Defendant Borough of South Plainfield's Brief in Support of Appeal of an Interlocutory Order Denying Defendant's Request to Have Its Case Transferred to the Council on Affordable Housing

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SUPREME COURT OF NEW JERSEY
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CIVIL ACTION
ON APPEAL FROM

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

NO. C-4122-73

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, et al.,

Plaintiffs,

v.

THE MAYOR AND COUNCIL OF THE
BOROUGH OF CARTERET, et al.,

Defendants.

DEFENDANT BOROUGH OF SOUTH PLAINFIELD'S BRIEF IN SUPPORT OF APPEAL OF AN INTERLOCUTORY ORDER DENYING DEFENDANT'S REQUEST TO HAVE ITS CASE TRANSFERRED TO THE COUNCIL ON AFFORDABLE HOUSING

On the Brief:

FRANK A. SANTORO, ESQ.

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STATEMENT OF FACTS

On July 23, 1974, the Urban League of Greater New Brunswick and seven individuals sued South Plainfield and 22 other Middlesex County towns on behalf of all low and moderate income families challenging the municipalities' zoning ordinances as exclusionary and, therefore, unconstitutional. After an extensive trial in 1976, Judge David Furman issued a ruling finding that the Borough of South Plainfield's zoning ordinance was unconstitutional and assigned South Plainfield a fair share obligation of 1,749 units, of which 45 percent were low income and 55 percent moderate income.

The Judgment of Judge Furman required rezoning within 90 days; however, no zoning revision occurred because in November 1976, the Appellate Division stayed the Judgment pending appeal. In 1979 the Appellate Division reversed the Judgment in its entirety. On January 20, 1983, the Supreme Court reversed the Appellate Division and remanded to the Trial Court for determination of the region and fair share allocation, as well as the implementation of land use ordinance revisions and the adoption of other affirmative measures. South Plainfield participated in the remand proceedings, discovery was had and negotiations leading up to the Stipulation followed by the Urban League's Motion for Summary Judgment. Summary Judgment was entered on May 22, 1984. The Stipulation and Summary Judgment provided for the rezoning of

eight specific sites, which would require between 553 and 603 low and moderate income units and with mandatory set asides, a total of 2,367 to 2,417 units to be added to the approximate 6,000 residential units currently in the Borough. The Borough's Planning Consultant was then in the process of preparing proposed zoning and affordable housing ordinances for review by the Borough's Planning Board and ultimate adoption by the Mayor and Council of the Borough of South Plainfield. In a motion brought in October 1984 by the Plaintiff Urban League, the Trial Court entered an Order dated December 13, 1984, consolidating the case of Elderlodge vs. Borough of South Plainfield and the Urban League case.

It was in January of 1985 that the matter was recommended by the Planning Board to the Governing Body for adoption. The ordinances were scheduled for introduction in February of 1985, with intended second reading and adoption March 11, 1985. Changes in the proposed ordinances were requested by Plaintiff Urban League and the Borough of South Plainfield Governing Body therefore referred the ordinances back to the Planning Board in accordance with State Statute, requesting their review of the recommended changes. The Trial Court issued an Order on July 3, 1985, restraining the Borough of South Plainfield from approving any site plans, subdivision applications, variances, conducting any land sales and consummating any pending land sales, pending the Borough of South Plainfield's adoption of the required ordinances.

On or about July 5, 1985, the State Legislature adopted the Fair Housing Act. On July 22, 1985, South Plainfield filed its Motion for Transfer. The Trial Court did not set the Transfer Motion down on short notice, as requested by the Borough of South Plainfield, and it was not until the August 2, 1985 hearing that the Trial Court issued a stay of the effectiveness of the ordinances until a decision on the Transfer Motion. Thereafter, the South Plainfield Borough Council finally adopted the ordinances under protest on August 7, 1985.

On October 2, 1985, Judge Serpentelli heard oral argument on the Borough of South Plainfield's request to transfer. At the time, the Court also heard the oral arguments of the Townships of Piscataway, Warren, Monroe and Cranbury.

The Court decided to deny all transfer requests. It is from that denial that this appeal is being taken.

POINT I

TRIAL COURT HAS ERRED IN ITS INTERPRETATION AND APPLICATION OF "MANIFEST INJUSTICE" OF SECTION 16 OF CHAPTER 222, PUBLIC LAWS OF 1985.

In accordance with Section 16 of the Act, Defendant/Appellant Borough of South Plainfield moved to seek a transfer of its case to the Council on Affordable Housing. Other municipalities, including the Township of Piscataway, Monroe Township, Cranbury Township, Holmdel and Warren Township, likewise applied for a similar transfer approval.

The Trial Court summarily denied the transfer requests of all of said municipalities on the basis that to grant such requests would result in a manifest injustice to a party to the litigation. In so doing, the Court supplied its own interpretation of manifest injustice, stating that its findings in that regard were "fact specific" and that "you know manifest injustice when you see it."

But the term manifest injustice has already been utilized in cases dealing with retroactive application of statutes. Thus, "When considering whether statute should be applied prospectively or retroactively, Supreme Court's quest is to ascertain the intention of legislation. When the Legislature has clearly indicated that the statute should be given retroactive effect, the Courts will give it that effect unless it will violate the

Constitution or result in manifest injustice." State DEP v. Ventron Corp., 94 N.J. 473 (1983) at 498.

Another case interpreting the test to be applied when a statute should be applied retroactively is found in Gibbons v. Gibbons, 86 N.J. 515 (1981) where it was held that "when the Legislature has expressed the intent that a statute be applied retroactively, the Court should apply the statute in effect at the time of its decision; this expression of legislative intent may be either express, that is stated in the language of the statute or pertinent legislative history or implied, that is retroactive application may be necessary to make the statute workable or give it the most sensible interpretation";

AND

> "Even if a statute may be subject to retroactive application, a final inquiry must be made, that is will retroactive application result in 'manifest injustice' to a party affected by such application of the statute; the essence of the inquiry is 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 such reliance are so deleterious and irrevocable that it be unfair to apply the statute retroactively." (emphasis supplied)

In Rothman v. Rothman, 65 N.J. 219 (1974), it was held that:

> "The rule favoring prospective applications of statutes, while a sound rule of statutory interpretation...is no more than a rule of statutory interpretation and is not to be applied mechanistically to every case."

In the Gibbons case there was no clear expression of legislative intent that the amendment to the statute on equitable distribution should be applied prospectively; in fact, it was inferred from legislative history that the Legislature intended the amendment to apply retroactively. In the matter of the Fair Housing Act, clearly the Legislature did intend the Act to have retroactive application and it cannot be said that in the specific instance of the Plaintiff Urban League that it (the Urban League) relied to its prejudice on the law that was changed as a result of the retroactive application of the Fair Housing Act.

The Trial Court in deciding whether or not manifest injustice would result from the granting of the transfers referred to the original draft language of Section 16 of the Fair Housing Act:

> "...no exhaustion of the review and mediation procedures established in Sections 14 to 15 of this Act shall be required unless the Court determines that a transfer of the case to the Council is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing..."

Essentially, the Trial Court focused upon the phrase "likely to facilitate and expedite the provision of the realistic opportunity for low and moderate income housing" and thereby decided that the speed with which a case would be likely to move through the Council on Affordable Housing should be synonomous with the question of manifest injustice. The Court, in reviewing the different time periods described in the Act, estimated that

the "best case" would move through the Council in some 22 months. This, the Court concluded, was too long and, hence, manifestly unjust. However, the Legislature deleted the language "facilitating and expediting the provision..." and the Legislature did intend that some delay was obviously inherent in an administrative body's handling of exclusionary zoning matters, otherwise no administrative action dealing with items of general welfare which took time could withstand the "velocity of resolution" test, as applied by the Court below.

As stated above, the Trial Court utilized as a definition of manifest injustice the deleted language of the original draft of the Act, i.e. "...will the transfer facilitate and expedite the provision of a realistic opportunity (of housing availability to low/moderate income persons." (15a Appendix)

In such regard the Court below also said:

> "...in the context of manifest injustice to the parties, we are asking whether or not the transfer will aid the lower income people by speeding a day when the realistic opportunity for housing will arrive." (15a Appendix)

AND

> "Delay equates to postponing the day that the realistic opportunity is afforded and housing is built." (33a Appendix)

The Court below erred in the following ways: First, it improperly designated the standard for "manifest injustice" to be the velocity of resolution test stated above; secondly, it misapplied the standard to lower income families' constitutional

rights to have housing available promptly.

The speed by which any housing would be built is a factor explicitly rejected by the Legislature when it discarded the language of the original draft of Section 16 of the Act.

The Court below also indicated that the determination of manifest injustice, which it found to be fact specific as to those defendants presently before it, is and will be a balancing process in all cases. In applying such a balancing of the equities, the Court determined that the delay inherent in transferring the Defendant's case to the Council on Affordable Housing was manifestly injust to the lower income individuals represented by Plaintiff Urban League and that there was no manifest injustice to the Defendant municipality in not transferring its case. (emphasis added)

Again the Court erred since in applying the balancing test, it again utilized the Legislature's rejected "velocity of resolution" test.

> "A Court has no discretion but to apply the statute in effect at the time of its decision." Kruvant v. Mayor of Cedar Grove, 82 N.J. 435 (1980)
>
> AND
>
> "A Court's duty in construing a statute is to determine the legislative intent and implement it." AMN, Inc. v. So. Brun. Twp. Rent Level Bd., 93 N.J. 518, 525 (1983)

In the case before the Court, neither of these standards of statutory construction were utilized. In fact, the Court below treated manifest injustice as just one of the standards to be applied in deciding transfer motions. In reality it also expressly utilized the stricken language of the original draft of Section 16.

Another factor not decided and yet decided by the Court below is the question of burden of proof and upon which party such burden rests. Under one of the leading cases on manifest injustice (Gibbons), the burden of proof is clearly upon the party seeking to prevent the transfer. As stated above, Gibbons stands for the proposition that:

> "...a party claiming manifest injustice must demonstrate both that it relied to its prejudice on the prior law and that the consequences to it as a result of the reliance are deleterious and irrevocable". Gibbons v. Gibbons, supra.

The Court below ignored this burden of proof requirement by in essence placing such a burden upon the Defendant municipalities. It is submitted that were the test applied to what the Court indicated were the real parties in interest, lower income families, the result is obvious--no manifest injustice has been demonstrated since there is absolutely nothing in the record below to show that any lower income individual relied upon the prior law and that such reliance has been deleterious and irrevocable.

However, if such burden of proof test, as stated in Gibbons, were strictly construed as it applies to Defendant South Plainfield, it can be seen that South Plainfield's settlement was based upon the then case law of Mount Laurel II. The Fair Housing Act is a remedial statute and must be given an opportunity to work. It is, therefore, clear under cases such as Castiglioni vs. Castiglioni, 192 N.J. Super 594 (Ch. Div. 1984) that "where a judgment was sought to be modified...the Court agreed that the passage of a remedial statute was sufficient grounds for reopening the judgment."

The Court in such case further held that the modification of such judgment as a result of a remedial statute applies equally to both a judgment rendered after trial and one negotiated by settlement.

POINT II

THE UNIFORM DENIAL OF THE REQUESTS TO TRANSFER THE CASES INVOLVING THE BOROUGH OF SOUTH PLAINFIELD, THE TOWNSHIPS OF PISCATAWAY, WARREN, MONROE AND CRANBURY AND OTHERS FRUSTRATES THE BASIC PURPOSE OF THE PROVISIONS OF CHAPTER 222, PUBLIC LAWS 1985, WHICH PURPOSE IS TO GET THESE EXCLUSIONARY ZONING CASES OUT OF THE COURTS.

In addition to Defendant/Appellate Borough of South Plainfield's Transfer Motion request, various municipalities have requested transfer of their Mount Laurel cases to the Council on Affordable Housing. Among them are included the municipalities of Denville, Washington Township, Randolph, Tewksbury, Roseland, Township of Warren, Cranbury, Monroe, Piscataway, Manalapan, Bernards, Watchung, Bernardsville, Holmdel, Franklin, Scotch Plains, Hillsborough and Cherry Hill. With the possible exception of the Tewksbury and Scotch Plains application, every other request has so far been denied by the three Judges hearing Mount Laurel cases.

If this pattern of transfer request dispositions continues, it appears that all but the 16(b) cases (those filed within 60 days of the enactment of the Fair Housing Act) will be uniformly denied.

It is, therefore, asserted that if the Legislature did not intend to have pending exclusionary zoning cases transferred, there would be no Section 16 in the Act, but rather only Section 16(b). Obviously, the Legislature did intend to include the cases

such as Defendant/Appellant Borough of South Plainfield and the other similarly affected municipalities for it is clear that you know legislative purpose when you see it.

The Fair Housing Act has established a preference for the transfer of cases from the Courts to the Council on Affordable Housing.

The presumption that a transfer be permitted only when such transfer were likely to facilitate and expedite the provision of a realistic opportunity for law and moderate income housing is not part of the Act as adopted. This test and, hence, presumption was removed in favor of the "manifest injustice" test.

Clearly, the inference in the Legislature's removal of the prior language of Section 16 is that transfers would not likely facilitate and expedite the construction of housing. It is also clear that this deleted language not be used as a substitute for the "manifest injustice" test. The two sections are certainly unequal in meaning and in impact.

Providing for a "manifest injustice" weighing of the equities certainly is intended to limit and not to broaden the Court's discretion in deciding the transfer issue.

The Court below has employed the reverse illogical conclusion that because the Legislature removed the "facilitating and expediting" language, it didn't intend to also limit the Court's discretion. In fact, it (the Court) even suggests that this absent language can and should still be employed.

No other conclusion can be drawn when the Court's wholesale denial of transfers is based upon the "velocity of resolution" fact specific manifest injustice test.

The Trial Court's standard of "you know manifest injustice when you see it" has effectively removed over one hundred thirty cases from the Legislative decreed mediation and review process of the Council on Affordable Housing.

Continued interference by the Courts in the Legislative-Executive areas of zoning and housing can only result in real constitutional confrontation that now appears inevitable, and perhaps ultimate relief from these decried intrusions will await some higher appeals process.

POINT III

THE TRIAL COURT'S DECISION TO DENY SOUTH PLAINFIELD'S REQUEST TO TRANSFER FLIES IN THE FACE OF THE JUDICIAL DECLARATIONS IN THE MOUNT LAUREL II DECISION STATING THEIR PREFERENCE FOR LEGISLATIVE ACTION IN THE AREAS OF EXCLUSIONARY ZONING.

The Supreme Court in Mount Laurel II in its discussion of the constitutional basis for Mount Laurel and the judicial role stated:

> "...the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is better left to the Legislature." Mount Laurel II at Page 212.

AND

> "...so while we have always preferred legislative to judicial action in this field, we shall continue - until the Legislature acts..." Supra at Page 212.

ALSO

> "The judicial role, however, which could decrease as a result of legislative and executive action, necessarily will expand to the extent that we remain virtually alone in the field..." Ibid at Page 213.

AND

> "Our deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions." Ibid (emphasis supplied).

And finally in closing its opinion, the Court reiterated:

> "as we said at the outset, while we have always preferred legislative to judicial action in this field, we shall continue - until the Legislature acts..."

On July 2, 1985, the Legislature acted by its adoption of Chapter 222 of Public Laws of 1985 "Fair Housing Act". The Trial Court's decision to deny Defendant/Appellant Borough of South Plainfield and the other municipalities' request to have their cases transferred to the Council on Affordable Housing is anathema to the Supreme Court's own policy statements and, hence, should be overturned.

POINT IV

THE STIPULATION ENTERED INTO IN MAY 1984 BY THE MUNICIPAL ATTORNEY ON BEHALF OF THE BOROUGH OF SOUTH PLAINFIELD LACKED FORMAL AUTHORIZATION OF THE GOVERNING BODY AND HENCE IS IN DIRECT CONTRAVENTION TO THE PROVISIONS OF N.J.S. 40A:2-3, ET SEQ.

Defendant/Appellant never had a trial to determine fair share numbers because of the Stipulation entered into in May 1984 by its legal counsel. That Stipulation, which naturally resulted in a Summary Judgment being entered by the Court May 22, 1984, in favor of the Urban League, required that the Defendant/Appellant in one provision contribute the land and provide necessary financial support, including seed money and tax abatement as to one of the Mount Laurel sites. (Exhibit D)

Such a Stipulation was executed by Defendant/Appellant's legal counsel without Defendant/Appellant Borough of South Plainfield first having adopted a formal resolution at a public hearing called for such purpose.

Since the Stipulation requires the expenditure of public funds, it was an ultra vires act and is in direct contravention to the basic requirements set forth in the statutory provisions of N.J.S. 40A:2-3, et seq., which said section requires public hearings to be held by municipalities prior to their incurring future indebtedness for any purpose. Hence, the Stipulation is void and the Summary Judgment should therefore be set aside.

POINT V

THE TRIAL COURT SHOULD NOT BE ALLOWED TO CONTINUE THE RESTRAINTS ON THE SALE OF BOROUGH OWNED LAND, WHERE SUCH LAND IS NOT INVENTORIED "MOUNT LAUREL" LAND, SINCE SUCH RESTRAINTS CONSTITUTE A TAKING.

By virtue of several Orders issued by the Trial Court, the Defendant/Appellant Borough of South Plainfield has been restrained and is continuing to be restrained from conducting land sales of Borough owned land, including the finalization of pending land sales. Such restraints have been imposed on all Borough owned land, regardless of its non-inclusion in Mount Laurel inventoried sites.

Defendant/Appellant Borough of South Plainfield has adopted under protest what it believes to reasonably comply in all respects to the Judgment against South Plainfield of May 22, 1984.

The remedies for noncompliance recited by the Supreme Court in Mount Laurel II did not authorize, nor could it authorize, such restraints, nor continue the restraints of Defendant/Appellant Borough of South Plainfield's constitutional right to deal with its property as it chooses. Hence, since the Defendant/Appellant Borough of South Plainfield has made reasonable efforts to comply under protest, these restraints should be immediately removed.

CONCLUSION

For the foregoing reasons, Defendant Borough of South Plainfield respectfully requests this Honorable Court reverse the Trial Court's decision and approve South Plainfield's application to transfer its case to the Council on Affordable Housing.

Respectfully submitted,

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Dated: December 2, 1985