

CH - Affordable Living Corp v.
Township of Denville

Aug. 27, 1985

- Letter brief submitted by Shongum Union ~~to~~ Hill Civic Association
in response to Plaintiff's brief in opposition to Defendant's
motion to transfer to COAH

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*NJ AND NY BARS
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August 27, 1985

Hon. Stephen Skillman
New Jersey Superior Court
Court House
New Brunswick, NJ 08903

RE: Affordable Living Corp. v. Township of Denville
Do. No. L-042898-84 P.W.

Dear Judge Skillman:

This is submitted on behalf of Shongum Union Hill Civic Association (SHUCA) in response to Plaintiff's, Affordable Living Corporation, Inc. (ALC), brief in opposition to Defendant's, Mayor and Council of the Township of Denville (Denville), motion to transfer this matter to the Council On Affordable Housing.

Under section 16 of the Fair Housing Act, N.J.S.A. 52:27D-301 et al., "[i]n 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." N.J.S.A. 52:27D-316.

To satisfy the "manifest injustice" standard, ALC must establish that it has been denied the equivalent of due process of law. See, e.g., State v. Oats, 32 N.J.Super. 435 (App. Div. 1954); Howe v. Strelecki, 98 N.J.Super. 513, 521 (App. Div.

1967). Similarly, whether retroactive application of a statute will result in "manifest injustice" has been framed in the following manner:

* * * whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively. [Gibbons v. Gibbons, 86 N.J. 515, 523-524 (1981)].

In the instant matter, it is clear that ALC has not made the requisite showings. The underlying litigation was commenced by the Department of Public Advocate on behalf of the Morris County Fair Housing Council, et al., on October 13, 1978. As a result of the Public Advocate's, not ALC's, efforts, the zoning ordinances of the Township of Denville (Township) were found not to be in compliance with the Mt. Laurel doctrine.

ALC was not incorporated until March 8, 1983, a little more than one month after the Supreme Court's ruling in Mt. Laurel II (So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983)). A copy of the Certificate of Incorporation is attached as Exhibit "A". Thereafter, the corporation entered into a contract to purchase 42.06 acres of vacant land, zoned one acre residential (40,250 square foot lots), situated in the Township. On June 29, 1984, at a time when the Public Advocate's action was drawing to a conclusion, ALC filed an action against the Township to have the site rezoned for high density housing.

Thus, at the time that ALC entered into a contingent agreement to purchase the subject property, it was aware that the

Court strongly favored a legislative response to the need for lower income housing. ALC assumed the risk that the Legislature would not resolve this matter before its project was approved under the now superceded procedure. The fact that ALC miscalculated the timing of the legislative response, and is at jeopardy of losing the opportunity for a possible windfall profit, falls far short of a manifest justice. Rather, any purported hardship that may result to ALC from the transfer of the instant matter to the legislatively established Council will be incurred by a corporation that had full knowledge of the process and the likelihood of a change in the applicable law.

Additionally, under the "time of decision rule", in instances in which legislation affecting a cause is amended while the matter is on appeal, the statute in effect at the time of the appellate court's decision should generally be applied by the court. State, Dept. of Environ. Protect. v. Ventron Corp., 94 N.J. 473, 498 (1983). The rationale for this principle is to effectuate the current policy declared by the Legislature; such policy is presumed to be in the public interest. Kruvant v. Mayor & Council Tp. of Cedar Grove, 82 N.J. 435, 440 (1980); Orleans Builders & Developers v. Byrne, 186 N.J. Super. 432, 445 (App. Div. 1982), certif. den. 91 N.J. 528 (1982). The court, by applying the presently effective version of the statute does not undercut the intent of the Legislature. Id. See, e.g., Orleans Builders & Developers v. Byrne, supra (application of time of decision rule in pinelands area); Redeb Amusement, Inc. v. Tp. of Hillside, 191 N.J. Super. 84, 102 (Law Div. 1983) (under time of

decision rule, moratorium ordinance controlled all licensing applications for mechanical amusement devices; testimony did not establish that time of decision rule violated the plaintiff's due process rights). In the instant matter, the Fair Housing Act is the law in effect at the time of the trial court's decision. ALC's contention that the provisions of that statute be selectively applied to fit its economic aspirations, is contrary to the well established time of decision rule. Nor has ALC established a vested right, or substantial change in position sufficient to constitute a violation of ALC's due process rights. Redeb Amusement, Inc. v. Tp. of Hillside, supra.

Another issue that should be addressed is ALC's entitlement to any relief whatsoever under the Mt. Laurel doctrine. While the decision affords relief to "builders" in certain situations, the Court was cautious to indicate its concern with the possibility of promoting speculation. For example, the Court indicated that its decision was not intended to leave open space prey to land speculators. 92 N.J. at 211, 219. It should be emphasized that the decision was intended to create housing opportunities for lower income families, not chances for knowledgeable middlemen to acquire options on open land and realize excessive profits by selling to builders for high density development. In the instant case, it cannot be disputed that the value of vacant land zoned one acre residential is substantially less than similar land zoned, as proposed, for 9 units to the acre.

In connection with the purchase of property, the term

"speculation" has been defined "* * *" to mean the act or practice of buying land, goods, shares, etc., in expectation of selling at higher prices." 81A C.J.S. Speculation, at 219. The observation in the Master's Report that ALC "* * *" has sold affordable housing sites in Freehold and West Windsor to builders", is consistent with the characterization of the corporation as involved in speculation, rather than actual construction. David N. Kinsey, "Master's Report: The Compliance of Denville Township, Morris County, New Jersey With Mount Laurel II," at 49.

Similarly, the recent submissions by ALC fail to justify entitlement to a drastic rezoning of the subject property. While those submissions indicate that ALC's principals and their allied businesses have expended some effort to obtain the requested rezoning, there is no sufficiently detailed presentation of expenses or anticipated profits. Thus, one of the essential ingredients to demonstrate a manifest injustice has not been demonstrated. No relief can properly be granted to ALC without a searching inquiry of the corporation's status as a "builder", rather than a speculator, and a detailed analysis of its expenses and projected revenues.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Township's motion to transfer this action to the Council on Affordable Housing should be granted.

Respectfully submitted,



LEWIS GOLDSHORE

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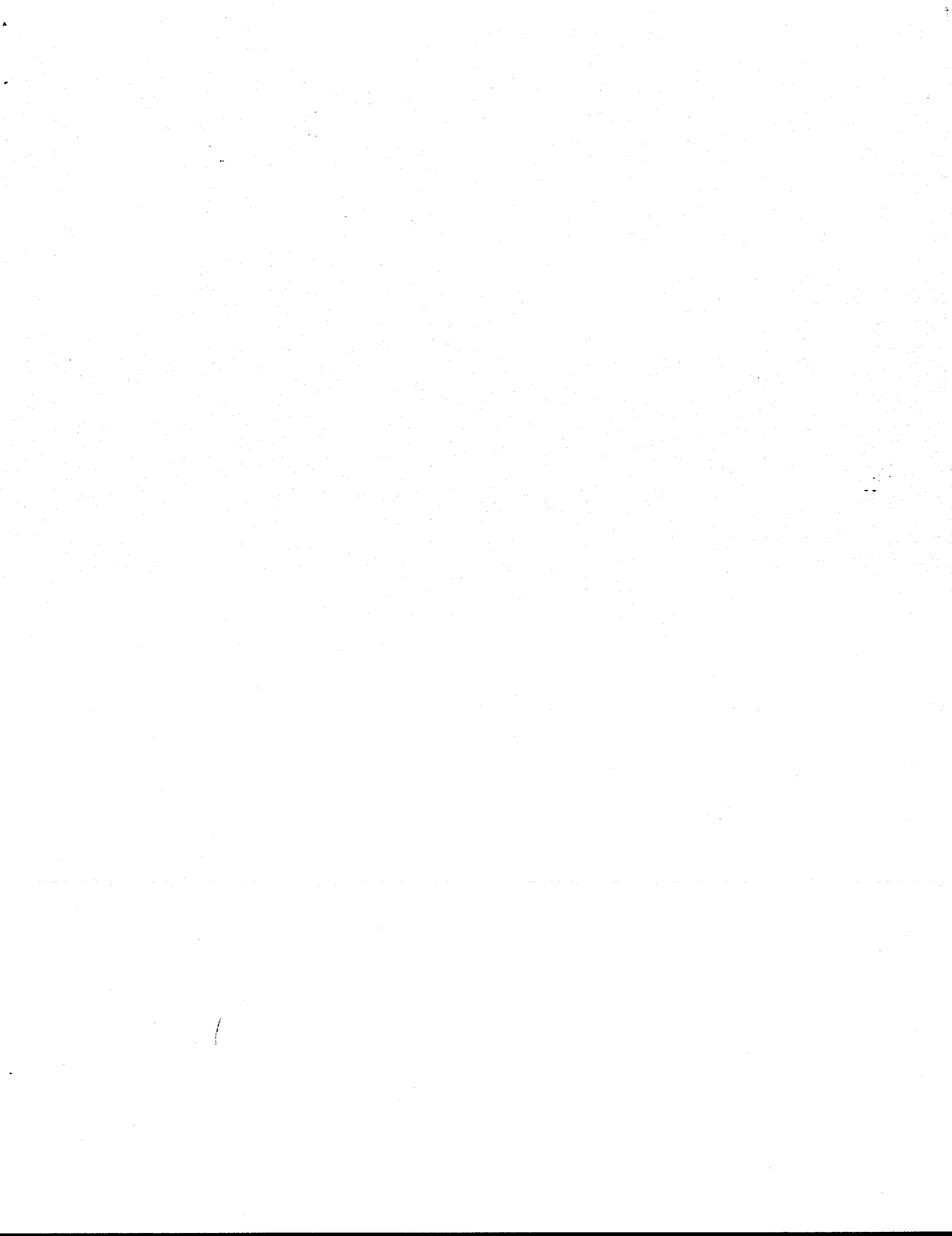
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CERTIFICATE OF INCORPORATION

OF

AFFORDABLE LIVING CORPORATION

THIS IS TO CERTIFY that there is hereby organized a corporation under and by virtue of N.J.S.A. 14A:1-1 et seq., entitled "The New Jersey Business Corporation Act", and the several supplements thereto and acts amendatory thereof.

FIRST: The name of the corporation is Affordable Living Corporation.

SECOND: The location of the corporation's registered office is 510 Park Boulevard, Cherry Hill, New Jersey 08034 and the name of the corporation's registered agent at that address is Carl S. Bisgaier.

THIRD: The purpose of the corporation is to engage in any activity within the purposes for which corporations may be organized under "The New Jersey Business Corporation Act".

FOURTH: The total authorized capital stock of the corporation shall consist of One Thousand, Two Hundred Fifty (1,250) shares of Preferred Stock with a par value of Five Thousand Dollars (\$5,000) per share and One Thousand, Two Hundred Fifty (1,250) shares of Common Stock, without nominal or par value.

All or any part of the shares of Common Stock, without nominal or par value, may be issued by the corporation from



time to time and for such consideration as may be determined upon and fixed by the Board of Directors, as provided by law.

The holders of the Preferred Stock shall have no voting power, and shall be entitled to receive and the corporation shall be bound to pay thereon, from profits or surplus, a fixed yearly dividend of three percent (3%) per annum, and no more, payable annually. Such dividends shall not be cumulative. In the event of the liquidation, dissolution, or winding up, whether voluntary or involuntary, of this corporation, the holders of the Preferred Stock shall be entitled to be paid the par value of their shares, with all dividends which have been declared, but not paid, as of the date of the adoption of a plan of liquidation by the Board of Directors. After the payment to the holders of the Preferred Stock of its par value and declared, but unpaid, dividends, the remaining assets and funds of the corporation shall be divided among, and paid to, the holders of the Common Stock, according to their respective shares.

FIFTH: At each election of Directors, every shareholder who is entitled to vote at such election shall have the right to accumulate his votes by giving one candidate as many votes as (i) the number of directors to be elected and in whose election he has the right to vote, multiplied by (ii) the aggregate number of his votes shall equal, or by distributing such votes on the same principle among any number of such candidates.

SIXTH: The initial Board of Directors of the corporation shall consist of three directors whose names and addresses are:

Peter L. Abeles
372 Central Park West
New York, New York 10025

Carl S. Bisgaier
124 Lafayette Avenue
Haddonfield, New Jersey 08033

Kenneth S. Schuman
147 West 79th Street
New York, New York

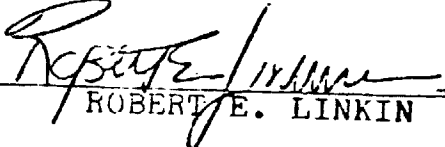
SEVENTH: The name and address of the Incorporator of the corporation is Robert E. Linkin, Engelhard Building, P.O. Box 5600, Woodbridge, New Jersey 07095.

EIGHTH: The period of existence of the corporation is perpetual.

NINTH: In furtherance and not in hinderance of the powers conferred by statute, the Board of Directors is authorized to make, alter and amend the By-Laws of the corporation.

TENTH: The effective date of the corporation shall be the date when this Certificate is filed with the Secretary of State of New Jersey.

IN WITNESS WHEREOF, the undersigned, being over the age of twenty-one years, has hereunto set his hand on this 8 day of March, 1983.


ROBERT E. LINKIN

STATE OF NEW JERSEY)
: ss.:
COUNTY OF MIDDLESEX)

BE IT REMEMBERED on this 24th day of March, 1983,
before me, the subscriber, a Notary Public of the State of New
Jersey, personally appeared ROBERT E. LINKIN, who I am
satisfied is the person named in the within instrument, and
thereupon he acknowledged that he signed and delivered same as
his act and deed for the uses and purposes therein expressed.

Michael Ann Accella
Notary Public

MICHAELEANN ACCELLA
A Notary Public of New Jersey
My Commission Expires April 20, 1987

FILED

MAR 8 1983

JANE BURGIO
Secretary of State

RECEIVED
MAR 10 1983
SECRETARY OF STATE

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RECEIVED
SECRETARY OF STATE

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