U.L. v. Carteret, "4 towns" ☒ no date

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INTRODUCTION

The Supreme Court has held that "the judiciary has the power, upon transfer, to impose those same conditions designed to conserve 'scarce resources' that the Council might have imposed were it fully in operation," Hills Development Co. v. Bernards, N.J. , slip op., p. 87. The Court deferred to the experience and demonstrated expertise of this Court to determine those conditions. In this portion of the decision, perhaps more than any other, the Supreme Court demonstrates the continuing commitment to the principles of Mount Laurel II expressed later in the opinion:

> "No one should assume that our exercise of comity today signals a weakening of our resolve to enforce the constitution rights of New Jersey's lower income citizens. The constitutional obligation has not changed; the judiciary's ultimate duty to enforce it has not changed; our determination to perform that duty has not changed." Id. at 92.

The Supreme Court has unequivocally directed that scarce resources must be preserved if their depletion would undermine the Council's task, but it has left the determination of such rsources to this Court. The threshold question, i.e., "What is scarce?" is almost impossible to ascertain in the absence of the regional and fair share determinations to be made by the Council. This is not insurmountable, at least in the four Urban League cases.

The Supreme Court has made it very clear that the Council will not be bound by the fair share methodologies developed in the litigation below, which focused exclusively on substandard housing as an indicator of need. However, both Mount Laurel II and the Fair Housing Act specifically refer to affodable housing; that is, housing that does not cost more than 30% of the household's income. The Council may well find that those low income households forced to allocate more than 30% of their meager resources for housing are entitled to the benefits of the Act, thus resulting in fair share numbers far greater than those

set during the litigation. # Those fair share numbers, moreover, invariably represented a compromise on the part of the Urban League, to which it is no longer bound. By encouraging voluntary planning at the local level, permitting inter-local transfers, and providing substantial new subsidy money, the Fair Housing Act provides compliance techniques that were not readily available to the courts and has the potential to provide for a significantly greater fair share.

As a practical matter, however, the four Urban League towns are already claiming difficulty in accommodating the minimal fair share numbers derived during the litigation by the consensual methodology. In order to avoid the possibility that the municipalities dissipation of resources would preclude them from satisfying the fair share set by the Council, however, plaintiff Urban League urges the Court to adopt a prudent and conservative approach. For purposes of this application, therefore, we ask this Court at the very least to preserve those resources necessary for the realization of the following fair share

allocations: Cranbury: ; Piscataway: ; South

Plainfield: ; and Monroe: .

I. A DISCOVERY SCHEDULE AND A HEARING DATE SHOULD BE SET TO DETERMINE THE CONDITIONS TO BE IMPOSED UPON TRANSFER

The discovery in this case is several years old[1] and this Court is well aware of the often rapid changes in the burgeoning towns which are the subject of this application. More important, the discovery previously sought did not address the questions posed by the Supreme Court in the Hills Development decision. As the Court there noted:

> "We would deem it unwise to impose specific conditions in any of these cases without a much more thorough analysis of the record, including oral argument in each case on what conditions would be appropriate. 'Appropriate' refers not simply to the desirability of preserving a particular resource, but to the practicality of doing so, the power to do so, the cost of so doing, and the ability to enforce the condition. Some cases may require further fact-finding to make these determinations." Id. at 87, 88 (emphasis added).

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[1] Answers to interrogatories of Cranbury, Monroe, Piscataway and South Plainfield are dated 5/2/84, 4/13/84, 3/3/84 and 2/8/84, respectively.

There can be no question that further discovery and a full evidentiary hearing is essential in each of the Urban League cases. Prior experience in each of the towns may suggest "the desirability of preserving a particular resource," such as vacant land in Piscataway and South Plainfield and sewage and water capacity in Cranbury and Monroe. Review of the record alone, however, provides a far from adequate means of ascertaining the desirability of preserving other, perhaps equally scarce resources or of clarifying the "practicality . . . power . . . cost . . . and ability to enforce" the preservation of such resources. These questions can only be answered after further discovery.

The Urban League respectfully requests that this Court establish a schedule for such discovery and set a hearing date following the completion of same. In order to ensure that the municipalities' ability to satisfy their Mount Laurel obligation is not eroded prior to the hearing, it is further submitted that in the interim, there should be no building permits issued in any

of the subject towns for projects involving more than $, nor should any action be taken vesting rights in connection with any proposed development involving more than acres or units.

II. EXISTING RESTRAINTS SHOULD BE CONTINUED

A. The Restraints Set Forth In This Court's Orders Dated Regarding Piscataway, Should Remain In Full Force and Effect Pending Action By The Council

While the decision is clear that the Council shall not be bound by the previous Orders entered in a matter (Id. at 82), it does not relieve any of the parties from such Orders pending review and evaluation by the Council. In fact, the continuance of the existing narrow and carefully drawn restraints is implicit in the decision. The Supreme Court expressly notes the potential value to the Council of such Orders:

> At the same time, we underscore that the agencies now involved in this field are free to use the records developed in litigation, including any interim orders or stipulations entered, for such purposes as they deem

appropriate. (Emphasis added) (Id. at 84)

The Council will not be able to avail itself of such "interim orders or stipulations", of course, if they have been trashed before the Council is even in operation. Restraining orders protecting certain sites, for example, will be of little use to the Council if the sites are disposed of before the Council is in a position to evaluate them in the context of the "sound, comprehensive statewide planning" (id. at 24) envisioned by the legislature. Indeed, lifting those restraints before the Council has had the opportunity to decide whether they should be lifted amount to exactly the kind of usurpation of the Council's function by the judiciarythat the Supreme Court has so firmly rejected.

Moreover, continuation of the new restraints is consistent with the Supreme Court's directive to impose "such conditions as the trial courts may find necessary to preserve the municipalities' ability to satisfy their Mount Laurel obligation." (Id. at 30) This Court was doing no more than

imposing just such conditions at the time it entered the restraining Orders. It was established then that the protection sought by means of the restraints was vital to the municipality's realization of its fair share. The fair share number contemplated by the Court at that time, was substantially less than that which may reasonably be anticipated from the Council, of course, reflecting substantial compromise on plaintiffs' part to which they are no longer bound. Moreover, there has inevitably been a reduction of already limited resources since the entry of those restraints; in part, because of their very limited scope.[2] The continuation of these restraints represents only a beginning, but crucial element of the Order to be entered pursuant to the Supreme Court's mandate.

Although it seems self-evident that the decision requires such Orders to remain in effect pending action by the Council,

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[2] The extent to which resources have been diminished because of wilful noncompliance with the restraints in issue requires further discovery. As set forth in the affidavit of John M. Payne, Esq., submitted herewith, there have already been incidents of such wilful noncompliance in Piscataway.

the letter of Phillip Paley, Esq., dated , attached hereto as Exhibit A, unfortunately demonstrates the need for further clarification. Accordingly, it is respectfully requested that this Court expressly continue the existing rstraints in effect in Piscataway in its Order imposing conditions on the transfer of those matters.

B. The Ordinances Presently In Effect In South Plainfield, Representing The Restraints On Certain Development, Should Also Be Continued

III. RESTRAINTS SHOULD BE IMPOSED BASED ON THE RECORD BELOW

IV. COUNSEL FOR THE CIVIC LEAGUE SHOULD BE PERMITTED TO CONTINUE ITS REPRESENTATION BEFORE THE COUNCIL

Plaintiff Civic League respectfully requests a determination by this Court that its counsel, the Constitutional Litigation Clinic of Rutgers Law School (the "Clinic"), be permitted to continue its representation before the Council. Plaintiff recognizes that this is an unusual request, but it is necessitated by the unusual circumstances of this case.

The Conflicts of Interest Law, N.J.S.A. 52:13D provides in pertinent part that:

> "b. No State officer or employee or member of the Legislature, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for, or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before any State agency; * * *"

It is assumed that the Council will be considered a "state agency" for purposes of this statute. There are no reported decisions regarding the status of Rutgers Law School clinics for purposes of this statute, nor has any determination ever been

made specifically concerning the Constitutional Litigation Clinic. A 1972 Advisory Opinion regarding the Rutgers Women's Rights Clinic, however, gives rise to the possibility that plaintiff's counsel could be deemed "state officers or employees" subject to the provisions of the cited statute and thus precluded from continuing their representation of the Civic League.

While the basis for that opinion is dubious at best, it is not necessary for this Court to decide whether any Rutgers clinic is properly within the purview of the cited statute because of the unique circumstances of the Mount Laurel litigation. It is respectfully submitted that the question of the Clinic's continued representation of the Urban League before an administrative body that did not even exist at the time the Clinic was retained is so clearly beyond the scope of that statute. The situation in the matter of the Rutgers Women's Rights Clinic was plainly distinguishable from the case at bar. Here, unlike there, a statute was enacted creating the Agency in question after the retention of the Clinic and after years of

litigation. Indeed, even after the creation of the Council it could not have been foreseen that any of the Urban League matters would be transferred there.

It is well established that a Court has jurisdiction to rule on a conflict of interest issue arising during the course of litigation. It is especially appropriate for this determination to be made by the trial court where, as here, that Court fully appreciates the myriad complexities which must be mastered if there is to be adequate representation in this case.

It is plain that the evil sought to to be avoided by the Conflicts Statute does not -- and could not -- exist here. Its primary purpose is to regulate and control "the activities of legislators, State officials and employees in their private business and commercial contractual dealings with the State." Attorney General's Formal Opinion No. 18 (1979). As the Court noted in Knight v. Margate, 86 N.J. 374 (1981):

> "There can be no equivocation on the point that the New Jersey Conflicts of Interest Law, as most recently amended, vitally

serves a significant governmental purpose. The paramount objective of the Conflicts of Interest Law in general is to 'ensure propriety and preserve public confidence' in government. Its prohibitions, applicable to a wide spectrum of publci officials and employees, include accepting gifts for favors, outside representation on a matter dealt with in an official capacity, and voting on subjects in which the official has a pecuniary or personal interest." (Citations omitted) (Id. at 383)

Here, the Clinic plainly has neither a personal nor a pecuniary interest in the proceedings before the Council. Counsels' only interest is in assuring adequate representation for its client. As this Court is aware, the Clinic is not even receiving a fee in connection with its representation of the Civic League, a nonprofit organization representing the interests of lower income households.

In fact, the Civic League's inability to afford an attorney may effectively preclude its continued participation in this action. As set forth in the affidavits of Jeffrey Fogel, Esq. and C. Roy Epps, submitted herewith, it appears that the Civic

League will have no lawyer unless the Clinic is permitted to continue its representation.

In Havons, Inc. v. Secretary of Interior, 711 F.2d 1208 (3d Cir. 1983), the United States Court of Appeals for the Third Circuit found that even assuming that the continuing representation would violate disciplinary rules, disqualification is "never automatic" and it would be denied where it would be "neither just nor fair to the parties involved." Id. at 1213. Here, of course, there can be no serious question of any disciplinary rule violation. Moreover, as set forth above, only the most narrow technical construction could give rise to a claim of violation under the New Jersey Conflicts of Interest Law. Even if such construction were imposed, however, it is respectfully submitted that under the circumstances here, disqualification should not follow.