

Moorestown

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- letter

- w/ enclosure settlement proposal for turf.

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FROM: Carl S. Bisgaier, Esquire  
Kenneth Meiser, Esquire

Please review the enclosed very carefully. Ken and I, along with others, have been discussing possible conditions for accepting transfer. The enclosed is a proposal made at the trial level in the context of the Moorestown case. The Township is now considering it, and the hearing date has been moved from December 9, 1985, to December 20, 1985.

Please call Ken at (201) 494-3500 or me to discuss this as soon as possible. We will be submitting something like this in our Reply Brief to the Supreme Court.

PROPOSAL FOR CONDITIONAL TRANSFER

While transfer, per se, is unthinkable, transfer with conditions might be statutorily and constitutionally tolerable. The constitutional mandate called for the expeditious creation of a realistic housing opportunity. The statutory standard is that no transfer may occur if it could result in a manifest injustice to a party. The affected parties are the poor and the plaintiff developer.

The interest of the poor is in having housing provided, at least incrementally, within the six-year period of repose. The poor are also vitally concerned with the integrity of the judicial process as regards the developer since, absent the developer - plaintiff class, no incentive exists for municipalities to comply, whether voluntarily or through the administrative process.

The developer's interest is in obtaining site specific relief within a reasonable time. The timeliness of that relief has already been substantially tested in this litigation.

The defendant avers its desire and intent to comply. However, it now seeks the opportunity to do so through the administrative process. Yet, as late as November 18, 1985, its expert acknowledged a fair share obligation of 1,287 units. See Hintz report. Dr. Moskowitz found an obligation of 1,436 units in

his October 24, 1985, report. Both reduced their respective figures substantially by credits and other devices.

Plaintiff would consider agreeing to a transfer on the following conditions:

1. the case is transferred and further proceedings on fair share and compliance except as noted below are stayed for a period of two (2) years, or such shorter time as noted below;
2. the defendant must expeditiously seek substantive certification and administrative approval of the fair share number and notify the court immediately upon obtaining such certification or approval, or upon a final municipal determination not to accept the Council's conditions for certification or fair share numbers;
3. if the court approves the substantive certification or fair share number, the case will be over in its entirety or at least as to the issue of fair share. If no substantive certification or fair share number is achieved, the court will proceed to a final ruling on fair share and/or compliance;
4. pending the duration of the two (2) year period of transfer, the defendant shall immediately implement under judicial supervision and approval, one-third of the fair share number established by the court's expert. The court will also rule on site suitability and final entitlement to the builder's remedy. The defendant will also immediately begin to work toward upgrading sewer capacity, extending sewerage infrastructure and modifying relevant 201 Plans to accommodate this development.

The effects of the proposal are:

1. The defendant may achieve administrative review;
2. the other parties achieve immediate, albeit incremental, relief;
3. the defendant cannot "lose"; that is, it will only be implementing one-third of a fair share number. Its ultimate fair share responsibility (as calculated by its own expert) established through the administrative process will be much higher and will be implemented later.

Again, this proposal is offered in the most conciliatory context. In fact, transfer is totally inappropriate. However, if the defendant is willing to commence, incrementally, the compliance process now, the court might give its desire for transfer greater deference. The power of the court to grant this relief could be justified as a means of avoiding a manifest injustice and in aid of its equitable jurisdiction. As stated by the Supreme Court in State v. U.S. Steel, 22 N.J. 341, 357 (1956), quoting Patrick v. Groves, 115 N.J. Eq. 208 (E. & A. 1934):

The power of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar.