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Plaintiff's Brief and Appendix in Opposition to Transfer per Sec. 16a of the Fair Housing Act of 1985

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs-Respondents,

vs.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,

Defendants-Appellants.

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-124 (#24,782)

Civil Action

(Mount Laurel)

Sat Below:
Hon. Eugene Serpentelli, A.J.S.C.

PLAINTIFF'S BRIEF AND APPENDIX IN OPPOSITION TO MOTION TO TRANSFER PER SEC. 16a OF THE FAIR HOUSING ACT OF 1985

CRANBURY LAND COMPANY, a New Jersey Limited Partnership,

Plaintiff-Respondent,

vs.

CRANBURY TOWNSHIP, etc.,

Defendant-Appellant.

DOCKET NO. A-124 (#24,782)

REAL ESTATE EQUITIES, INC., :
etc.,
:
Plaintiff-
Respondent, :
DOCKET NO. A-126 (#24,784)
vs. :

TOWNSHIP OF HOLMDEL, etc., :

Defendant- :
Appellant

MONROE DEVELOPMENT :
ASSOCIATES,
:
Plaintiff-
Respondent, :

vs. :
DOCKET NO. A-127 (#24,785)

MONROE TOWNSHIP, etc., :

Defendant- :
Appellant.
:

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PROCEDURAL HISTORY

This brief is written on behalf of plaintiffs in three separate actions and the procedural history of each will be addressed separately below.

I. Cranbury: plaintiff Cranbury Land Company will rely on the opinion below and the following:

a. the procedural history set forth in the brief of the Urban League;

b. the procedural history in its trial brief (see pp. 7a-10a);

c. the affidavit of Carl S. Bisgaier, Esquire, dated September 17, 1985 (see pp. 121a-125a).

As to the Cranbury Land Company, the procedural history in this case is unique. Particular attention should be paid to the fact that its efforts to provide lower income housing in Cranbury predated the filing of this complaint (which occurred on November 10, 1983). In fact, its efforts predated the filing of the Urban League litigation and the filing of the original complaint in Mt. Laurel I. This early history (which included the filing of a lawsuit with what is now referred to as a Mt. Laurel count on February 14, 1973) is described in an affidavit contained in the appendix hereto at pages 121a-125a.

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II. Monroe: plaintiff Monroe Development Associates will rely on the opinion below and the procedural history set forth in the brief of the Urban League.

III. Holmdel: plaintiff Real Estate Equities, Inc. will rely on the opinion below.

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STATEMENT OF FACTS

As to Cranbury and Monroe, plaintiffs Cranbury Land Company and Monroe Development Associates will rely on the Statement of Facts in the Urban League brief and the following:

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I. Cranbury: affidavit of Carl S. Bisgaier, Esquire, dated September 17, 1985 (at pp. 121a-125a) and April 2, 1985 (at pp. 126a-138a) and the expert report of Abeles Schwartz Associates dated September 1985 (at pp. 139a-166a); and

II. Monroe: affidavit of Carl S. Bisgaier, Esquire, dated April 2, 1985 (at pp. 126a-138a) and the expert report of Abeles Schwartz Associates dated September 1985 (at pp. 167a-177a).

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As to Holmdel, plaintiff Real Estate Equities will rely on the opinion below and on the following:

1. the affidavit of Carl S. Bisgaier, Esquire, dated September 26, 1985 (at pp. 97a-120a) and April 2, 1985, (at pp. 126a-138a); and

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2. the expert report of Abeles Schwartz Associates dated October 1985 (at pp. 178a-185a).

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Plaintiff here underscores the significance and relevancy of the facts contained in the affidavit at pp. 97a-120a. They detail the type of horrendous risk which confronts a a builder choosing to undertake this type of litigation. The defendant Holmdel vigorously attacked plaintiff's financial resources; an attack which was the basis for setting an early hearing date on fair share.

Plaintiff also underscores the readiness of this case for final trial court resolution. The Master has submitted his final report on fair share issues on December 2, 1985. The fair share opinion should be released forthwith. The Township has, in place, a compliance ordinance (having stipulated to non-compliance of the ordinance in place when the matter was instituted). Thus, no "compliance period" will be necessary subsequent to release of the fair share opinion. A trial can be held virtually immediately on final compliance.

LEGAL ARGUMENT

POINT I

THE TRANSFER OF THIS ACTION WOULD RESULT IN A MANIFEST INJUSTICE TO THE PLAINTIFF AND LOWER INCOME HOUSEHOLDS

Plaintiffs Cranbury Land Company, Monroe Development Associates and Real Estate Equities, Inc. rely on the brief submitted below and attached hereto (see pp. 1a-96a). Particular attention is addressed to the points raised in correspondence from Mr. Townsend dated November 15, 1985.

A. The Meaning of Manifest Injustice: This is briefed below at pp. 68a-94a. An analysis of the criteria for manifest injustice are found at pp. 68a-84a. Delay in the implementation of the provision of a realistic housing opportunity is cited as a criterion. See pp. 82a-94a as to the application of all criteria to the case. As to the impact of further delay on plaintiff-developers and, in turn, ultimate vindication of the mandate, see particularly pp. 74a-76a. With regard to the timeframe for review under the Act, plaintiffs generally accept the opinions below to the effect that the deadlines suggest potential finality by September 1, 1987. However, as indicated by the courts, numerous "deadlines" for action may be extended indefinitely at the discretion of the OAL or Council.

Most significant weight should be given to delay and its effects on both the poor and builders. Again, see pp. 74a-76a. Mount Laurel litigation or its threat is the only means of enforcing the constitutional mandate. This Court has so found and so has the Legislature. The threat of litigation underpins the entire Fair Housing Act and is the only means cited to encourage voluntary utilization of the Act as a means to attain compliance.

The builders are the only realistic plaintiff class. They have already undergone an extraordinary ordeal in this litigation. Time is perhaps the most important concern they have. One cannot expect landowners to give options for more than a few years. The costs of carrying land ultimately undermine the ability to produce affordable housing on the land. Private entrepreneurs are willing to tie up their time and resources for just so long before "cutting their losses" and looking elsewhere. The defendants count on this. Delay has proven to be their only "defense". As stated in the brief below:

> The last point is extremely significant. The court has already ruled that voluntary compliance in the absence of the threat of litigation is meaningless. The Legislature has essentially so found; as previously detailed, the Act relies exclusively on the threat of litigation to induce voluntary participation before the Council.

> The developer-plaintiffs stand not only as representatives of the poor but as examples to future litigants. Extraordinary reliance has been placed on them by the Court. How they fare in this process will be the test of whether future litigants appear to vindicate this constitutional mandate.
>
> Developers who sued did so in reliance on the court's expression of commitment that if they brought suit, subject to conditions set in the opinion, they would achieve a certain result - site specific relief in a timely fashion. The timeliness of that relief is already in question given the extraordinary length of the trial stage to date. The death knell to future litigation would be judicial unfairness to those developers who have sued and who are bearing the economic and political risks of suit.
>
> A delicate balance has been struck in the private residential development business in favor of undertaking this type of litigation. If that balance is tipped in the other direction, any hope for the vindication of this mandate will be dashed. If this plaintiff class suffers any injustice at the hands of the judiciary, it will never appear again, regardless of the call. The mandate would then be completely unfulfilled - there is simply no other plaintiff class.

As to the scope of review, it is for this Court to determine the meaning of "manifest injustice", paying whatever

deference it chooses to the decision below. The findings of fact, below, essentially address harm to the poor in the delay of realizing housing opportunities. This Court has an equal capability to make the same judgments. Neither court below felt the need to address harm to the actual litigants in light of the alternative basis for the decision. Thus, there are no findings below as to the implications of bad faith or delay as to the plaintiffs. The lower court assessments as to the timeframe for resolution of these cases at the trial level are subject to great deference and should not be overturned unless patently unreasonable or irrational.

B. Application of the Moratorium to Cases Not Transferred: See Point II below.

POINT II

THE BUILDERS' REMEDY MORATORIUM IS UNCONSTITUTIONAL

Sec. 28 of the Act purports to effect what the Governor referred to as a "moratorium" on the builders' remedy (See News Release and Conditional Veto Message). The section defies any reasonable interpretation and, under any interpretation, is unconstitutional. A reading of the sections raises the following questions:

1. what is meant by "builders' remedy" - does it refer merely to relief to a successful litigant or, more generally, to incentive zoning and mandatory set asides; i.e., what is earlier defined as "inclusionary developments". See Sec. 3(f);

2. why is a distinction made between cases filed before and those filed "on or after January 20, 1983";

3. why does it "terminate" at the time for the filing of the housing element under Sec. 9;

4. if its termination date is tied to the filing of a housing element, should it be applicable to cases not transferred or those involving municipalities that have not adopted resolutions of participation per Sec. 9; and

5. why is a distinction made between public interest and non-profit plaintiffs and "an individual or a profit-making entity".

Regardless of how one answers these questions, a more fundamental issue controls: how can the Legislature constitutionally constrain the courts in their exercise of remedial powers in prerogative writ cases? The obvious answer is that it cannot. As Judge Skillman has observed, it is one thing to impose a moratorium on the municipal power to act and quite another to impose one on the court's power to act. See p. 25 of the slip opinion in Boonton. Municipalities, being creatures of the Legislature, are subject to its authority; the courts are not.

Judge Skillman, in his opinion on transfer in Boonton, all but reaches the conclusion that Sec. 28 is unconstitutional. However, the questions raised by the court cannot be

satisfactorily answered and are, essentially, rhetorical. See pages 21-25 of the slip opinion. Even if the section was comprehensible, plaintiffs see no conceivable way to save it constitutionally. Fortunately, it can be severed per Sec. 32.

The following is an attempt to answer the five questions raised above as to statutory interpretation:

1. Judge Skillman has interpreted the term "builder's remedy" in Sec. 28 to apply to any judgment requiring incentive zoning and mandatory set asides as opposed to merely a judgment of "reward" to a litigant seeking personal site specific relief. This seems to make sense in the context of the Governor's statement and veto message in which he refers to the builder's remedy as "disruptive of the planning process". It also was the thrust of the section prior to the Legislature's acceptance of the Governor's amendment. Since he only indicated his intent to change the prospective nature of the section, it may be assumed that (despite the vast differences in wording) the substance was to remain the same; i.e., no court orders requiring inclusionary developments until the time for filing housing elements had run.

There are problems with that analysis. First, the term "builder's remedy" is usually distinguished from "incentive zoning" and is so in the Act. Thus, in Sec. 3 the term "builder's remedy" is used in its traditional meaning. Sec. 4(f)

defines "inclusionary development". See also Sec. 11 and 23. Section 11(a)[1] refers to mandatory set asides and density bonuses (incentive zoning) in the context of the viability of "inclusionary developments". Further, the precursor to the present Sec. 28 made no reference to "builder's remedy" and explicitly constrained any judgment which required the construction of non-lower income housing.

Absent the Governor's statements, it would be very clear that Sec. 28 was intended to apply only to the traditional notion of "builder's remedy" - as it states: "a court imposed remedy for a litigant"; i.e., site specific relief as a reward per <u>Mt. Laurel</u> II. So read, it is extremely punitive since it would put every landholder in the municipality in a better position than the one who brought suit and sought to vindicate the constitutional mandate.

2. no sense can be made out of the use of January 20, 1983, as a dividing line. It is clearly irrational and seems to be punitive against parties seeking to fulfill the Court's mandate as articulated in <u>Mt. Laurel</u> II as opposed to those who happened to file a complaint the day before the decision was rendered.

3. & 4. the termination date makes no sense. It is certainly inexplicable in the context of cases not transferred or municipal defendants that do not adopt resolutions of

participation. It is also not tied into when a municipality actually files its housing element as opposed to the deadline for filing.

5. The distinction between an "individual or profit-making entity" and a public interest or non-profit entity is truly ludicrous. Thus, the same suit, filed the same day, proceeding in the same manner in every respect would yield a different result under Sec. 28 depending upon the economic status of the litigant. No possible rationale can be found to support this distinction.

POINT III

OTHER CONSTITUTIONAL ISSUES

These plaintiffs are essentially in accord with the decision of Judge Skillman on interpreting the Act to save it in all other respects.

1. Sec. 16(b) exhaustion: plaintiffs believe that the Act cannot foreclose judicial discretion as to exhaustion in prerogative writ actions. See pp. 79a-80a below and the cases cited in support in Judge Skillman's decision. See p. 60 of the slip opinion.

2. Definition of Region: see p. 28a below.

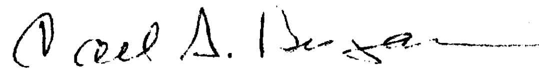
3. Credits against fair share: see pages 31a-33a below.

Plaintiffs' brief below details numerous potential flaws in the Act. See generally pages 15a-48a below.

CONCLUSION

For the aforementioned reasons, transfer should be denied and Sec. 28 declared unconstitutional, inapplicable and severable.

Respectfully submitted,



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Dated: December 4, 1985.

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs-Respondents, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants-Appellants.	SUPREME COURT OF NEW JERSEY DOCKET NO. A-124 (#24,782) Civil Action (Mount Laurel) Sat Below: Hon. Eugene D. Serpentelli, A.J.S.C. CERTIFICATION OF SERVICE

This is to certify that copies of the plaintiffs-respondents' brief in the above-captioned matter on transfer were served on all relevant parties on December 5, 1985.

CARL S. BISGAIER