants' suggestion that plaintiff has challenged the corridor determination for the first time in his amended and supplemental pleading is erroneous. See plaintiff's original complaint, paragraph 6:

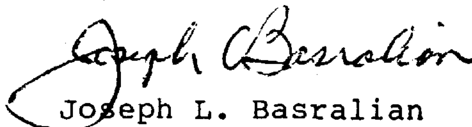
> The true developing corridor of land within the defendant township consists of the areas both to the east and west of Route Nos. 202-206 and has been designated as such in the Somerset County Master Plan and the New York Regional Plan, and there is evidence of a further developing corridor of land on both sides of Interstate-78 both to the east and west of Interstate-287.

The additional sentence included in paragraph 6 of plaintiff's Amended and Supplemental Complaint, referred to by defendants, states only why the corridor was misdefined.

is not limited to simply the issues raised on appeal.* The appropriate procedure, we believe, is for limited intervention by plaintiff before Judge Serpentelli with respect to those issues to be determined by Judge Serpentelli which will impact upon plaintiff's plan.

In sum, it is a gross mischaracterization of plaintiff's Amended Supplemental Complaint to suggest that plaintiff has converted his challenge to the zoning of his property (which, for all of the reasons set forth in his original complaint, should be zoned essentially for commercial use) to a Mt. Laurel II challenge. The Mt. Laurel II reference in plaintiff's Amended and Supplemental Complaint is, as described supra, a limited one and does not transform the essential thrust of plaintiff's action.

Very respectfully,



Joseph L. Basralian

JLB/mp

cc: McCarter & English, Esqs.
Vogel & Chait, Esqs.
Brener, Wallack and Hill, Esqs.
Somerset County Clerk

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*See Appellate Division decision remanding to Judge Serpentelli, at 6:

> We believe that the matter will be resolved by remanding the cause to Judge Serpentelli for review of the issues presented by this appeal in light of the opinion in Mount Laurel II and the issues heretofore decided by the trial judge which have not been challenged by an appeal.