AMG

11-11-85

Letter re:
- Brief & appendix of Ps AMG & Skytop
Appellate

pgs. 29
pi # 3361

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JUDGE SERPENTELLI'S CHAMBERS

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IN REPLY REFER TO FILE NO 5323-02

November 11, 1985

John E. Coley, Jr., Esquire
15 Mountain Boulevard
Warren, New Jersey 07060

Re: AMG Realty Company, et al. vs. Township of Warren

Dear Mr. Coley:

Enclosed is a copy of our letter forwarding the brief to the Appellate Division on behalf of the Plaintiffs-Respondents in the above matter along with two copies of that brief.

Very truly yours,

McDONOUGH, MURRAY & KORN
A Professional Corporation

Joseph E. Murray

Joseph E. Murray

JEM:bp
Enclosures

cc: Honorable Eugene D. Serpentelli, J.S.C.
Mr. Richard B. Neff
Mr. Philip Caton
Eugene W. Jacobs, Esquire
J. Albert Mastro, Esquire
Raymond R. Trombadore, Esquire
Robert H. Kraus, Esquire
Mr. Richard T. Coppola

AMG REALTY COMPANY and SKYTOP LAND CORP., Plaintiffs-Respondents, vs. JOHN H. FACEY, et als., Intervenors, vs. TOWNSHIP OF WARREN, Defendant-Appellant, Consolidated with TIMBER PROPERTIES, Plaintiff-Respondent, vs. THE TOWNSHIP OF WARREN, et als., Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A- Civil Action ON NOTICE OF MOTION FOR LEAVE TO APPEAL FROM ORDER OF LAW DIVISION: SOMERSET COUNTY/ OCEAN COUNTY (Mount Laurel II) Sat Below: HON. EUGENE D. SERPENTELLI, Judge, Superior Court

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BRIEF AND APPENDIX FOR PLAINTIFFS/RESPONDENTS, AMG REALTY COMPANY AND SKYTOP LAND CORP.

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On the Brief:

Joseph E. Murray, Esquire

BRIEF

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PROCEDURAL HISTORY

The plaintiffs, AMG Realty Company and Skytop Land Corporation (hereinafter collectively referred to as AMG) agree with the Procedural History as set forth by the defendant, Township of Warren, except as follows:

(a) The "decision" of Honorable Arthur S. Meredith, J.S.C. rendered on May 27, 1982 was a Judgment which was not appealed by the Township of Warren (Pa-1.)

(b) The trial commencing in January of 1984 before Honorable Eugene D. Serpentelli took 18 days to complete and the opinion rendered by Judge Serpentelli on July 16, 1984 in that matter has been approved for publication. 116 N.J.L.J. 384 (Sept. 12, 1985).

(c) Subsequent to the entry of the interim judgment by Judge Serpentelli on August 1, 1984 [Da3] a Master was appointed and several public meetings were conducted for the purpose of effecting a further rezoning of Warren Township to comply with the principles of Mount Laurel I and II. These hearings culminated in the submission of a new proposed zoning ordinace in December of 1984 which, since that date, has been under review by the Court appointed Master and is scheduled for completion at this time.

(d) Upon completion of the Master's review of the new proposed ordinance the trial court is to schedule a plenary hearing for the purpose of determining whether the ordinance complies with the constitutional mandate of Mount Laurel and whether, and to what extent, the builder's remedy awarded to the plaintiffs shall be effectuated.

COUNTER STATEMENT OF FACTS

Plaintiffs AMG, through litigation initiated by it in December of 1980, has twice obtained a judgment declaring Warren Township's zoning ordinances exclusionary and unconstitutional. The first judgment was rendered under the principles of Mount Laurel I, South Burlington County N.A.A.C.P. vs. Mt. Laurel, 67 N.J. 151 (1975) and the second was entered under Mt. Laurel II, 92 N.J. 158 (1983) (Da3).

There is nothing in the record with respect to this limited appeal to support the factual allegation by Warren Township that it is facing an "onslaught" by private developers [Db3-22]. In each of the two judgments previously entered against the Township, it has been specifically found that Warren Township has unconstitutionally acted to prevent low and middle income people from having a realistic opportunity for the construction of low cost housing within its borders. This judgment reflects a policy of such exclusion since 1948 when Warren Township enacted its first zoning ordinance. To refer to private developers, such as the plaintiffs herein, as bringing an "onslaught" upon the Township is misplaced. In fact, this type of litigation seeks to provide lower income housing to rectify the

unconstitutional action of the defendant which has been existent for much too long.

Likewise, plaintiffs cannot agree with the defendant's factual assertion that the Fair Housing Act "provides for a means for resolution of the Mount Laurel issues and Mount Laurel disputes" [Db4-2]. There are no facts in the record to support this conclusion. And, it is arguable that the Act does not, in fact, provide a fair or reasonable means for resolution of these problems but that issue is not now before the Court. This is a matter of legal argument and not an agreed fact.

LEGAL ARGUMENT

POINT I

LEAVE TO APPEAL THE ORDER OF OCTOBER 15, 1985 SHOULD BE GRANTED

Because of the nature of this litigation and the desire of the plaintiffs to pursue the satisfaction of the Mt. Laurel mandate as it relates to Warren Township, it is essential that the interlocutory order denying the transfer of the matter to the Affordable Housing Council be reviewed by the Appellate Division.

Although it would be normal to expect opposition to a request for leave to appeal, plaintiffs recognize that the "interest of justice" standard, as set forth in R. 2:2-4, applies to all parties in this matter. The parties include the plaintiffs as well as the lower income people whose interests are truly represented in this type of litigation. Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359 (Law Div. 1984). It is in the "interest of justice" that this matter proceed promptly before the trial court through the compliance hearing, and ultimate substantive appeals therefrom, without the prospective impediment of there being a lack of subject matter jurisdiction to have conducted the compliance hearings in the first place.

Accordingly, due to the major import of the proper determination of the forum to hear this matter the plaintiffs (AMG and Skytop) concur in the defendant's request to consider the interlocutory appeal.

POINT II

THE DENIAL OF THE TRANSFER MOTION BY THE TRIAL JUDGE WAS A PROPER EXERCISE OF DISCRETION AS PERMITTED BY THE FAIR HOUSING ACT

The Fair Housing Act, N.J.S.A. 52:27D-301 et seq., is recognized as a Legislative effort to respond to the New Jersey Supreme Court's expressed desire to have the problems relating to the satisfaction of lower income housing needs rectified by the Legislature. South Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 212 (1983). The Act purports to establish a mechanism through which the goals of providing a realistic opportunity for housing needs of the poor can be met.

The Legislature, however, did not direct that the mechanism be exclusively within the province of the administrative process under the auspices of the Department of Community Affairs and the Council on Affordable Housing, as set forth in §5 of the Act (N.J.S.A. 52:27D-305). The Act, in §16 (N.J.S.A. 52:27D-316), acknowledges the existence of exclusionary zoning cases pending before the judicial branch of government prior to the effective date of the Act and, as to these cases, gives the Court the express authority to either retain jurisdiction of these cases or permit a

transfer of them to the Council. Specifically, §16 of the Act establishes a standard for judicial application with the following language:

> "for those exclusionary zoning cases instituted more than 60 days prior to 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."

A. Appellate Review of Whether the Trial Judge Abused His Discretion Is Limited to a Review of Whether He Properly Conceived the Applicable Law and Whether He Properly Applied the Law to the Factual Complex.

The statute establishes a standard of "manifest injustice" and authorizes the trial judge to apply judicial discretion and make a determination as to whether the requested transfer would result in a violation of that standard. In reviewing the exercise of discretion the Appellate Court should be concerned with two factors: (1) has the trial judge properly conceived the applicable law and (2) has the trial judge properly applied the law to the factual complex. In re Presentment of Bergen County Grand Jury, 193 N.J. Super. 2, 9 (App. Div. 1984); Kavanaugh v. Quigley, 63 N.J. Super. 153, 157 (App. Div. 1960). Only if the judge misconceives or misapplies the law does his discretion lack a

foundation and become an arbitrary act. In re Presentment of Bergen County Grand Jury, supra., at 9. Implicit in the exercise of discretion is a conscientious judgment directed by law and reason and looking to a just result. Sokol v. Leitstein 9 N.J. 93, 99 (1952); State v. Evans, 193 N.J. Super. 560, 565 (App. Div. 1984).

In the event that the trial court properly conceived and applied the applicable law to the facts before him, his exercise of discretion will not be overturned by the reviewing court unless there was an abuse of that discretionary power. Sokol, supra., at 99. A reviewing court, when considering the exercise of discretion by a trial court, cannot substitute its judgment for that of the trial judge unless it determines that either one or both of the two factors previously stated did not exist. In that event, the reviewing court must adjudicate the controversy anew. In re Presentment of Bergen County Grand Jury, supra., at 9; Vorhies v. Cannizarro,166 N.J. Super. 551, 558 (App. Div. 1961); Kavanaugh v. Quigley, supra., at 158.

B. Proper Factors Were Considered by the Trial Judge in His Denial of the Transfer Motion.

1. "Time" as a Factor

The Township of Warren initially urges that the trial judge improperly conceived the applicable law in that "the

only basis for the denial below appears to be the Judge's belief that the completion of the present judicial process will resolve the issues more quickly than would a transfer" (Db13-20 & 25) This "time" comparison reason is urged as an invalid factor because of certain deleted language in the Act as finally adopted. The deleted language represented a very narrow basis for judicial retention of a pending case. The "manifest injustice" standard as finally set forth in the Act is broader and indirectly retains the deleted language as a part of the broader standard. As part of this broader standard time was, and is, a major factor in this and other cases. The needs of the poor for adequate lower income housing are not being fairly considered if lengthy delays in satisfying that need are encouraged or permitted. The Supreme Court expressed a hope for "adequate legislative and executive help" Mt. Laurel II, supra., at 213. Such help is not "adequate" if protracted delays are built into the Act. Such delays will not exist if the pending cases are retained and processed as proposed by the trial judge.

The trial judge correctly noted that the deleted language of §16 was not dispositive of the utilization of a time factor, either to include it or to exclude it, as an element of manifest injustice. (Da63-1 to 21). Its inclusion was proper and the trial judge acted appropriately in applying this factor in this case.

2. Other Factors

The Township next argues that the trial court made no findings or statements which demonstrate or illustrate any manifest injustice to AMG other than the "time" factor. (DG16 - 3 to 5). Yet, the factors considered by the trial court were not so limited as urged by the Township. A review of the trial court's opinion in fact reveals three factors other than "time," which were considered.

The first factor considered was "cost" to the parties of a transfer:

> "If the transfer would include a transfer of the entire record of the cases with the Council being bound by such record the proceedings before the Council would eliminate dual litigation costs. However, the Act does not appear to provide for this procedure." (Da64, 20-25, Da65 1-10).

If the record from 18 days of trial cannot be utilized as the law of the case and each active litigant must begin anew with experts, studies, exhibits, etc., there is most definitely a substantial cost to these parties which will be incurred if the matter is transferred. Clearly, such cost would not be incurred if the matter was retained in the Court. The certification of Richard Reff, a principal of the Plaintiffs, confirmed that the trial expenses exceeded $230,000 (Pa3). Thus, the Trial Judge properly considered the factor of "cost" in denying the transfer motion.

The second factor considered was loss of remedies from a tranfer:

> "The transfer of a case to the Council could effectively diminish or make unavailable the remedies to enforce compliance with the Mt. Laurel mandate as to those cases which are near completion or in instances where housing is imminent." (Da69, 6-10)

Thus, the Court realistically observed that the Act would not provide a "builder's remedy" as part of the Council's authority. Nor does the Act vest the Council with jurisdiction over municipal utility companies or sewerage authorities and it is evident that the deprivation of sewerage to an area is the same as barring the residential development of that area, especially for any high density residential use. In the AMG case the Warren Township Sewerage Authority is a party defendant. Sewers are essential and an injunction has been issued by the trial court against the Sewerage Authority to prevent it from completing the expansion of a sewer plant which expansion sought to exclude the plaintiffs. Absent authority to deal with the Sewer Authority the Council would be effectively unable to accomplish its objectives. The Court's retention of the case will in fact keep this element of an effective remedy alive. Thus, the Trial Judge properly considered the factor of "loss of remedies" in denying the transfer motion.

The third factor considered by the Trial Judge was the ability to enforce compliance upon transfer:

> "Nothing in the Act requires a municipality to apply for "substantive approval" under section 13 of its provisions." (Da72 15 to 20).

Significantly, plaintiffs have obtained two judgments compelling the Township to rezone. The procedures of the Act, if literally followed by the defendant, can result in the Township not having to comply with these judgments at all. The Act mandates a municipality to adopt a "resolution of participation" (N.J.S.A. 52:27D-308) but while there are methods available to enforce the processing of a rezoning scheme, there is no final obligation under the Act to actually adopt such rezoning. Section 13 (N.J.S.A. 52:27D - 313) provides that a municipality "may" seek a certification from the Council that its proposed ordinace complies with the Act. However, it need not do so at all. Although a six month time limit in Section 13 is inserted to prevent the use of an outdated housing element, this period is not a fixed term within which the ordinance must be adopted. Accordingly, if a transfer can result in no final rezoning by the Township this is certainly a factor that the Trial Judge properly considered in denying defendant's motion.

C. The Trial Judge Properly Applied the Definition of "Manifest Justice" in Denying the Transfer Motion.

Defendant Township urges that the trial court erroneously used an "I know it when I see it" test (Pb 14, 19-20), instead of the two pronged standard set forth in Gibbons v. Gibbons, 86 N.J. 515 (1981), in its application of the definition of "manifest injustice" under the Act. Plaintiffs contend that the Trial Judge properly applied the definition of "manifest justice" in denying the transfer motion.

As to the Court's application of the "I know it when I see it" test, the Court when discussing the term "manifest injustice" stated:

> "That term, to me, tends to be fact-specific, and I therefore deem it more appropriate to define it in the context of each of the cases that appear before me today, and those which are scheduled for the next several weeks. In that process, I believe that its full meaning will evolve as those motions are heard and as the motions now pending before the other Mount Laurel judges are heard and decided. In cases at what I have referred to as the factual extremes, the term will be relatively easy to interpret. Like obscenity, to paraphrase Justice Stewart, you should be able to know it when you see it. (Da 64).

Thus, the Court's statement, taken in and not out of context, reflected its reference to "factual extremes" and that when faced with such extremes the term "manifest injustice" would be "relatively easy to interpret." (Da 64-22). After setting forth the factual patterns of the cases before it the Court found that these cases did reflect the extreme and thus it was obvious that they fell within the "manifest injustice" standard.

As to the Gibbons test, it is respectfully urged that the same has no application here. The Act contains no definition of "manifest injustice" and plaintiffs urge, as they argued in the brief below (Da 38-39), that "manifest injustice" should be given a common meaning which would be "a clear withholding of fairness."(Da 39-20)

We are not dealing with a question of whether a given statute is to be applied retroactively as in Gibbons. The Act before us was not being interpreted by the trial court as to its retroactive application but solely as to whether its transfer motion, if granted, would prospectively result in a manifest injustice to any party. It is respecfully urged that the Gibbons case has no application to the definition of "manifest injustice" as applicable to the Act and it is distinguishable on that basis alone.

D. While the Trial Judge Correctly Found That "Manifest Injustice" Would Result to AMG if the Matter Were Transferred, the Plaintiff Developers Are Not the Parties Which Must Suffer a "Manifest Injustice" for a Transfer Motion to be Denied.

Finally, defendant urges that the trial court should be reversed because it failed to make "findings or statements" indicating a manifest injustice as to the "developer plaintiffs." [Db 16] AMG contends that the Trial Judge did find that a transfer would result in a "manifest injustice" to plaintiff developers, but, more importantly, that the plaintiff developers are not the parties which must suffer a "manifest injustice" for a transfer motion to be denied.

The Trial Judge found that "manifest injustice" would be suffered by AMG in that there would be dual litigation costs to plaintiffs if the matter were transferred to the Council. See, infra., at 11. Moreover, as was argued by AMG in its brief before the trial court, with respect to the burden of proof and presumptions, AMG acquired certain vested rights under the final judgment entered by Judge Meredith in May of 1982 which rights would be lost if the within matter were transferred. These include the loss of its builder's remedy relief, (Da 43); its inability to

participate in the Council process (Da 47) and its loss of the shifting of the burden of proof and presumptions which resulted from the 1982 judgment (Da 48-54). It is this type of prospective injury to AMG which constitutes the manifest injustice if the matter were transferred.

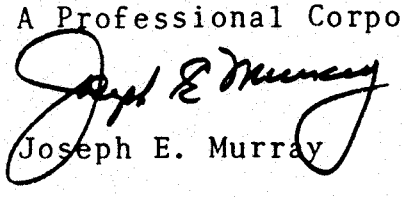
More significantly, the Act refers to "any party to the litigation" and the Trial Judge correctly included the lower income poor as direct parties, citing Morris County Housing Council v. Boonton Township, supra. The Trial Judge correctly found that a transfer would result in a manifest injustice to the lower-income families because "every day in which this Court delays resolution of these cases,...they remain in substandard housing." (Da 69-3 to 5). "Expediting lower income housing is at least one very important element involved in the definition of "manifest injustice." (Da 69-25 to 70-2). As the Trial Judge held, "What's left to be done in Warren Township" could be accomplished in approximately four months if the within matter is retained with the trial court (Da 76-24 to 77-5); the time span for completion of review of defendant's new ordinance under the Act, in the "best case" scenario, would be 23 months. (Da 70-24 to 75-14).

CONCLUSION

Because of the needs for Mt. Laurel litigation to efficiently proceed to a conclusion without further unneeded delay it is urged that the Appellate Court hear and decide the interlocutory appeal of Warren Township. As to the merits of such appeal for the reasons set forth herein it is submitted that the trial court lawfully exercised its discretion in denying the transfer motion and its ruling theron should be affirmed.

Respectfully submitted,

McDONOUGH, MURRAY & KORN
A Professional Corporation



Joseph E. Murray

Dated: November 11, 1985

JUDGMENT OF HON. ARTHUR S. MEREDITH S-7598

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FILED

MAY 27 1982

SOMERSET COUNTY

ORIGINAL TO SUPERIOR COURT 5-27-82

Entered

Indexed

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Attorneys for Plaintiffs

AMG REALTY COMPANY, A Partnership organized under the laws of the State of New Jersey, and SKYTOP LAND CORP., a New Jersey Corporation,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
	:	SOMERSET COUNTY
	:	DOCKET NO. L-23277-80
Plaintiffs,	:	
vs.	:	Civil Action
THE TOWNSHIP OF WARREN, a Municipal Corporation of the State of New Jersey,	:	JUDGMENT
Defendant	:	

This action coming on to be heard before this Court in the presence of Joseph E. Murray, Esquire, (McDonough, Murray & Korn, P.A.), attorneys for the Plaintiffs and John E. Coley, Esquire, (Kunzman, Coley, Yospin & Bernstein, P.A.), attorneys for the Defendant, and the Court being of the opinion, as expressed in an oral opinion stated on May 18, 1982, that the Plaintiffs are entitled to the relief demanded in the complaint;

IT IS on this 27th day of May, 1982, adjudged as follows:

(a) The current zoning ordinance of the Township

Pal

of Warren (Ordinance 79-3) is illegal and invalid as being exclusionary in violation of the principles set forth in N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975);

(b) The defendant, Township of Warren, shall, within nine months from May 18, 1982, undertake a rezoning to comply with the principles and obligations of Mt. Laurel (N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975) and, within such time, present such rezoning to this Court for review and approval;

(c) Specific zoning relief as to the lands of the respective Plaintiffs as described in the complaint filed in this matter is not granted nor denied at this time;

(d) This Court retains jurisdiction of the subject matter of this case.

ARTHUR S. MEREDITH, J.S.C.

CERTIFICATION OF RICHARD NEFF
IN OPPOSITION TO TRANSFER MOTION

FILED:
September 11, 1985

McDONOUGH, MURRAY & KORN
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Attorney for Plaintiffs AMG Realty Company and Skytop Land Corp.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-23277-80 P.W.
L-67820-80 P.W.

AMG REALTY COMPANY and SKYTOP LAND CORP., Plaintiff	:	Civil Action
JOAN H. FACEY, et als., Intervenors,	:	CERTIFICATION OF RICHARD B. NEFF
vs.	:	
THE TOWNSHIP OF WARREN, Defendant,	:	
CONSOLIDATED WITH	:	
TIMBER PROPERTIES, Plaintiff,	:	
vs.	:	
THE TOWNSHIP OF WARREN, et als., Defendant.	:	

Richard B. Neff, of full age, hereby certifies as follows:

1. I am a principal of AMG Realty Company and of Skytop Land Corp., each of whom are plaintiffs in the above-designated matter. This certification is being submitted in opposition to the application of the Township of Warren to transfer the above case to the Housing Council, which motion is now pending before the Superior Court of New Jersey.

2. I have been personally involved on behalf of AMG Realty Company and Skytop Land Corp. in all matters of the litigation against the Township of Warren as well as matters involving the proposed development of the AMG and Skytop parcels prior to the institution of suit against the Township in December of 1980. These companys have expended in excess of $236,000 in legal and experts' fees in regard to this matter as of August 1, 1985. The following is a schedule of the expenses incurred by AMG and Skytop with respect to this matter:

Engineering Expenses	$ 9,814.00
Real Estate Consulting and Experts Fees	28,588.00
Legal Fees	101,154.00
Planning Experts' Fees	55,623.00
Accountants' Fees	5,943.00
Architects' Fees	35,485.00
Public Relations Promotion Materials	5,956.00
Total	$242,563.00

3. These expenses have been incurred over a five-year period, during which time AMG and Skytop have voluntarily removed their lands from the development for single-family housing under the one and one-half acre zone limitations presently in force under the zoning ordinance of Warren Township. These companys have surrendered the marketing of these lands in a municipality which has historically

developed single-family residential homes at very high prices. During the course of this litigation housing sales in Warren Township have involved individual transactions of homes selling for more than $400,000 and $500,000. AMG Realty Company and Skytop Land Corp. have maintained the payment of real estate taxes on these properties and have surrendered the farm exemption due to the proposed development of the sites for lower-income housing.

4. In the event that this matter is transferred to the Housing Council there will be substantial additional delays in accomplishing the hoped for objective of lower-income housing construction on these sites. Due to the history of the Township's treatment of these sites it is most likely that the Township would not apply its rezoning planning to these sites for other than single-family one and one-half acre lot development. Even if it were to ultimately favorably rezone these sites under the mediation process, there may well be a loss of a housing market or other unforeseeable events that could impair the housing market and the ability of these companys to produce the housing that it has represented its willingness and ability to do since 1980.

5. I personally feel that I have, through these respective companys, funded meaningful litigation which has helped numerous municipalities and builders to accomplish the objectives of lower-income housing without the necessity of incurring the substantial expenses that I have incurred in this matter. I feel it would be totally unfair to have these expenditures, plus my personal efforts, rendered useless with respect to the AMG and Skytop lands which would probably be the case if this matter were transferred to the Housing Council.

6. I hereby certify that the foregoing statements are true. I am aware that if the foregoing statements are wilfully false, I am subject to punishment.

RICHARD B. NEFF

Dated: AUGUST 29, 1985