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Denville

- letter brief re: rejection of COAH transfer

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December 4, 1985

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Stephen W. Townsend, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
CN 970
Trenton, New Jersey 08625

Re: Morris County Fair Housing Council, et al., vs. Boonton Township, et al. (Denville Township) - Docket Nos. A-125, (#24,783) related cases on Appeal Docket Nos. A-122 to A-133

To the Honorable Chief Justice and
Associate Justices of the Supreme Court:

Please accept this letter brief pursuant to R.2:6-2(b), filed on behalf of the plaintiff in the above-captioned matter, Angelo Cali. This letter brief urges affirmance of the decision of the Honorable Stephen Skillman, J.S.C., refusing to transfer this action to the Affordable Housing Council (hereinafter referred to as the Council).

This letter brief shall address only the issue of why this particular plaintiff should not have his complaint transferred to the Council. As to the questions of the constitutionality of the "Fair Housing Act", L.1985, c.222; N.J.S.A. 52:27D-301 et. seq. and what constitutes "manifest injustice", under Sec.16 of this Act, we will rely on the briefs prepared by the other plaintiffs in these consolidated cases.

The Township appealed to the Superior Court, Appellate Division and on November 13, 1985, the matter was certified directly to the Supreme Court of New Jersey.

Statement of Facts and Procedural History

A unique factual history involving the subject property had substantially proceeded the filing of this Plaintiff's complaint on July 9, 1985.

The subject property is approximately 44.6 acres, in the Township of Denville. The land's northern boundary rises to the lands of the Morris Knolls Regional High School. It is

designated as Lot 4, Block 40001 and Lot 1, in Block 40203, on the Township Tax Map.

As early as May, 1984, Township officials had communicated with the present owner concerning the development of the subject site. This development would include low and moderate income housing units.

Trial on the original law suit began on July 2, 1984. On July 25, 1984, the parties advised the court of a tentative settlement, and trial was suspended to permit completion of the settlement.

The Township, in an effort to settle the pending litigation with the Public Advocate's Office, considered rezoning twelve sites for multi-family uses with twenty percent of the units set aside for low and middle income families.

The subject property was one of the chosen sites and was designated "Site No. 1" by the Township. In an attempt to implement the proposed settlement, the Township approached the current owner of the subject site about developing it in accordance with Mount Laurel II. He, in turn, hired Walter Leicht, a renowned architect and developer who designed a proposed project along the guidelines suggested by the Township. This plan proposed a development of the land at a density of ten units per acre with a twenty percent allocation for low and middle income units. This plan met the requirements of Mount Laurel II in all respects.

However, the Township failed to implement or adopt any proposed change in the zoning ordinance and cancelled a scheduled December 20, 1984, master plan hearing. At this hearing, the Township had previously agreed to move forward with its goal of providing its fair share of low and moderate income housing and adopt a master plan to implement this goal.

Because the proposed settlement failed, trial resumed on January 11, 1985, and on January 14, 1985, Judge Skillman issued an oral opinion concluding that the Denville Zoning Ordinance failed to meet its Mount Laurel II obligations. Shortly thereafter Judge Skillman ordered Denville to rezone and appointed David N. Kinsey, Advisory Master to assist the Township in meeting its Mount Laurel II obligations.

On May 17, 1985, the current owner entered into an agreement with Mr. Angelo Cali, an experienced and respected builder, to purchase and develop the site in accordance with the guidelines previously discussed with the Township planner. Counsel for the contract purchaser, as well as the architect and planner, Walter Leicht, have met with Dr. Kinsey. They have addressed several meetings regarding the development of Denville and have brought the Advisory Master up to date with the subject property and the proposed plan for its development.

On July 9, 1985, the plaintiff, Angelo Cali, filed a Verified Complaint in Lieu of Prerogtative Writ against the Township of Denville, the Municipal Council of the Township of Denville and the Planning Board of the Township of Denville. The plaintiff then filed a Notice of Motion for Consolidation of his action with the others concerning Denville, pending before the Honorable Stephen Skillman, J.S.C. This Motion was unopposed by other parties, including the appellant, Township of Denville.

On August 2, 1985, Judge Skillman ordered the consolidation of Angelo Cali's case with the others pending against Denville, "...conditioned upon plaintiff Angelo Cali's agreement to be bound by the determinations of region and fair share which have been made in prior proceedings in this case..."

On July 2, 1985, Governor Kean signed L.1985, c.222, which called for the creation of the Affordable Housing Council. On July 8, 1985, Denville moved to terminate the appointment of the special master and transfer all the matters concerning Denville to the Council.

Judge Skillman denied the request to terminate the master's appointment on July 19, 1985.

In August, 1985, Dr., Kinsey submitted his report to the court regarding Denville's compliance with Mount Laurel II. In this report, he found the subject site to be suitable for development and also found the proposed project to be acceptable.On October 28, 1985, he denied the defendants' Motion to transfer all matter to the Council.

Legal Argument

In his opinion of October 28, 1985, Judge Skillman rejected the argument of Denville that Mr. Cali's complaint was subject to mandatory transfer to the Council, pursuant to Sec. 16(b) of the Fair Housing Act, if the Public Advocate's suit and the suits of the other developers against Denville were not transferred. Morris County Fair Housing Council, et.al. v. Boonton Township, et.al., Slip Opinion, pages 55-56. Denville had argued that the transfer was required because Mr. Cali's complaint was filed less than 60 days before the effective date of the Act. N.J.S.A. 52:27D-316(b.).

Judge Skillman held that a transfer could lead to the same issues being litigated before both the court and the Council at the same time leading to the possibility of inconsistent results. Citing Fairlawn Shopper, Inc. v. Director, Div. of Taxation, 98 N.J. 64, 74 (1984),he found that "...a basic principle of statutory interpretation..." was "...that a statute be construed reasonably and in conformity with its underlying intent." Id. at 55. Judge Skillman could find no legislative intent for simultaneous litigation of the same issue before two tribunals.

He also held that since the Cali complaint had been consolidated with the Public Advocate's suit and "...consolidation is designed to serve the policies of economy and efficiency in litigation and 'fuses the component cases into a single action' (citation omitted)...", section 16 should be interpreted to permit consolidated cases to be heard by the court to prevent manifest injustice. Id. at 55.

In view of Judge Skillman's expertise in dealing with Mount Laurel II matters and his extensive knowledge of the instant case, his findings in regard to consolidation should be given deference, particularly where there was no objection by any other party.

Further, when Judge Skillman signed the Order consolidating Angelo Cali's action with the other cases pending against Denville, pursuant to R.4:38-1, he ruled that all prior proceedings regarding the determination of region and fair share would be binding on Mr. Cali. Thus, there can be no question of any injustice toward the defendant because there has been no fundamental change in the litigation.

While Judge Skillman's rationale is compelling itself, there are other rationales which would equally justify his order. One such rationale would analogize this matter to the type of problem addressed by R.4:9-3. This rule concerns when amendments to pleadings relate back. Harr v. Allstate Insurance Co., 54 N.J. 287, 299-300(1969) holds that this rule should be construed liberally and is directed toward the conduct, transaction or occurrence giving rise to the cause of action. In the instant case, this plaintiff's complaint, because of his acceptance of the prior determinations regarding region and fair share, should "relate back" to those complaints of other plaintiffs filed prior to sixty days before the effective date of the Act. It is the conduct of the defendant which has made it necessary for this complaint to be filed. The defendant cannot now be allowed to argue that this action should be transferred due to technicality in the Act, particularly when no other case is to be transferred.

Another rationale is that in any event, Cali had a right to intervene. As indicated in the Statement of Facts, the Township has regarded the subject property as the prime site for development. The Master also selected this site as one of the three suitable sites for development. Clearly, Cali has an interest in the subject of the actions pending against Denville. R.4:33-1 allows intervention as of right when a party claims an interest to the property or transaction which is the subject of an action, the disposition of which may affect his ability to protect his interest and that interest is not adequately represented by the existing parties. Cali, ironically, would have the right to intervene even after a final judgment were entered. Vicendese v. J-Fad, Inc., 160 N.J. Super. 373 (Ch.Div. 1978).

Applications made pursuant to this rule are treated liberally. Zanin v. Iacano, 198 N.J. Super. 490 (Law Div. 1984). The test to allow a party to intervene is whether intervention will unduly delay or prejudice the rights of the original parties. Loomar Realty Corp. v. Broad Street National Bank of Trenton, 74 N.J. Super. 71 (App.Div. 1962).

In view of the probable affect on the subject property by the action of the Public Advocate and the other plaintiffs against Denville, Cali could be considered an intervenor as of right under R.4:33-1. No other party could protect his interest. Because he is bound by prior proceedings and

decisions in the litigation, there is no prejudice to the other parties nor has his suit resulted in any delay. The same rationale could also justify his being a permissive intervenor under R.4:33-2.

This lack of prejudice is also demonstrated by the lack of any objection by Denville to Cali's Motion for Consolidation. In view of this failure to file a timely objection, we do not believe that the consolidation so ordered by Judge Skillman should now be thwarted by transfer of Mr. Cali's complaint to the Council.

Another rationale would interpret the 60 day limitation to refer only to the filing of complaints alleging new causes of action. In this case, Cali's complaint does not present a new allegation of any Mount Laurel II violation; it merely seeks to be part of the proceedings which will determine the remedy for the violation previously adjudicated by Judge Skillman. In this sense it does not allege a new cause of action and, thus could be considered outside of the 60 day limitation. This suggested interpretation is buttressed by the language of N.J.S.A. 52:27D-316 (b). That section deals with the institution of a law suit "challenging a municipality's zoning ordinance". In this case the municipality's zoning ordinance had been challenged and adjudged to be deficient long before this suit was instituted; hence, this section simply does not apply to Cali's complaint.

Mount Laurel II provides that every municipality has an obligation to provide a realistic opportunity for a fair share of a region's present and prospective toward moderate income housing need. South Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983), at 215.

In order for this mandate to be fulfilled, it is reasonable that all suitable sites for development in a municipality be considered in litigation to determine a municipality's fair share. More importantly, in fashioning an appropriate remedy, all sites and their topographic, environmental,and other developmental factors must be considered.

As the facts show, both the Township and the Master have found Mr. Cali's site to be suitable for development to satisfy Mount Laurel II requirements. In view of this agreement about the suitability for development of the subject site, it would be

most undesirable to transfer decisions concerning this intregral site from the court which has been wrestling with the problem of Denville's fair share of lower and moderate income housing for sometime to the Council which is still in its formative stages.

If a realistic, intelligent and knowledgeable decision regarding the housing needs and obligations of Denville is to be made, it is best made by a single decision maker, such as Judge Skillman, who has before him the total picture and its constituent parts. Transferring the Cali complaint to the Council removes an important piece from the picture, making it more difficult for the court to determine Denville's obligations and impossible for the Council to do so. Transfer of Mr. Cali's complaint to the Council can only result in an incomplete and inaccurate determination of Denville's fair share of low and moderate housing needs and obligations. Cali's omission from the case before Judge Skillman omits the party with the most knowledge of facts relating to a prime candidate for development. Mount Laurel II can only reasonably read as requiring a municipality's fair share and zoning obligations to be determined by looking at the total municipality. Isolated determinations reduce the constitutional grandeur of Mount Laurel II to Pecksniffian proportions.

Conclusion

For the foregoing reasons, Plaintiff, Angelo Cali, asks the Court to uphold the ruling of Judge Skillman and not to transfer his complaint against the defendants to the Affordable Housing Council

Respectfully submitted,

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By: _____
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