ULv. Cortese, various towns 4/23 (1986)

Brief submitted by way of reply to answering papers + request to intervene / informally appear by attorneys of various towns

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April 23, 1986

The Honorable Eugene D. Serpentelli
Assignment Judge, Superior Court
Ocean County Court House
CN 2191
Toms River, NJ 08754

Dear Judge Serpentelli:

This letter brief is respectfully submitted by way of reply to the answering papers and requests to intervene or informally appear filed by Mario Apuzzo, Esq. and Clapp & Eisenberg, Esqs. in connection with Monroe; Phillip Paley, Esq. on behalf of Piscataway; Frank Santoro, Esq. and John George, Esq. in connection with South Plainfield; McCarthy and Schatzman, P.A., William C. Moran, Jr., Esq., Sterns, Herbert & Weinroth, P.C., William L. Warren, Esq. and Peter D. Sudler, Esq. in connection with Cranbury and the letter of Deputy Attorney General Michael R. Clancy, Esq. in connection with the Clinic's continuing representation of the Civic League. As we discussed with Your Honor's law clerk, since many of the answering papers were not received until this week, the Court is permitting us to serve and file this letter on Thursday, April 24, 1986.

The Civic League will not reply separately to the many letters from developers seeking to be heard in this matter. It is the Civic League's position, set forth at greater length in its answer to the motion of Realty Transfer to intervene in Monroe, that intervention is not justified and in any case should not be permitted because it will result in delay and prejudice the rights of parties. If it would be helpful to the Court to hear from these developers on an informal basis, however, the Civic League will not object.

Counsel: Frank Askin-Jonathan M. Hyman (Administrative Director) - Eric Neisser-Barbara Stark

Monroe

As Mr. Apuzzo notes, the Civic League has framed its request for relief in terms of conditions to be imposed against the Township; i.e., the Township should be restrained from contracting with the MUA for an expansion of its capacity or from approving any development application that will use water or sewer capacity until sufficient capacity has been reserved for low and moderate income purposes. Clearly the Township can be enjoined from issuing building permits if it will result in improper use of scarce sewerage capacity. Mr. Apuzzo insists that the MUA is an indispensable party, although he fails to set forth any factual basis for this contention. It is respectfully submitted that if the MUA is indeed indispensable pursuant to R. 4:28, Mr. Apuzzo should simply move to join it as a party.

In response to Mr. Apuzzo's demand for yet another recitation of the acts comprising Monroe's bad faith, plaintiff refers him to the Civic League's brief and the Certification of Eric Neisser, Esq., submitted in support thereof. Examples of Monroe's bad faith have already been set forth at length, including the Township's continuing refusal to comply with this Court's Order of May 13, 1985 directing it to pay the Master, planning consultant and attorney.

Mr. Apuzzo objects to the Civic League's request for enforcement of this Order in the context of the conditions motion. As he is well aware, however, this may well be this Court's last opportunity to enforce this Order. Monroe's demand for a stay of a year-old Order is based only on its filing in the Appellate Division of an as yet unperfected Notice of Appeal, an Appeal the Appellate Division previously declined to hear. It is respectfully submitted that there is no excuse for the Township's persistent refusal to make the Court ordered payments and the instant demand for a stay is merely another strategem to avoid doing so. Unless immediate payment is made a condition of transfer, the Township's past actions leave no doubt that it will continue to ignore the Court's Order and potentially the Court's conditions orders too.

Mr. Apuzzo apparently concedes the need for further discovery here, but inexplicably demands "all costs" in connection with same. There is no reason to suspend the Court rules regarding discovery, including those which address the allocation of costs and the place of depositions. Nor is the imposition of an arbitrary deadline with respect to discovery appropriate at this point. The Civic League proposed a discovery schedule, which Monroe does not challenge. The Civic League has no interest in drawing out the discovery process. The greater defendants' cooperation, the more expeditiously these matters may be resolved.

Piscataway

Unfortunately, it appears from its brief that the Township of Piscataway would rather rehash several years of litigation than address the issue properly before the Court, i.e., the conditions which must be imposed pending transfer to preserve scarce resources. Rather than waste this Court's valuable time by responding on a point by point basis to the specious and irrelevant arguments set forth in Piscataway's brief, the Civic League shall reply only to those few points pertinent to the pending motion.

After expressing his tremendous frustration at this Court's consistent refusal to permit Piscataway to avoid its Mount Laurel obligation, counsel for the Township reaches the astonishing conclusion that the prior restraints entered by this Court "are no longer valid" because, "The Supreme Court did not order that existing rstraints continue until vacated by the tiral court (as it could have, easily)."

There is no authority, in law or logic, for the novel rule of construction proposed by counsel, in which Court Orders evaporate unless they are explicitly continued. As quoted by Piscataway, the Hills Court merely noted that "... we believe the Council is not bound by any orders entered in this matter." It did not say, "... we believe the parties are not bound by any orders," (as it could have, easily). It is respectfully submitted that Piscataway's desperate effort to distort this absolutely unambiguous holding should be condemned by this Court as the most outrageous example yet of the Township's determination to shirk its Mount Laurel obligation.

Just as the Council may choose to disregard certain Orders, it is not bound by stipulations between the parties, including, of course, stipulations as to potentially suitable sites. As set forth in its brief, the Civic League made significant concessions as to developable land by deciding not to oppose the Master's conclusions in order to facilitate resolution of this matter. Under these circumstances, discovery as to suitable sites presently available is crucial here.

Even the most cursory review of the Hills decision, or the Civic League's brief, belies Piscataway's bald assertion that: "Nothing within Mount Laurel III [sic] presupposes that this Court has the authority, in the present posture of the case, to impose a discovery condition." As set forth at page 88 of the slip opinion, and quoted at page 9 of plaintiff's brief, the Supreme Court unequivocably held:

> We would deem it unwise to impose specific conditions in any of these cases without a much more thorough analysis of the record... * * * Some cases may require further fact finding to make these determinations.

It is respectfully submitted that proper, certified discovery is especially essential where, as here, defendant has already demonstrated its inability to keep track of sites supposedly reserved for Mount Laurel.

Piscataway's self righteous insistence that, "Piscataway has fully honored prior restraints" is contradicted by its admission, earlier in the same brief, of its "erroneous" approval of Site 80 for non-Mount Laurel use. While sanctimoniously characterizing the Civic League's "omission of this history" as "inexcusable," Piscataway neglects to point out that the approval was not rescinded for more than a month after the Civic League requested rescission, as set forth in the letter of Barbara Stark dated March 4, 1986, attached as Exhibit A. In fact, as set forth in the letter of James Clarkin III, Esq. dated March 13, 1986, attached as Exhibit B, Piscataway continued to equivocate, stating that the Civic League's assumption of an appropriate Mount Laurel set aside was "not entirely accurate." The letter of March 26 appended to Mr. Paley's brief was issued several days <u>after</u> the Civic League motion was filed and expressly to rebut the Motion. Unless the Civic League is granted the requested discovery, it will be impossible to ascertain the extent of other such "erroneous" municipal actions.

Piscataway misstates the Civic League's position with regard to dissolution of restraints against certain sites such as Site 3. As the Court is aware, the Civic League sought the restraints in dispute over the vehement opposition of the Township. Plaintiff only asks that Piscataway be prevented from spitefully obstructing settlements reached by the real parties to those Orders, i.e., the Civic League and the developers, which dissolve restraints the Township has consistently opposed.

Finally, the Civic League will respond only briefly to the alleged conflict of interest posed by the ownership of land by Rutgers University, since this issue is site specific and there is no motion before the court properly raising it. We note, however, that when Piscataway previously manufactured this issue for its own ends, by insisting that the Master consider a Rutgers-owned site that the Civic League had deemed unavailable, the Civic League arranged for counsel not associated with the Rutgers Constitutional Litigation Clinic to review the site and reiterate the League's concession. Since Piscataway continues to assert vigorously that

too much land has been reserved already for Mount Laurel purposes, there is no need consistent with good faith for it to inject issues regarding Rutgers land that the Civic League has already put out of the case. If necessary, the League will again arrange independent counsel to handle this question.

In any event, the Rutgers land issue is site specific and has nothing to do with the broad question presented to the Court by the present motion, whether N.J.S.A. 52:13D-12 et seq. applies to all four of these cases, because of the unique posture of these cases. The Civic League's reply to alll parties answering papers on this general issue is presented below under the heading "The Clinic's Representation of the Civic League."

South Plainfield

The Civic League is essentially seeking maintenance of the status quo in South Plainfield. The melodramatic insistence of Frank Santoro, Esq. that the grant of this minimal relief will "bring the Defendant Borough to its knees begging for a compliance hearing and the right to begin immediate construction of all the low and moderate income housing the plaintiff Civic League wants" is far fetched, if not completely fantastic.

It is crucial that this Court confirm the continuing validity of existing restraints because South Plainfield has already shown its determination to flagrantly ignore those restraints pursuant to its self-serving and erroneous reading of the Hills decision. This Court is well aware that South Plainfield rescinded Ordinances 1009 and 1010, enacted at the express directive of this Court. The Supreme Court said that the Council would not be bound by prior Orders; it did not hold that South Plainfield would not be bound.

The necessity for the restraints sought is further demonstrated by South Plainfield's persistent violation of even those restraints conceded to be in effect. In his Letter Memorandum, Mr. Santoro takes umbrage at the "great deal of inference [is] suggested" regarding South Plainfield's sale of "less than .5 acres" inventoried lands. The point, of course, is that South Plainfield should not have sold any of that land and approved it for non-Mount Laurel development, as Mr. Santoro and all the relevant government entities served with the Judgment were well aware.

Finally, it is respectfully submitted that Mr. Santoro's view as to the appropriate allocation of taxpayers' dollars has no bearing whatsoever on the question before this Court; i.e., whether N.J.S.A. 52:13D-12 et seq. is applicable here. To the extent that South Plainfield does address that issue, the Civic League replies below.

Cranbury

Cranbury objects to the imposition of conditions sought by the Civic League basically for two reasons: (1) The Township's expectation that it will be assigned a fair share number well below the Urban League fair share number or the phased fair share of 536 units recommended by the Master, and (2) Cranbury's belief that the restraints sought will be "counterproductive," preventing development of concededly much needed infrastructure. It is respectfully submitted that neither point is valid here.

First, as Mr. Moran, notes in his letter brief, the expectation of a sharply reduced fair share is based only on hearsay to the effect that the Council will not impose fair share obligations in excess of 20% of already occupied housing stock. As Mr. Moran concedes, since the required public notification and hearing process has not taken place, this is at most a tentative guideline. It is also completely arbitrary and would result in a windfall for Cranbury. The Civic League will vigorously challenge this guideline, if indeed it is ever formally promulgated, in the appropriate forum. Until that time, it is respectfully submitted that the mere possibility of action by the Council should not operate to nullify the previous fair share numbers arrived at after painstaking analysis of the actual situation in Cranbury. Whatever rough guidelines may be adopted by the Council, it is assumed that the Council will diligently consider the specific facts in each particular town before determining that town's fair share number. Moreover, it should be noted that the same newspaper article relied on for the 20% figure indicates that the Council is adopting a very stringent approach with regard to agricultural and historic area adjustments. In short, the Court is urged to utilize the previously adopted fair share numbers since it is by no means certain that the Council will adopt lower figures.

Secondly, as set forth in its Notice of Motion and brief, the Civic League has no objection to "additional residential or non-residential use [of water or sewer capacity] financed exclusively by the developer thereof, provided that a portion of the new infrastructure, or a cash equivalent, is reserved for subsequent Mount Laurel devlopments." Reservation of such infrastructure, of course, would only be sought up to the amount actually necessary for Cranbury's realistic Mount Laurel obligation. If the infrastructure described in the Affidavit of Mayor Alan Danser is in fact realized, it would be more than adequate for anticipated Mount Laurel housing. This does not, however, render infrastructure as it presently exists any less of a scarce resource. As the Mayor flatly admits, "At the

present time Cranbury Township has virtually no water capacity to accommodate any new development of any kind." While the Civic League shares Cranbury's hopes that the planned expansion will take place, it is respectfully submitted that until those hopes are realized, the very narrowly drawn restraints sought here should be imposed. Of course, the Civic League's approach would not bar approval of actual Mount Laurel projects including that of developers such as Morris Brothers, of a bona fide 20% set aside or its financial equivalent is included. It will have to be determined, however, what an appropriate credit is if low and moderate income units are not provided directly.

By way of answer to the motion of Warren, Goldberg, Berman & Lubitz, on behalf of plaintiff Garfield and Company, in which Michael Herbert, Esq. of Sterns, Herbert and Weinroth joins on behalf of plaintiff Lawrence Zirinsky ("movants"), the Civic League shares their concern regarding infrastructure. Plaintiffs submit however, that the relief set forth in their Order is more appropriate than the ongoing review process urged by movants. The procedure suggested in movants' papers would impose a tremendous burden on this Court, effectively requiring a ruling on every application which "will adversely impact Cranbury's ability to provide housing for its fair share of the region's low and moderate income communities." The Civic League submits that the relief requested in its paper will be less onerous, and far simpler to monitor and enforce. The Civic League further submits that if there is a need for Mr. Caton's services, there is no basis for requiring the Civic League to share responsibility for his fee.

Representation of the Urban League

It is noteworthy that Michael R. Clancy, Esq. appearing on behalf of the Executive Commission on Ethical Standards ("Commission"), does not seek disqualification of the Constitutional Litigation Clinic ("Clinic") as attorneys for the Civic League. Indeed, Mr.Clancy expressly affirms the "propriety of the Clinic proceeding in this matter" before the Court. The Commission merely notes that this Court may decline to rule on this question because of, first, "primary jurisdiction given the Ethics Commission by the Legislature" and, second, the pendency of a request for an advisory opinion by the Rutgers Prison Law Clinic. Neither argument is persuasive here.

As a matter of law, the Commission's first argument must fail. First, the cited statute does not confer "primary," but merely "jurisdiction" on the Commission. Contrary to Mr. Clancy's implications, there is no basis here for assertion of exclusive jurisdiction by the Commission. In fact, the doctrine of primary

jurisdiction relied upon by Mr. Clancy is predicated upon concurrent jurisdiction.

> Questions of primary jurisdiction arise only when the statutory arrangements are such that administrative and judicial jurisdiction is concurrent for the initial decisions of some questions.
> 2 Am. Jur. 2d § 789 at 690

In view of this Court's understanding of the unique circumstances of this litigation, it is respectfully submitted that this Court should exercise its concurrent jurisdiction with regard to the Clinic's continuing representation here.

As in Feiler v. N.J. Dental Ass'n, 191 N.J. Super. 426, aff'd, 199 N.J. Super. 363, cert. denied, 99 N.J. 162 (Ch. Div. 1983), it is respectfully submitted that this Court's superior knowledge of the underlying facts mandates its determination of this issue. As the Feiler Court held:

> Common sense dictates that a case should be heard in the forum best qualified by expertise and relevant law to decide it. There is nothing in the special education or experience of the members of the board of dentistry that gives them expertise to determine the facts or law in a matter in which a dentist is charged with fraudulently overstating his charges. Whether the practice occurs can be competently determined by a court. Whether the practice ought to be stopped to protect the rights of competing dentists can best be determined by a Court. Thus, this Court not only has jurisdiction of the matter, but ought to exercise it.
> Id. at 433 (Emphasis added)

It is respectfully submitted that here, as in Feiler, this Court not only has jurisdiction, but ought, by virtue of its expertise and the nature of issues presented, to exercise it and permit the Clinic to continue representing the Civic League.

The pending Prison Law Clinic request for an advisory opinion from the Commission is unresponsive to the instant motion for two reasons. First, the Prison Law Clinic request, which might resolve the applicability of the Conflict of Interest Law to clinical education, although technically pending, will not be decided in time to assist the Civic League or the Court in this litigation. We have been informed that some months ago the Prison Law Clinic requested

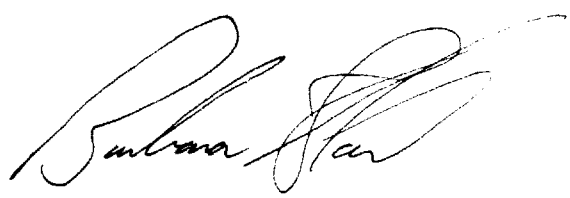
deferral of an opinion while the parties discuss the alternatives to direct representation by Clinic faculty that would trigger the statute. It may well be that the negotiations, already more than two months old, will not be concluded before the Council receives its first housing element. In any case it is clear that no resolution will occur before this Court must make its decisions on these motions.

Second, even if the Prison Law Clinic request were decided, and decided adversely to the Clinic, within a reasonable time, such an advisory opinion, which is in any case not binding on this Court, would not address two other issues raised by our motion. Unlike the Prison Law Clinic, the Constitutional Litigation Clinic is not seeking a ruling with regard to possible prospective clients, but assurance that the Clinic not be compelled to abandon a client midstream because the Legislature chose to impose a new and extended administrative procedure that was wholly unforeseeable when the Court's jurisdiction was properly invoked 12 years ago. Similarly, a Commission opinion on the Prison Law Clinic could not address the Hovsons' argument that disqualification would be unfair even if technically called for by the statutory language.

Conclusion

For all of the foregoing reasons, the Civic League respectfully requests imposition of the conditions set forth in its motion papers.

Respectfully submitted,



cc/Service Lists

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March 4, 1986

James Clarkin, Esq.
850 U.S. Highway 1
PO Box 1963
North Brunswick, NJ 08902

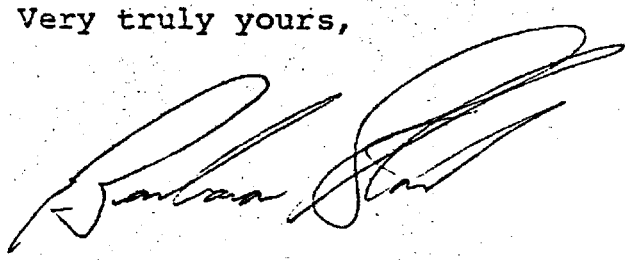
Re: Urban League vs. Carteret

Dear Mr. Clarkin:

This shall confirm our telephone conversation this morning in which you explained that the approval of site 80 without a Mount Laurel set aside was an error. You further advised that the matter would be reopened, and that provision would be made for an appropriate set aside or the approval would be rescinded.

As we discussed, we would appreciate copies of correspondence and resolutions assuring a Mount Laurel set aside for this site in accordance with the Judgment.

Very truly yours,



cc/Philip Paley, Esq.
Chris Nelson, Esq.

Exhibit A

Counsel: Frank Askin-Jonathan M. Hyman (Administrative Director) - Eric Neisser-Barbara Stark

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

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OF COUNSEL
GERALD T. FOLEY (1926-1976)

March 13, 1986

Ms. Barbara Stark
RUTGERS SCHOOL OF LAW
Constitutional Litigation Clinic
15 Washington Street
Newark, New Jersey 07102-3192

RE: Urban League v. Carteret
Our File No. 10004

Dear Ms. Stark:

I am in receipt of your March 4, 1986 letter. I did not characterize the Board's approval of site 80 as an error. However, the approval was given because the Board was not aware that site 80 was in the Mount Laurel inventory.

Your letter also indicates that you understand that a Mount Laurel set aside will be assured for this site in accordance with the judgment. That is not entirely accurate since the Mount Laurel III decision is controlling over Judge Serpentelli's judgment. Of course, the Piscataway Township Zoning Board of Adjustment will comply in all respects with the Supreme Court Mount Laurel III decision.

Very truly yours,

JAMES F. CLARKIN III

JFC/klh
CC: Phillip L. Paley, Esq.
CC: Chris Nelson, Esq.

Exhibit B