

AMG

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letter re. opposing Dr. Casdell's  
motion

- w/ memo opposing

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May 3, 1985

The Honorable Eugene Serpentelli  
Superior Court of New Jersey  
Court House Ocean County  
CN-2191  
Toms River, New Jersey 08753-57

RE: Top O' The World Corpor-  
tion v. Township of  
Greenbrook and  
AMG Realty Corporation  
vs. Township of Warren

Dear Judge Serpentelli:

Enclosed please find an original and one copy of Top O'  
The World Memorandum in Opposition to the Motion to  
Consolidate.

Sincerely

  
Kenneth E. Meiser, Esq.

KEM/baf

Enclosure

cc: John E. Coley, Jr., Esq.  
J. Albert Mastro, Esq.  
Joseph E. Murray, Esq.  
Raymond R. Trombadore, Esq.  
Eugene W. Jacobs, Esq.  
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## INTRODUCTION

Warren Township, a defendant in AMG v. Warren Township, has made a motion to have that case consolidated with Top O' The World Corporation v. Township of Green Brook, a case in which Warren is a third party defendant. Plaintiff Top O' The World Corporation submits this brief in opposition to the motion for two reasons. First, Warren Township has failed to demonstrate any need whatsoever for consolidation. Second, the Supreme Court in Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp. II (hereinafter Mount Laurel II) 92 N.J. 158 (1983) sought to eliminate unnecessary delay and complexity in exclusionary zoning litigation. If this motion were granted, substantial additional delay and complexity would be guaranteed.

The purpose behind Warren's motion is twofold. Warren seeks to prevent a builder's remedy from being granted to any plaintiffs in the Green Brook litigation upon property which is near Warren's border. Second, Warren seeks to prevent any other land in Green Brook close to Warren's borders from being zoned for Mount Laurel housing. The certification in support of this motion is entirely aimed at achieving these two goals. In this brief, Top O' The World will show that each and every point which Warren makes in its consolidation motion for the purpose of achieving these two goals has already been made in its answer in the Green Brook case. Nowhere in its motion does Warren demonstrate why it cannot adequately raise these two concerns in the Green Brook case

or why consolidation is necessary in view of Warren's third party defendant status in Green Brook. Top O' The World accordingly concludes that consolidation is totally unnecessary.

Moreover consolidation will guarantee that this compliance hearing will turn into a procedural nightmare. In making its motion, Warren had to serve ten other attorneys who represent parties in one of the two cases. A compliance hearing with up to eleven attorneys and witnesses for up to eleven parties is virtually guaranteed to produce protracted litigation, complexity and delay -- exactly what the Court in Mount Laurel II sought to avoid. Since consolidation is unnecessary and will produce substantial additional delay and complexity, the motion must be denied.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Warren Township seeks to consolidate two cases, AMG Realty Company, et al. vs. Township of Warren and Top of The World Corporation et al. vs. Township of Green Brook. Warren is the defendant in the AMG case. It borders Green Brook Township and was joined along with the Warren Township Sewerage Authority, the Township of Bridgewater, and the Somerset-Raritan Valley Sewerage Authority as third party defendants in the Green Brook case. As third party defendant, Warren has filed an answer. Among the fourteen separate defenses in Warren's answer are a number directly related to this motion. Warren asserts that the properties for which plaintiffs seek a developer's remedy in the Green Brook case would

"require services from the Township of Warren which may include fire protection, police protection, use of Warren's recreational facilities, educational facilities and institutions, community institutions, rescue squad, sewer and roads which shall be unduly burdensome, degrading and shall impose a fundamental and economic detriment to the township of Warren".\*

Additionally, Warren argues that permitting the plaintiffs proposed development would unfairly allocate the burdens of Green Brook's fair share upon Warren Township.\*\* Warren further asserts that the Top O' The World parcel is in an environmentally sensitive area. It concludes that permitting development upon the parcel would be detrimental to the

\* Sixth separate defense of Warren Township  
\*\* Eighth separate defense of Warren Township

health, safety and welfare of the residents of Warren Township and would be harmful to the "natural environment, ecosystem and ecological balance of the area."\*

In the Green Brook case, the parties entered into a consent order signed by this court in December, 1984, establishing Green Brook's fair share as 325 low and moderate income units. A master was appointed to consider the issue of the suitability of lands in Green Brook for low and moderate income housing. The master was given full authority to confer with the parties and their experts to allow her to fully review Green Brook's compliance plan. After completing this review the master will determine whether the proposed zoning changes will make realistically possible Green Brook's fair share of lower income housing. In the consent order the court specifically reserved judgment on whether to grant any plaintiff in the Green Brook case a builder's remedy. Finally, the consent order provides that the third party complaint against Warren Township and the other third party defendants is stayed, although the order specifically allows the third party defendants including Warren to voluntarily participate in the revision process.

Along with the motion to consolidate there is a certification by counsel for Warren, John E. Coley, Jr. Coley notes that plaintiff Top O' The World seeks a builder's remedy on property located in the southwestern border of

\* Eleventh separate defense of Warren Township

Warren Township. Coley asserts that the traffic may not be able to be handled through Green Brook roads and will require access through interior Warren Township roads.\* The certification further claims that the Top O' The World tract is "far removed from the main stream (sic) of Green Brook services and is more in line with those of Warren".\*\* Additionally he states that the primary services offered by Warren Township including fire prevention, police services and other community services and facilities are substantially more proximate to the Top O' The World tract than those offered by Green Brook.\*\*\* Coley's certification concludes that rezoning the Top O' The World site would place the majority of Green Brook's Mount Laurel burden upon Warren while giving all the credits and benefits to Green Brook.\*\*\*\* For these reasons Warren seeks consolidation.

\* Certification, paragraph 5

\*\* Id., paragraph 7

\*\*\* Id., paragraph 9

\*\*\*\* Id., paragraph 10



THE MOTION FOR CONSOLIDATION SHOULD BE DENIED BECAUSE NO NEED HAS BEEN SHOWN FOR IT AND BECAUSE CONSOLIDATION WILL PRODUCE UNNECESSARY DELAY.

A. NO NEED FOR CONSOLIDATION HAS BEEN SHOWN

In making this motion for consolidation Warren Township seeks to preclude a developer's remedy from being issued to Top O' The World and to prevent Green Brook from meeting its fair share on property which is close to the border of Warren Township. Warren asserts that sound planning requires a Mount Laurel court to do more than focus upon a defendant municipality in approving Mount Laurel housing; the court should look at the impact upon other municipalities in a region, especially neighboring municipalities. For these reasons, Warren seeks consolidation.

Despite the discussion in Warren's brief about the importance of regional planning issues, that is not what this motion is about. This motion concerns whether consolidation is necessary to give Warren an opportunity to raise regional planning issues. The simple fact of the matter is that Warren as a third party defendant in the Green Brook case has already raised all of those regional issues. Consolidation would not add anything to Warren's ability to raise its regional planning concerns. It is important to realize that this court's order of December 21, 1984 specifically allowed Warren to supply such information as Warren chooses to help the master evaluate the proposed revisions in the Green Brook

land use ordinances. Were Warren not a party in this case or had the master no authority to listen to Warren's comments, there might be an argument that consolidation was essential to protect Warren's rights. But such is not the case. Warren by means of the December 1984 consent order has full opportunity to sit down with the master to make the points which it says are so crucial to the welfare of its residents and to the regional welfare. Moreover, once the report of the Green Brook master is finalized, Warren will have the further opportunity as a third party defendant to submit information to this court if it opposes the proposed Green Brook land use revisions or the master's conclusions.

Warren's status as a third party defendant is a key factor as to why consolidation is unnecessary. There is nothing in the certification of Warren's attorney in support of this motion which is not also contained in Warren's answer in the Green Brook case. The certification expresses concern that the Top O' The World development will primarily rely on the roads of Warren Township. This is nothing new; the sixth separate defense in Warren's answer in the Green Brook case likewise states that the plaintiffs' use of the roads of Warren township will be unduly burdensome upon Warren.\* Warren in this motion asserts that the plaintiffs' site will be closer to fire prevention, police services and other community services in Warren than those offered in Green

\* See page 3 supra

Brook. This also is nothing new; Warren's concern about police protection, fire protection, rescue squads and other community services and facilities are included in the sixth separate defense in Warren's answer.\* In short, the ten paragraph certification in support of consolidation simply paraphrases the separate defenses of Warren Township's answer in Green Brook.

Warren in its brief acknowledges its status as a third party defendant, commenting that "half the step has been taken".\*\* It concludes then that only by "a full consolidation can the problem be addressed head on."\*\*\* That one sentence is the full extent of Warren's analysis in its brief of the need for consolidation: Joinder is half a step and only by full consolidation can the problems be addressed head on. There is no explanation anywhere in the brief as to what consolidation can accomplish that will not be accomplished by its role as defendant in Green Brook. There is no showing that the role of Warren as a third party defendant is inadequate to protect any legal interest or right which Warren may have in Green Brook's rezoning. Despite rhetorical phrases such as "addressing problems head on", Warren totally fails to show that consolidation is necessary to protect it from the rezoning of Green Brook.

\* See page 3-4

\*\* Warren's brief, p. 8

\*\*\* Id.

Warren is especially concerned about preventing Top O' The World Corporation from achieving a builder's remedy. This concern cannot be evaluated without a brief review of the standards for a builder's remedy. The Supreme Court in Mount Laurel II established three requirements for a builder's remedy. A plaintiff which seeks a builder's remedy must succeed in Mount Laurel litigation, must provide a substantial amount of lower income housing, and must have a development which is not clearly contrary to sound land use planning. See Mount Laurel II supra, 92 N.J. at 279 - 280. Warren's position is that granting a builder's remedy to Top O' The World would be clearly contrary to sound land use planning. Plaintiff Top O' The World strenuously disputes this. What is important, however, for purposes of this motion is that as a third party defendant, Warren can seek to submit information to the master and to the court on this issue. Permitting consolidation will not change the legal standard in any way for determining entitlement to a builder's remedy nor give Warren any better right than it now has to attempt to establish that a developer's remedy to Top O' The World would be clearly contrary to sound land use planning. Once again there is simply no showing that consolidation is needed or that it will serve any useful purpose.

B. CONSOLIDATION WILL PRODUCE ONLY UNNECESSARY DELAY AND ADD TO THE COMPLEXITY OF THE LITIGATION.

In Mount Laurel II supra the court recognized that one of the primary enemies of municipal compliance with Mount Laurel I has been endless delay. Likewise, the court recognized that "the length and complexity of exclusionary zoning trials are often outrageous". Mount Laurel II supra, 92 N.J. at 200. A major purpose of the Mount Laurel II decision was to eliminate delay, and reduce the length and complexity of trials. This motion flies in the face of the Court's concern, and if granted would inevitably produce much more delay, complexity and confusion.

In the Green Brook case the parties consist of three plaintiffs in the case, defendant Green Brook Township, and four separate third party defendants. In the Warren case there are three plaintiffs in addition to Warren Township. This court can get an idea as to how complex a consolidated hearing in these two matters would be simply by observing that Warren's counsel had to serve ten attorneys and two court masters with copies of this motion.

Consolidation therefore could bring parties represented by eleven attorneys into one case. The experience of everyone involved in Mount Laurel cases has been that the more counsel there are, the longer, more complex and delayed the trial inevitably is. In this case, if consolidation were granted, the court would hear testimony from two masters,

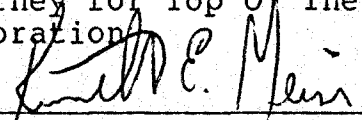
both of whom would face cross-examination by up to eleven attorneys. Once there was consolidation, each attorney would have to protect his client's interest by questioning both masters about any issues that could possibly affect the outcome of the case to his clients. Thus, even though the Warren plaintiffs, AMG, Timber Properties and John Facey, have no interest in Green Brook they will have to listen to Warren's cross-examination of the Green Brook master. Furthermore, they will have to ask her their own questions to rebut any inferences that might be drawn from her testimony that could impact upon their right to a builder's remedy in Warren. Likewise, if consolidation is granted, each of the three plaintiffs in the Green Brook case will have to listen to the testimony of the Warren master and cross-examine him on any issues that could potentially impact on their right to a builder's remedy in Green Brook. Witnesses in the Green Brook case will inevitably face cross-examination from all parties in the Warren case, just as Warren witnesses will be cross-examined by all the parties in Green Brook. Witnesses for parties in Green Brook will have to respond to testimony of witnesses in Warren and vice versa. The presence of up to eleven attorneys and experts for up to eleven parties in one consolidated matter guarantees a prolonged compliance hearing that could easily take several months or longer. The consolidation motion asks for a form of relief that would assure the delay and complexity which Mount Laurel II sought to eliminate or minimize.

The message of the Supreme Court against unnecessarily complicating and delaying Mount Laurel litigation is clear. Because this motion for consolidation will produce only delay, confusion and complexity without any corresponding benefits, the motion must be denied.

CONCLUSION

Wherefore, plaintiffs respectfully request that the motion for consolidation be denied.

FRIZELL & POZYCKI  
Attorney for Top O The World  
Corporation

  
by: Kenneth E. Meiser, Esq.