

AMG

9-19-85

Letter re:

- Brief in Support of D, Turp. motion
to transfer to COAH

Pgs. 12

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(202) 466-6044Honorable Eugene D. Serpentelli
Ocean County Court House
CN 2191
Toms River, NJ 08753Re: AMG Realty Company vs. Warren Township, et als.
Docket No. L-23277-80 P.W. and L-67820-80 P.W.

Dear Judge Serpentelli:

Please find enclosed defendant, Township of Warren's brief in response to plaintiff's opposition to motion for transfer to The Fair Housing Council with respect to the above-mentioned matter.

Respectfully submitted,

KUNZMAN, COLEY, YOSPIN & BERNSTEIN

John E. Coley, Jr.

JEC:eg
enc.

Sent Federal Express

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AMG REALTY COMPANY and SKYTOP
LAND CORP.,

Plaintiffs,

vs.

JOHN H. FACEY, et als.,

Intervenors,

-vs-

THE TOWNSHIP OF WARREN,

Defendant.

Consolidated with

TIMBER PROPERTIES,

Plaintiff,

-vs-

THE TOWNSHIP OF WARREN,
et als.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

Docket No. L-23277-80 P.W.
L-67820-80 P.W.

(Mt. Laurel II)

Civil Action

BRIEF IN SUPPORT OF DEFENDANT, TOWNSHIP OF WARREN'S
MOTION TO TRANSFER MATTER TO COUNCIL ON AFFORDABLE HOUSING

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On the Brief

I. PRELIMINARY STATEMENT

This motion seeks to transfer the within litigation to the Council on Affordable Housing [Council] established under the recently enacted Fair Housing Act, Chap. 223; P.L. 1985 [Act]. The Township Committee for the Township of Warren adopted a resolution on August 1, 1985, which is to constitute a "Resolution of Participation" under Article 9, Section A of the Act. The resolution further authorized the preparation and submission, to the Council of a "Housing Element" and the filing of the within motion. Inasmuch as the Court has not entered a final judgment in accordance with the terms of the Act, this case may be transferred to the Council. It is respectfully submitted that justice requires that this matter be transferred to the Council for determination and resolution.

II. STATEMENT OF FACTS

The matter before the Court has not reached the stage of a "final", appealable, judgment. The constitutionality of the Warren Township ordinance, and a determination of Warren's fair share was decided by the Honorable Eugene Serpentelli, J.S.C., on July 16, 1984. The parties have been involved in the compliance aspect of the case since the 1984 decision. The report by the master appointed by the Court has not yet been filed. There is no right for any party to appeal the 1984 determination of the Court inasmuch as the decision or judgment is not considered final.

Warren Township is located in Somerset County. Most of the municipalities which surround Warren are either involved in Mt. Laurel litigation or have entered into settlements in Mt. Laurel cases. Indeed, Warren has been named as a third party defendant in a case brought against one of Warren's immediate neighbors, Green Brook. The entire Central Jersey region is in one form or another involved in the processes by which the Mt. Laurel doctrine sought to guide growth, development, expansion and revitalization. Older suburban centers such as Plainfield are feeling economic pressures from the loss of economic base and newer suburbs are growing as both residential and commercial communities. Warren is not an isolated case. It is only one of many municipalities in the region which are facing the onslaught of Mt. Laurel cases brought by private developers.

III. THE FAIR HOUSING ACT

The Fair Housing Act is the long awaited legislative response to the Mt. Laurel decisions. Sections of the act which are relevant to the within matter are as follows:

2b. In the second Mount Laurel ruling, the Supreme Court stated that the determination of the methods for satisfying this constitutional obligation "is better left to the Legislature," that the court has always preferred legislative to judicial action in their field," and that the judicial role in upholding the Mount Laurel doctrine "could decrease as a result of legislative and executive action."

2c. The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation.

3. The Legislature declares that the statutory scheme set forth in this act is in the public interest in that it comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court. The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

12. a. A municipality may propose the transfer of up to 50% of its fair share to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter. A municipality proposing to transfer to another municipality shall provide the council with the housing element and statement required under subsection c. of section 11 of this act, and shall request the council to determine a match with a municipality filing a statement of intent pursuant to subsection e. of this section. Except as provided in subsection b. of this section, the agreement may be entered into upon obtaining substantive certification under section 14 of this act, or anytime thereafter. The regional contribution agreement entered into shall specify how the housing shall be provided by the second municipality, hereinafter the receiving municipality, and the amount of contributions to be made by the first municipality, hereinafter the sending municipality.

b. A municipality which is a defendant in an exclusionary zoning suit and which has not obtained substantive certification pursuant

to this act may request the court to be permitted to fulfill a portion of its fair share by entering into a regional contribution agreement.

15. a. The council shall engage in a mediation and review process in the following situations: (1) if an objection to the municipality's petition for substantive certification is filed with the council within the time specified in section 14 of this act; or (2) if a request for mediation and review is made pursuant to section 16 of this act.

15. b. In cases in which an objection is filed to substantive certification the council shall meet with the municipality and the objectors and attempt to mediate a resolution of the dispute. If the mediation is successful, the council shall issue a substantive certification if it finds that the criteria of section 14 of this act have been met.

15. c. If the mediation efforts are unsuccessful, the matter shall be transferred to the Office of Administrative Law as a contested case as defined in the "Administrative Procedure Act," P.L. 1968, c.410 (C.52:14B-1 et seq.).

16. For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation. If the municipality fails to file a housing element and fair share plan with the council within five months from the date of transfer, or promulgation of criteria and guidelines by the council pursuant to section 7 of this act, whichever occurs later, jurisdiction shall revert to the court.

IV. LEGAL ARGUMENT

THE WITHIN MATTER SHOULD BE TRANSFERRED TO THE COUNCIL ON AFFORDABLE HOUSING

As this Court well knows, the essential doctrine of the Mount Laurel cases is that every municipality considered to be within the path of development and growth must provide a realistic opportunity for development of its regional fair share of low and moderate income housing. The decisions seek to prevent low and moderate income families from being forced to remain in the deteriorating urban and suburban centers. From a land use and planning perspective the doctrine calls for foresight in development; for intelligent and careful planning for the future of this state. The doctrine as modified by Mount Laurel II, 92 N.J. 158 (1983) uses the State Development Guide Plan as the guide for determining the areas subject to growth and development.

Constructive and intelligent planning was one of the primary concerns discussed by the Court in Mt. Laurel II. The Court stated:

As we view it, therefore, there is no reason today not to impose the Mount Laurel obligation in accordance with sound planning concepts, no reason in our constitution to make every municipality a microcosim of the entire state in its housing pattern, and there are persuasive reasons based on sound planning not to do so.

92 N.J. at 238. The Fair Housing Act takes into account the goals of consistent and cohesive planning for the entire state, and for each region throughout. It provides that one council shall administer the program. It provides for the submission of housing plans to the council by municipalities. It allows for municipalities to transfer portions of its fair share to another municipality within its region. That the Act requires a comprehensive planning scheme is without doubt. The Act specifically states that "[t]he interest of all

citizens...would be best served by a comprehensive planning and implementation response to this constitutional obligation. §2c. In creating the Act, the legislature further noted that the legislative solution enacted was to be preferred to litigation. It stated in §3:

The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

This statement is consistent with the Court's stated preference for Legislative control of this area. 92 N.J. at 212. Indeed, the Court is specifically quoted in the Act as saying so. §2b, supra.

Holding this "preference" before us, we must then consider whether this matter should be transferred to the Council so that the development and planning of Warren can be guided by the legislative scheme. Section 16 of the Act governs the transfer. It states:

For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in manifest injustice to any party to the litigation.

It is, therefore, necessary to consider how the transfer would effect the various parties to the action. There are essentially three parties in this case whose interests and rights must be addressed. First, there are the developers. Second, there is the Township, residents and municipal authorities. Third,

there are the people of low and moderate income whose rights the Mt. Laurel doctrine was designated to vindicate and protect.¹

The only possible injustice to the developer is the expenditure of money towards litigation without a "final judgment" or a "builder's remedy". The costs of litigation, however, have also been borne by the Township. As to the developer's ultimate goal of constructing the project on the subject parcels, the transfer will not preclude them from being allowed to develop the parcel or from participating in the council's planning process. If the Township's housing element and plan does not satisfy the party plaintiffs herein, they may file their objection to prompt the council's mediation proceedings as set forth in sections 15 and 16 of the Act. In fact, this process, if it is necessary, may be to the plaintiff's benefit as it would most likely be less expensive than a lengthy trial on the compliance aspect of the case followed by possible appeals of the entire matter. Furthermore, plaintiff's preparation for the present litigation would also serve them well if the matter had to be presented to the Council or an administrative law judge. In short, any actual prejudice to the plaintiffs is minimal; especially in respect to the nature of the constitutional issues which are actually before the Court.

With respect to the municipality, it, too, has spent substantial sums to defend the case. The Township, however, maintains that it would be prejudiced

1. There can be no dispute that the Mt. Laurel doctrine was created to protect persons who were not residents and had no holdings or other financial interest in the municipality under attack. The party plaintiff in Mt. Laurel I, South Burlington N.A.A.C.P., was allowed standing to sue the municipality on behalf of "third party nonbeneficiaries" See, Williams and Doughty, Studies in Legal Realism: Mount Laurel, Gelle Terre and Berman, 29 Rut. L. Rev. 73, 75 (1975). Many subsequent suits brought against municipalities have been commenced by developers. Despite the developer's inherent profit motivation for the suit, the Court has allowed them to proceed as a surrogate for the "third parties" to create a system to allow the constitutional rights to be upheld.

if the case were not transferred to the Council. If the case remains with the Court, the Township would, in essence, be lifted out of the planning process conducted by the Council. The Township may be required to shoulder a fair share in excess of what the Council may deem appropriate after a complete view of the region and the proposals and elements submitted by the municipalities therein. The Township may be precluded from entering into a participation agreement to allow for a transfer of its fair share to municipalities interested in taking on a portion allocated to Warren. To preclude Warren from transferring this matter to the council, it is respectfully submitted, would force Warren to be treated as an island in the planning process and would hinder the goal of the legislature and the Court to create a system whereby the development of the State can be carefully and cohesively planned for the benefit of all of the people of New Jersey; not just a select few.

Due to the nature of the Mount Laurel doctrine, we must also consider the "third party nonbeneficiaries." As stated above, it is the rights of these people, the rights of the general public, which the Court was protecting in the Mount Laurel cases. The legislature, the Governor, and the Supreme Court have agreed that this matter should be handled by the legislature. The legislative scheme has been created. It provides a mechanism by which the rights of the general public can be protected and the development progress and growth of the State can be planned for the general welfare on the State level. This being the preferred method of resolution and planning, it is submitted that the public will be prejudiced if the matter is not transferred. Undoubtedly, the interest of the general public is superior to that of a few profit-minded developers. The developers were not given the right to bring these actions in order to maximize their profits. They were permitted to pursue these cases only for the

purpose of protecting the general welfare. Their right to develop their parcel after successfully defeating a municipality is, at best, only secondary in Mt. Laurel litigation; indeed, the "builders remedy" was devised subsequent to the original case. In light of the action of the legislature, the language of the Act, the approval by the Governor, and of course, the unequivocal statements by the Supreme Court preferring a legislative solution, if a developer is truly vindicating the rights of the general public, it, too, must agree that this matter should be transferred to the Council. For only by a unified, statewide planning process, administered by a single body, can the general welfare be addressed in accordance with sound, cohesive planning for growth and development of this State.

V. CONCLUSION

There being no prejudice to plaintiffs and it being in the interest of justice and the general welfare, it is respectfully submitted that the within matter should be transferred to the Council on Affordable Housing.

Respectfully submitted,

KUNZMAN, COLEY, YOSPIN & BERNSTEIN

By: 

Steven A. Kunzman