Moorestown Twp.
(Moorestown)

Plaintiff Affordable Living Corp., Inc.'s Brief in Opposition to Motion to Transfer

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AFFORDABLE LIVING CORPORATION, INC., A New Jersey corporation, Plaintiff, vs. MOORESTOWN TOWNSHIP, etc., Defendant. -and- PLANNING BOARD OF TOWNSHIP OF MOORESTOWN, Intervenor.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON/ATLANTIC COUNTY DOCKET NO. L-103235-8 PW Civil Action (Mount Laurel)

PLAINTIFF AFFORDABLE LIVING CORPORATION, INC.'S BRIEF IN OPPOSITION TO MOTION TO TRANSFER

On the Brief:

Carl S. Bisgaier, Esquire

INTRODUCTORY STATEMENT

This motion for transfer presents issues which are entirely unique and, as such, have not been previously ruled upon. There are equitable considerations here which mandate denial of the motion wholly apart from the arguments presented to and accepted by other courts which, in and of themselves, would mandate denial of this motion.

Here, the defendant has engaged in numerous actions and/or has remained silent on numerous occasions since the effective date of the Fair Housing Act which actionsand silence trigger traditional doctrines of waiver, equitable estoppel, latches and limitations. Essentially, the defendants have consistently invoked this court's jurisdiction since the effective date of the Act and, as late as November 15, 1985, four and one-half months since that date. Having invoked that jurisdiction, defendantscannot now be heard to relinquish it. This will be briefed extensively below.

The motion may also be denied substantially for reasons set forth in the attached opinions of the Hon. Stephen S. Skillman, J.S.C. in Morris County Fair Housing Council v. Boonton Township, (Docket No. L-6001-78 P.W.) and Hon. Eugene D. Serpentelli, A.J.S.C., in Real Estate Equities, Inc. v. Mayor and Council of the Township of Holmdel, (Docket No. L-015209-94 P.W.).

With regard to those reasons, plaintiff will rely upon the attached brief submitted on behalf of the Cranbury Land Company in the Urban League of Greater New Brunswick v. Carteret case. Further briefing as to this matter will be set forth below.

PROPOSAL FOR CONDITIONAL TRANSFER

While transfer, per se, is unthinkable, transfer with conditions might be statutorily and constitutionally tolerable. The constitutional mandate called for the expeditious creation of a realistic housing opportunity. The statutory standard is that no transfer may occur if it could result in a manifest injustice to a party. The affected parties are the poor and the plaintiff developer.

The interest of the poor is in having housing provided, at least incrementally, within the six-year period of repose. The poor are also vitally concerned with the integrity of the judicial process as regards the developer since, absent the developer - plaintiff class, no incentive exists for municipalities to comply, whether voluntarily or through the administrative process.

The developer's interest is in obtaining site specific relief within a reasonable time. The timeliness of that relief has already been substantially tested in this litigation.

The defendant avers its desire and intent to comply. However, it now seeks the opportunity to do so through the administrative process. Yet, as late as November 18, 1985, its expert acknowledged a fair share obligation of 1,287 units. See Hintz report. Dr. Moskowitz found an obligation of 1,436 units in

his October 24, 1985, report. Both reduced their respective figures substantially by credits and other devices.

Plaintiff would consider agreeing to a transfer on the following conditions:

1. the case is transferred and further proceedings on fair share and compliance except as noted below are stayed for a period of two (2) years, or such shorter time as noted below;

2. the defendant must expeditiously seek substantive certification and administrative approval of the fair share number and notify the court immediately upon obtaining such certification or approval, or upon a final municipal determination not to accept the Council's conditions for certification or fair share numbers;

3. if the court approves the substantive certification or fair share number, the case will be over in its entirety or at least as to the issue of fair share. If no substantive certification or fair share number is achieved, the court will proceed to a final ruling on fair share and/or compliance;

4. pending the duration of the two (2) year period of transfer, the defendant shall immediately implement under judicial supervision and approval, one-third of the fair share number established by the court's expert. The court will also rule on site suitability and final entitlement to the builder's remedy. The defendant will also immediately begin to work toward upgrading sewer capacity, extending sewerage infrastructure and modifying relevant 201 Plans to accomodate this development.

The effects of the proposal are:

1. The defendant may achieve administrative review;

2. the other parties achieve immediate, albeit incremental, relief;

3. the defendant cannot "lose"; that is, it will only be implementing one-third of a fair share number. Its ultimate fair share responsibility (as calculated by its own expert) established through the administrative process will be much higher and will be implemented later.

Again, this proposal is offered in the most conciliatory context. In fact, transfer is totally inappropriate. However, if the defendant is willing to commence, incrementally, the compliance process now, the court might give its desire for transfer greater deference. The power of the court to grant this relief could be justified as a means of avoiding a manifest injustice and in aid of its equitable jurisdiction. As stated by the Supreme Court in State v. U.S. Steel, 22 N.J. 341, 357 (1956), quoting Patrick v. Groves, 115 N.J. Eq. 208 (E. & A. 1934):

> The power of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The procedural history and statement of facts is contained in the attached affidavit of Carl S. Bisgaier, Esquire, dated December 2, 1985. Reliance is placed on that affidavit and the record of this case. The affidavit is lengthy and won't be repeated herein although it is incorporated by reference. The salient facts, relevant to specific aspects of the legal argument in the brief, will be highlighted therein.

ARGUMENT

POINT I

THE DEFENDANT'S ACTIONS MITIGATE AGAINST TRANSFER

The defendant has, through its overt acts and silence, consistently invoked and acceded to this court's jurisdiction since July 2, 1985, the effective date of the Fair Housing Act. Its motion to transfer was not served until November 22, 1985. Counsel and the court were not informed it would be filed until November 19, 1985; nor given notice that it was even being considered until Novemver 15, 1985. All this in anticipation of a final trial date on fair share and compliance set for December 2, 1985.

The present motion is consistent with repeated attempts by the defendant to avoid a final judgment day before this court. It came only after the defendant sensed a dramatic weakening of its position on compliance: the report of the court's expert on October 24, 1985, and this court's rulings on November 1, 1985, and Novemver 15, 1985. The former set the fair share number in excess of the defendant's compliance plan and required incorporation of plaintiff's Salem Road site for compliance. The latter substantially undermined the defendant's legal theories as to eminent domain and blight. As soon as the judicial process

appeared to be turning "against" the defendant, it determined to jump ship. Previously, it had vigorously pursued that very process. This will be detailed below.

Section 16(a) of the Act calls for a transfer on motion by any party in the absence of manifest injustice to any party. No time period or conditions for making the motion are set forth. Prior versions of the Act did not call for transfer by motion. The previously relevant Section 14 called for the exercise of the court's discretion whether to require exhaustion of mediation and review. The language requiring a motion was incorporated into the Act on January 28, 1984, and remained essentially unchanged until adoption.

While the statute imposes no explicit limitation on when such a motion must be made, the context and legislative history presumes an election within a reasonable time and certainly precludes further encumbrancing of the judicial process. The legal context of this issue is generally similar to issues relating to the timeliness of objections to jurisdiction over the person, adequacy of process, and adequacy of service, or the timeliness of motions to change venue or transfer cases among the various parts of the Superior Court. Generally, the rules mandate prompt action on the part of a complaining litigant.

R.4:6-3 requires that objections to jurisdiction over the person, adequacy of process and service of process, be made by motion within ninety (90) days of the service of the Answer. The failure to do so waives those objections. Raskulinecz v. Raskulinecz, 141 N.J. Super. 148, 154 (Law Div. 1976); Leon v. Febbraro, 165 N.J. Super. 205, 207 (Law Div. 1978). See also R.4:4-6 to the effect that a general appearance or acknowledgment of service has the same force and effect as proper service.

R.4:3-3(b) requires motions for a change of venue to be made ten (10) days of the time for service of the last responsive pleading. Failure to move in a timely fashion results in a waiver of objections to venue. R.4:3-1(b) is similar as to transfers among the parts of the Superior Court: motion within ten (10) days or waiver of objections.

The reasons for these court rules and the general policy of resolving such issues early and quickly is to assure all parties and the court that they can move on to the resolution of substantive issues and trial preparation without fear of a loss of jurisdiction, transfer or venue changes. Thus, even the defense that the statute of limitation has run must be pleaded and is not self-executing. Zaccardi v. Becker, 88 N.J. 246 (1981).

The issue here is not only timeliness. It goes well beyond that. The above is only offered to provide some procedural context for what the defendant has done. Its actions since

July 2, 1985, plainly undermine the integrity of this motion.

Subsequent to July 2, 1985:

1. the defendants stood silent knowing that plaintiff was preparing to submit expert reports to the court's expert (Dr. Moskowitz) pursuant to the court's instructions that the expert's report on site suitability would be done by the end of July, 1985. Plaintiff submitted seven (7) reports;

2. the defendants stood silent in anticipation of Dr. Moskowitz's report on site suitability. The report was filed on July 29, 1985;

3. the parties received and evaluated a report on July 10, 1985, by Comar's expert Miller on the reasonableness of the blight declaration on several parcels in defendants' compliance plan;

4. subsequent to receipt of Dr. Moskowitz's report (which approved of the defendants' sites and suggested the possible need for an approval of plaintiff's Salem Road site in light of the novel aspect of defendants' program) and Mr. Miller's report on blight and public threats as to the blight declaration, the defendants did not seek a transfer. The Planning Board, on August 1, 1985, actually invoked this court's jurisdiction to approve the blight powers of the Planning Board in this context;

5. on August 7, 1985, the defendant Township filed its Answer to the Happ Complaint. R.4:6-2 requires the assertion of all legal defenses. The defendant did not invoke the defense of exhaustion; nor did it raise the Act as a bar. Quite to the contrary, it was proactive, invoking this court's jurisdiction by way of counterclaim, seeking a validation of the compliance program and power of eminent domain;

6. on August 16, 1985, the defendant Township filed its Answer to the Comar Complaint. Again, R.4:6-2 requires the assertion of all legal defenses. Again, the defendant not only failed to raise exhaustion and the Act as defenses, but was proactive, again invoking the court's jurisdiction by way of counterclaim, seeking a validation of its compliance program and power of eminent domain;

7. shortly thereafter, in September, 1985, the defendant submitted an expert report on compliance in response to reports filed by the plaintiffs in mid June of 1985. The report also responded to the Miller report on blight. This was submitted to Dr. Moskowitz in anticipation of his report on compliance in an attempt to persuade him as to his conclusions in that report;

8. the defendants stood silent when the compliance hearing, originally scheduled for February 1, 1985, then rescheduled for February 7, 1985, then to May 24, 1985, was scheduled to begin on October 2, 1985. In fact, on September 16, 1985, in response to possible delays due to plaintiff's request for a hearing on site suitability to run simultaneously with the compliance hearing, defendant did not seek transfer but again invoked this court's jurisdiction. Counsel for the defendant Township stated its desire for judicial review of the compliance program and certain municipal powers. He opposed delay due to the resolution of other time-consuming issues. On the other hand, he did not oppose a site suitability determination if it did not delay the compliance process and certainly was not opposing the compliance hearing;

9. then, on September 19, 1985, the defendant Township was proactive, invoking this court's jurisdiction, to rule on the powers of eminent domain pursuant to its compliance program;

10. when it appeared that other legal issues were involved in the compliance program and a resolution by motion was suggested prior to the compliance hearing, the defendant again stood silent as to transfer;

11. the defendants stood silent and did not oppose scheduling the site suitability hearing on plaintiff's sites for December 2, 1985, when the compliance hearing for that date was put off because of the lateness of Dr. Moskowitz's report. It only sought more time to file additional expert reports. These were submitted in mid to late October, 1985;

12. on October 8, 1985, LinPro's motion on fees was filed, as anticipated by all parties and the court;

13. the defendant again stood silent when the court corresponded with all parties on October 18, 1985, to the effect that the ruling on outstanding motions would be done within thirty (30) days, Dr. Moskowitz's report would be in by end of October and the compliance hearing set for November 13, 1985;

14. the defendant stood silent while Dr. Moskowitz prepared his report and when it was submitted on October 24, 1985. The report indicated a fair share greater than that provided for in defendant's compliance plan and called for development of plaintiff's Salem Road site as proposed;

15. the defendant stood silent while the court ruled on November 1, 1985, on its eminent domain motion and sought additional briefing and argument on the blight issue;

16. on November 7, 1985, the defendant again was proactive, invoking the court's jurisdiction to deny LinPro the builder's remedy and on November 14, 1985, it submitted an additional expert report on fair share and compliance;

17. on November 15, 1985, the court considered LinPro's fee motion and the defendant's blight motion. It gave substantial feedback on the blight issue, which was taken as very negative by the defendant, withheld judgment of the fee motion, and denied defendant's application to bifurcate the fair share and compliance phases of the compliance trial now set for December 2, 1985.

Finally, prior to the hearing on November 15, 1985, the defendant first indicated it might seek to transfer and that a decision would be made on November 18, 1985. The decision to transfer was telephonically communicated on November 19, 1985, and a motion was filed on November 22, 1985. On November 21, 1985, the court adjourned the December 2, 1985, trial date pending a resolution of the motion. Even after its feelings about transfer were first revealed, the defendant on November 18, 1985, filed an additional expert report on fair share and on March 19, 1985, filed its trial brief.

After July 2, 1985, the defendants, in fact, were not silent as to transfer. They stated, through counsel, that they were not going to seek transfer. On November 1, 1985, when the defendant Township adopted a Resolution of Participation per Section 9 of the Act, it averred that it was doing so simply to avoid future litigation and further claims as to additional builders' remedies.

Its decision to transfer came only after it appeared that it was losing ground before this court. Dr. Moskowitz's report of October 24, 1985, and the court's ruling on November 1 and November 15, 1985, were decisive. Basically, defendant's position was to accept and to invoke the court's jurisdiction as along as it appeared to the defendant that the court was in agreement with the defendant. As soon as things seemed to the defendant to be going against it, defendant elected to transfer.

The transfer decision is consistent with the defendant's past practices which, in retrospect, reveal the Township to have consistently acted to delay and avoid any negative judicial determination. At times, it appears that the defendant was clearly acting in bad faith. Consider the following:

1. on December 21, 1983, plaintiff sought some feeback from the defendant on its Lenola Road site prior to instituting litigation. Defendant delayed responding for two (2) months until, on February 14, 1985, it refused feedback and suggested that plaintiff seek a variance. Yet, within one month

of this court's October 12, 1984, decision to hold an informal site suitability review of plaintiff's site, on November 5, 1984, defendant produced a blistering expert report attacking plaintiff's site and two industrial developers to criticize it to the court without any prior notice to plaintiff;

2. the defendant has consistently played off the two plaintiffs (LinPro Philadelphia, Incorporated, and Affordable Living Corporation) against each other. First it told ALC to get a variance. Then the Zoning Board of Adjustment, with Planning Board approval, conditionally granted LinPro a variance on its SRI zoned lands. Then the Planning Board produced a Housing Element which proposed residential uses on SRI lands surrounding the LinPro site. Then, in answers to interrogatories and in its expert report, the defendant cited the variance approval as a basis for its good faith and a credit against its fair share. Then, at the November 4, 1984, site suitability conference, the defendant approved the loss of SRI lands around LinPro as acceptable from a planning perspective but criticized plaintiff's Lenola Road site as an island in the SRI zone on needed SRI lands. The variance was relied upon by the Planning Board in its September 10, 1984, Answer to the ALC Complaint, and by the defendant on September 28, 1984, reply to plaintiff's summary judgment motion, and in its simultaneous attack on plaintiff for failing to exhaust administrative remedies. Then, once it appeared that the Housing Element was dead due to public opposition and that a trial with ALC was imminent, the defendant overturned LinPro's variance and attempted to foreclose LinPro from a builder's remedy in a settlement with ALC. Now it has a pending motion to deny LinPro a builder's remedy citing the fact that ALC has vindicated the constitutional mandate;

3. the defendant's position on compliance has been painfully absurd, bordering on outright contempt of the court. On May 1, 1984, it filed its Answer. It averred that (a) the defendant was in compliance; (b) that it was diligent moving to compliance; and (c) it had passed Ordinance 1213 (a mandatory set-aside Ordinance) on first reading and was considering a landbank program. Ordinance 1213 was a simple rehashing of Mt. Laurel's "compliance" ordinance which was ultimately repealed by that township. In fact, the defendant never adopted Ordinance 1213 and tabled it for good on December 10, 1984, the day it also overturned the LinPro variance approval. Plaintiff moved for summary judgment on compliance on August 23, 1984. Defendant avoided a judicial ruling on this motion. First, it opened a full-scale attack on plaintiff's standing, exhaustion and primary

jurisdiction in hopes of dismissing plaintiff's complaint prior to a ruling. On the eve of the deadline for submission of its reply to plaintiff's motion, it produced a new Housing Plan Element, a Planning Board resolution to go to public hearing, a Township resolution to move to compliance, and an expert report on compliance considering the New Housing Plan Element as if it had been adopted. The Planning Board attorney corresponded to the court referring to the Housing Plan Element as if it had been adopted and to the fair share number as if it had been accepted. To avoid a hearing on the summary judgment motion scheduled on October 11, 1984, the defendants averred that it needed a delay of the return date because a negative ruling would damage any chances of voluntary approval of the New Housing Plan Element. The court deferred to those representations and on October 12, 1984, ruled against the defendant on its motions attacking the plaintiff but put off a ruling on summary judgment to the end of November. The reasons given were the defendant's continued avowal of compliance and commitment to move to compliance. We all essentially tolerated the obvious inconsistency in the defendant's positions. By the end of November, 1984, the Housing Plan Element solution had collapsed and the defendant faced a trial on February 1, 1985, and a possibility of a ruling on plaintiff's motion prior to the hearing. The defendant then dumped the LinPro approval and dumped Ordinance 1213. Suddenly, settlement with ALC in late December and January became possible.

Settlement was another fiasco. Having gotten plaintiff to agree and the court to tentatively approve a settlement, having the defendant's attorney sign a tentative settlement, the defendant Township refused to ratify it. To pour salt on the wound, the defendant Township's resolution refusing ratification contained an attack on ALC for its "extreme and unfair demands".

The settlement did delay the February 1, 1985, trial date. Immediately upon its collapse, defendant trooped into court with a "select" Mt. Laurel II Committee and sought an additional sixty (60) days delay in the compliance hearing to give the Committee a chance to work. The court would only agree to delay if the defendant would finally acknowledge non-compliance and set a hearing date for the trial for February 7, 1985.

Now, on the brink of a hearing, the defendant at last stipulated non-compliance. Almost a year had passed since the filing of the Complaint and over two years since the Mt. Laurel II decision.

Next came the complicated compliance package. Again, the defendant seemed on track. The effective date of the Fair Housing Act came and went. The defendant pushed on invoking the court's jurisdiction, feeling it would get approval. The first setback was Dr. Moskowitz's July 29, 1985, report approving

plaintiff's Salem Road site. However, the defendant's sites were rated higher, and there was reason, apparently, for the defendant to believe that it could avoid a builder's remedy on the Salem Road site. Then came the problem with eminent domain and blight. The defendants pushed this court for rulings, invoking its jurisdiction by counterclaims in Happ and Comar and motions in all cases. A big blow came with Dr. Moskowitz's October 24, 1985, report setting a fair share number at 1,014 units and recommending ALC's Salem Road site for full development. Next came this court's ruling on eminent domain and feedback on blight. Add to that the court's tentative refusal to bifurcate the trial and the pending motion on fees and the mixture triggered this motion.

Now, on the eve of the compliance trial which may not yield what the defendant had anticipated, it wants out. Suddenly, the administrative process seems better than the judicial one.

4. The exhaustion doctrine has been a game for the defendant. It raised it as a defense to ALC's Complaint. It indirectly approved of LinPro's actions. Then it overturned LinPro after it lost on its exhaustion motion against ALC, which motion it only filed in an attempt to dismiss plaintiff's Complaint prior to a ruling on summary judgment. It never raised exhaustion in its Answer to Comar and Happ. Quite to the contrary, it counterclaimed in those cases and asked the court, through those lawsuits, to approve its compliance plan. It never raised the Act or exhaustion after July 2, 1985, as everyone, including the court's expert and the court, was vigorously preparing for trial and dealing with pre-trial motions. Transfer only came up on the eve of trial.

Throughout this tortured history, the plaintiff (and the poor) diligently pursued this litigation and waited. Plaintiff found a site, sought non-litigative means to obtain approval, sued to vindicate the mandate and obtain approval for Mt. Laurel II development, agreed to a settlement which included ultimate compliance, diligently moved to find a substitute site upon receipt of defendant's negative expert report, dropped the McGarvey suite as soon as it appeared that actual development

would not result in non-competibility, and a compliance hearing and site suitability hearing would be held before further development occurred, produced expert reports, dealt with motions, responded to expert reports, stood by while the court paid remarkable deference to the defendant's assertions of good faith and need for time.

The court, itself, has been pushed about as far as one could imagine a court being pushed and tolerating defendant's excuses and need for delay. It is irrelevant that a substantial delay was due to awaiting the submission of Dr. Moskowitz's reports. That delay was, in part, due to the complexity of the defendant's own compliance package. Further, it simply delayed the inevitable: the defendant's attempt to avoid a judicial ruling which was not 100% in accord with its own position.

Transfer, per se, would be intolerable under these circumstances. To date, this litigation has cost plaintiff over $60,000.00 in non-attorney expenses and approximately 567 hours of attorney time has been spent on the case. Since July 2, 1985, over $26,000 has been expended and over 150 attorney hours; add to this the costs and attorney time for LinPro Philadelphia, Comar, Happ; add the costs to the people of Moorestown estimated at approximately $450,000; add the work of the court's expert and the efforts by the court itself. Since July 2, 1985, the court has participated in numerous case

management conferences, orchestrated the case toward trial, heard and ruled on a significant motion (emient domain) of first impression, and heard and has pending for resolution two other significant motions (blight and fees) of first impression. Since July 2, 1985, compliance hearings have been set for October 2, 1985; November 13, 1985; and, finally, December 2, 1985. Pressure has been put on Dr. Moskowitz to complete his review and file his report. What were the defendants doing? Pushing the court to act, invoking the court's jurisdiction, avowing that they did not intend to transfer, standing mute as to their intent to transfer until the final hour and only when it appeared their program was in difficulty.

The motion is being made in bad faith. The defendants are improperly seeking delays; not satisfaction of the judicial mandate. They need more time because their program is on the verge of collapse. They are now afraid of the very judicial process which they repeatedly invoked. The Act does not submit to any interpretation that would permit this type of abuse. Section 16(a) calls for an election by a party and a timely motion made in good faith. While there is no law directly on point, various equitable principles, alone or read collectively, point to a denial of the motion based on defendants' conduct.

A. The Defendant Has Waived Its Right to Move for Transfer: the doctrine of waiver is most on point. As indicated above, it is used to estop parties from raising jurisdictional objection or objections to venue or forum when the party has previously been silent. The Supreme Court has defined waiver as the intentional relinquishment of a known right; an "election to dispense with something of value, or to forego some advantage which he might, at his option, have demanded or insisted upon". West Jersey Title and Guaranty Co. v. Industrial Trust Company, 27 N.J. 144, 152 (1958). Waiver is distinguishable from other forms of equitable estoppel in that it is imposed regardless of reliance. County Chevrolet v. North Brunswick Planning Board, 109 N.J. Super. 376, 380 and 381 (App. Div. 1983). In County Chevrolet, the plaintiff had originally filed, then dismissed, a suit challenging a variance denial. It then sought to appeal the denial. It argued that since it had never been formally noticed of the denial, its time to initiate suit had not run. The court rejected the argument based on waiver. It held that:

> Plaintiff might properly have delayed the commencement of the suit to a time beyond the forty-five day limit had it chosen to do so. But by a clear, unequivocable and decisive act; i.e. the filing of a complaint at law to which the municipality was required to respond, plaintiff relinquished its right to notice by mailing as a time-triggering device.

County Chevrolet, supra, 109 N.J. Super. at 380-381.

Here, the defendant could have moved for transfer in the first instance. Perhaps, if nothing had otherwise transpired in this case, its delay in moving for a transfer would not trigger waiver. But, here, numerous events occurred after July 2, 1985 (several initiated by the defendant). Its counterclaims in Happ and Comar, its motions on eminent domain and blight, its acceptance of this court's jurisdiction to hear the motion on fees and builder's remedy, on and on.

The counterclaims themselves belie this motion. See Tiene v. Jersey City, 13 N.J. 478, 488 (1953):

> Having in effect counterclaimed under the statute, as it had a right to do, for an even more extensive investigation than the applicants asked for, it is clearly estopped to deny the applicant's right to a summary investigation.

By its action and silence, defendant clearly waived whatever objection it might have had to this court's jurisdiction or desire for administrative review. The motion should be denied.

B. The Defendant is Estopped from Moving to Transfer: Estoppel, like waiver, acts as a bar to the desire by the party to demand something to which it might have otherwise been entitled. The major distinction between the two, equitable estoppel and waiver, is "reliance". As articulated by the Supreme Court in West Jersey Title, supra, 27 N.J. at 135, it is the...

> preclusion by law against speaking contrary to one's own act or deed, one may not take a position inconsistent with that previously assumed and intended to influence the conduct of another, if such repudiation...would work prejudice or injury to the other.

As this court has stated:

> (Estoppel is) founded in the fundamental duty of fair dealing imposed by the law, that prohibits a party from repudiating a previously taken position when another party has relied on that position to his detriment. Generally, its elements are a representation (or misrepresentation), knowledge that a second person is acting on the basis of that representation, and substantial detrimental reliance by the second person.

Housing Authority of the City of Atlantic City v. State, 188 N.J. Super. 145, 149 (Ch. Div. 1983), app. dism. 193 N.J. Super. 176 (App. Div. 1984).

"Representation" in this context is used in its broadest sense. The Supreme Court has stated that:

> Equitable estoppel arises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negligent omission to do anything.

State v. U. S. Steel Corp., supra., 22 N.J. at 358, quoting 3 Pomeroy on Equity Jurisprudence (5th Ed. 1941) Sec. 802.

The burden of proving estoppel is on the party asserting it. Miller v. Miller, 97 N.J. 154, 163 (1984); however, the facts here are overwhelming and do not need repeating. It is also true that estoppel may not be applied as freely against a public as opposed to a private entity. However, the Supreme Court has held that:

> A municipal corporation is ordinarily subject to the doctrine of estoppel in pais to serve the demands of right reason and justice, at least where the invocation of the rule would not hinder or prejudice essential governmental functions.

Vogt v. Boro. of Belmar, 14 N.J. 195, 205 (1954). No concern need be wasted here that invocation of the doctrine would disturb any governmental function. At worst, it would expedite compliance with a constitutional mandate.

The applicability of the doctrine is painfully clear in this instance. Vogt involved a "long-established acquiesence in a course of procedure" and the Court held that "a municipal corporation may be estopped to deny the exercise of its consensual authority". Vogt, supra, 14 N.J. at 204. Quoting the

United States Supreme Court, our Supreme Court ruled that:

> (A party is) held to a careful adherence to truth in their dealings with mankind; and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced.

Vogt, supra, 14 N.J. at 205.

This is exactly what the defendant is attempting to do here. Its motion must be denied.

C. Laches Precludes Granting Defendant's Motion to Transfer. Laches is essentially an equitable defense to bar an action in the absence of the statute of limitations. In fact, even in the presence of such a statute, latches may act as a bar. Lavin v. Bd. of Education of the City of Hackensack, 90 N.J. 145, 151 and 152 fn. 1 (1982). Laches is the "neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done... (and) inexcusable delay in asserting a right". Lavin, supra, 90 N.J. at 151.

Delay, alone, is not controlling. Here it is delay in the context of numerous actions belying transfer during the delay. As the Court stated:

> The length of delay, reasons for delay, and changing conditions of either or both parties during the delay, are the most important factors that a court considers and weighs.

Lavin, supra, 90 N.J. 152. Here, there has been substantial change during the delay period. This case has been perfected for trial by all parties, the court's expert, and the court itself during the delay. Enormous time and money has been expended during the delay. A major motion has been briefed, argued and ruled upon during the delay. The defendant, itself, during the delay, was vigorously invoking the court's jurisdiction and attempting to persuade the court's expert and the court to validate its program. Its delay during this period is fatal. It chose not to move to transfer to suit its own purposes. Others relied on that choice, including all of the parties, the court's expert and the court itself. It is too late to change. The motion should be denied.

D. Conclusion: for all of the aforementioned reasons, this motion should be denied. The defendant cannot be permitted to use the court when it feels like it and remove itself from the court's jurisdiction when it feels like it. The Legislature could never have intended such an abuse of the Act. On its face, the Act provides merely an alternative mechanism to the judicial process. See Section 2 and 3. An election in a 16(a) case should be made expeditiously and in good faith. It would be a public disgrace to permit the defendant to play this game with the law and the court. What has this exercise been in the past five months? Why have we been engaged in it, with the defendants'

consent and support, if not to try this case before this court as expeditiously as possible? Did we merely go through all of this as a mere precursor to a transfer? Obviously not. Transfer should not be permitted.

POINT II

TRANSFER WOULD RESULT IN A MANIFEST INJUSTICE TO PLAINTIFF AND THE POOR

Major reliance for this point is made on the previously submitted Cranbury Land Company brief in the motion in Urban League of Greater New Brunswick v. Carteret and the opinions of Judge Skillman and Judge Serpentelli, previously referred to.

Although this court has not tried the issue of fair share and compliance, it is, in effect, virtually in the same position as the court in the other cases. Here, we have a stipulation of non-compliance, a new compliance program, a master's report and complete readiness for a final hearing. We are definitely in a position advanced from that in the Holmdel case and essentially in the same position as in Cranbury. In any event, in light of the imminence of a final prenary hearing, the readiness of the case for trial, and the history of the litigation to date, transfer, per se, would result in a manifest injustice to the plaintiff and the poor.

POINT III

DEFENDANT'S COMPLIANCE PROGRAM IS NOT AMENABLE TO ADMINISTRATIVE REVIEW, IN PART, AND DEMANDS AN EXPEDITIOUS JUDICIAL RESOLUTION

Exhaustion of administrative remedies is most inappropriate as to issues where "only a question of law is involved" or where "irreparable harm will otherwise result from denial of immediate judicial relief". Brunetti v. Bor. of New Milford, 68 N.J. 576, 588-589 (1975). This is discussed at length in the enclosed brief submitted in the Urban League case and incorporated into Point II above.

There are, however, unique aspects of the defendant's compliance program which raise unique legal issues regarding which transfer to an administrative agency would be plainly inappropriate. These include the "fee" and "blight" issues. The legality of the fees imposed by Moorestown's compliance program and the suitability of its sites for blight determination are matters pending before this court and which must be resolved by the court. The Council is hardly the entity to determine legality in this context; nor is an administrative law judge. These are unique and extremely important legal issues. The court is the peculiarly appropriate forum for their resolution.

Furthermore, transfer (and the inherent delays involved) would be extremely unjust to property owners in areas designated for rezoning or blight treatment in the compliance plan. Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107 (1975). Regardless of whether property owners could ultimately be compensated for their losses occasioned by delay, such delay is extremely unfair when an available remedy exists to expedite resolution of these issues. Even if the Council was an appropriate forum to resolve them, it is manifestly unjust to delay resolution at the trial level for approximately two (2) years. Appellate review alone could take at least that long, resulting in a combined timeframe of approximately five years before these landowners receive a final decision as to rezoning and blight.

POINT IV

THE NEED TO UPGRADE SEWER INFRASTRUCTURE DOES NOT MITIGATE IN FAVOR OF TRANSFER

The defendant alleges that the need to upgrade its sewer plant and infrastructure will take time and, therefore, the delay occasioned by transfer is not significant. This is untrue. First, there is no guarantee that the defendant will act expeditiously now to upgrade its sewer system. Second, if it awaits substantive certification, it will have delayed implementations by an additional three years on top of the additional two years certification will take. Third, if this case is resolved now at the trial level and appealed, the completion of the planning and development of the sewer system would coincide with the completion of the appellate process. Thus, the time it takes to upgrade the system would, in fact, not delay implementation. Defendant's argument in this regard is completely frivolous if not misleading.

CONCLUSION

For the foregoing reasons, defendants' motion should be denied.

Respectfully submitted,

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