U.L v. Coterct, Cranbury 1985

-Reading Notes on Cranbury's Brief

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READING NOTES ON CRANBURY'S BRIEF

p.4, line 10: The alternate relief is nothing more than an interlocutory appeal. Trundle out the arguments used in the Piscataway brief.

p.4 bottom: No basis in fact for thinking that the legislature will adopt legislation. The whole history of Mount Laurel litigation has demonstrated the unfairness of waiting for the legislature. Is it not as likely that the legislature will back off its efforts to compromise if the court shoulders the task of gutting its own decision?

pp 6-7: The SDGP changes were fully tried last May. This is another attempt at interlocutory appeal.

p7, line 12: Assuming that 4:1 builder's remedy is used. The judge has not yet awarded any builder's remedies and has expressed some significant concern about doing so. In 6 months of remedial deliberations, the town never seriously addressed alternate ways of achieving its fair share. Creative financing mechanisms. MALLACH AFFIDAVIT.

p.8, line 3: Accuses courts of focussing only on mechanistic fair share and prospective need obligation. But those are the first steps, not the last steps. Once the numbers are determined, lots of ways to deal with the remedy, if a town wants to do so. Maybe emphasize the variety of solutions that the Urban League agreed to in other towns. Note the implicit disapproval of the concept of Mount Laurel, even tho they say that don't object to the constitutional basis. They implicitly dispute prospective need (eg need other than in their town) and the importance of a numerical solution. MALLACH AFFIDAVIT.

p.10, line 7: Over a short period of time. Ignores the generally conceded need to stage, where there are serious infrastructure and size problems.

p.10, line 15: Burchell affidavit. The AMG formula has nothing to do with the 4:1 builder's remedy. It establishes a fair share number which can be met in a number of different ways, depending upon the community's preferences and resources. If a community want to avoid overbuilding, it has ways of doing so. MALLACH AFFIDAVIT.

p.11: Water. Present system may be inadequate but that is not the point. Mount Laurel anticipates that infrastructure will have to be built and its lack may not in and of itself be set up as a reason to deny growth. Otherwise, the municipality's defense is circular. However, if physical limitations preclude realistic expansion of the system (eg, inadequacy of the acquifer and no alternatives) Mount Laurel doctrine is adequate to recognize this defense. The problem is that the towns don't want to bother making the proofs, which they can't prevail on very often. They want to rely on hypothetical parades of horribles. MALLACH AFFIDAVIT.

p.12: Sewers. Note that Cranbury's sewer does have excess capacity equal to more than the present size of the community (900 vs 750 homes). That suggests that the township anticipated significant growth and what it objects to is Mount Laurel growth. MALLACH AFFIDAVIT.

p.13: Schools. For decades, it has been the law of NJ that school costs cannot justify exclusion. Moreover, the town's argument ignores the fact that the very growth it seeks to avoid will bring in large residential ratables and large numbers of taxpaying citizens to bear those costs. There is something pathetic in Cranbury's old-fashioned "us-and-them" approach to local control. Also, the school costs have not yet been subject to any kind of adversarial proofs. Mayor Danser's aff. is not very compelling on this point. MALLACH AFFIDAVIT.

p.14: Traffic. The argument is circular and self-serving. Growth generates traffic. If proof of increased traffic can justify avoidance of Mount Laurel, then there will never be any Mount Laurel progress. MALLACH AFFIDAVIT.

p.15: Environment. Above all, Mount Laurel recognizes the legitimacy of the environmental defense. Cranbury has designed its compliance submission around this premise and the master is about to report his evaluation of it. Thereafter, the Court will hear plenary testimony on compliance and render a decision on the environmental issue. Development can be adapted to environmental concerns through buffering, site planning, etc. The issue is prematurely raised. (Interlocutory appeals point). MALLACH AFFIDAVIT.

p.16: Litigation. Frivolous appeals like this one drive up litigation costs for all the parties. Can't have it both ways -- Cranbury could have complied with virtually no litigation costs, at a lower fair share number, and possibly without any builders, leaving it maximum flexibility. It can't be heard now to cast off on the Urban League (and its volunteer attorneys) the costs of its stonewalling strategy.

p.17, line 12: uncertainty and confusion. What uncertainty and confusion. Mount Laurel sets up a clear constitutional obligation. AMG sets up a clear, calculable methodology. The SDGP sets up clear growth lines. Cranbury got to draft its own compliance plan, which is both clear and unambiguous. Cranbury doesn't like what it has got, but what it has got is neither unclear nor confusing.

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p.18, line 10: Brief makes much of Mount Laurel's invitation to come back with revisions based on experience. Fine, but court also said no interlocutory appeals, and for good reason. What the court intended was the obvious -- that as the cases percolated up in the ordinary course, the court was willing to consider the problems realistically. Cranbury labors to demonstrate the obvious -- that the court did not intend to lock itself ritualistically into a doctrine that could not evolve with the circumstances shown. Otherwise the injunction not to allow interlocutory appeals would be meaningless.

p.20. Have student team run these cases to see if any surprises. Note that the interlocutory appeal language in Mount Laurel is probably sufficient to distinguish them all. Mount Laurel intended etc.

p.20, line 12: exigent circumstances. In our affidavit, show why no exigent circumstances here, since Cranbury will have full rights of hearing and appeal before anything is done to its detriment.

p.21, line 7: an incredible paragraph. Characterize it as such in our brief. "Curbing" the courts, before they "skew" the legislative role. What is this nonsense?? Nothing the trial court has done in this case in any way limits the legislature in fulfilling the role it has for too long abdicated. (This may be the place to site my Mount Laurel I article on using the courts to stimulate legislative action.)

p.21, line 13: judicial economy. Mount Laurel takes care of this -- judicial economy in having whole cases before it. This rule based in part on the unhappy experience under Mount Laurel I, where interlocutory appeals slowed the process to a snail's pace. (We might even note Oakwood at Madison and included our recent filing against them which shows that nothing has been built yet). Note: this may be a potential sticking point for us, because it can be argued (better than they have done thus far in the brief) that enough of the "big issues" have been decided that the Supreme Court should either validate them or say no. If the AMG methodology is seriously wrong, for instance, it doesn't make sense to go on using it in more and more cases. After the Supremes invalidated, for instance, would all the cases have to be redone, or would some labor under a "law of the case" judgment that other towns don't have to bear.

p.21, lines 21-22: Cranbury has five Mount Laurel plaintiffs arrayed against it, but they are consolidated in one litigation. It would hardly be in Cranbury's financial interest to have five separate suits.

p.22, line 4: failure of developers to submit rudimentary development plans. Plaintiffs believe, and the trial court has ruled, that no more than a bona fide offer to build Mount Laurel housing is required at this point. The court has also made it abundantly clear that any remedy awarded will be conditioned on timely completion of the proffered housing. Cranbury's objections to these rulings were the subject of extensive briefing and oral argument before Judge Srpentelli on May **, 1984, and Cranbury has adequately preserved its right of appeal on these points. Even if the rulings below are incorrect, they obviously can be corrected on appeal before any action adverse to Cranbury's interest is taken. Indeed, if anyone's interest is affected by the present posture of an issue such as this, it is the builder's, who have participated fully and at some expense in the trial, and who would be chagrined to learn only on appeal that they were barred from a builder's remedy because of the lack of detail in their initial submissions to the town and court. Note also that considerably more detailed submissions have been supplied by some of the developers during the remedial hearings. Cranbury's actual plan rezones without regard to these, since Garfield, the only rezoned plaintiff, has submitted none, nor have the non-plaintiff landowners who were actually rezoned.

p.22, footnote 12: an incorrect reading of the Franklin Township opinion. For good reason, the Court gave some importance to the first early filing, but thereafter, the Franklin procedure places great emphasis on site suitability, and is intended to discourage additional suits by landowners in poor location,

since they have lesser prospects of success. Moreover, note the "immunity" provisions described in the case that seek to limit builder suits to one or none if the town is willing to implement Mount Laurel promptly. (Note also that the Court in Franklin was well aware of the builder remedy problem in Cranbury and that the Franklin result is largely consistent with the position suggested by the Urban League in a brief requesting that the Court rule on the builder's remedy issues in Cranbury a year ago.)

p.26, line 20: No right without a remedy. Cranbury seems to assume that it has a "right" to avoid its Mount Laurel obligation, although it piously mouths fidelity to the underlying constitutional rule. What rights it has are in issue in this case, will eventually be resolved, and will then be tested on appeal.

On the subject of rights, by the way, make the point somewhere that Cranbury is not the sole determiner of its contribution to regional housing policy. The whole point of Mount Laurel is that the regional problem requires a regional solution that transcends municipal parochialism and self interest.

p.26, line 24: unavailability of interlocutory appeal. The brief shuffles labels like the least sophisticated law student. This is an interlocutory appeal, and the court's jurisdiction to hear it (or discretion to hear it) is determined by the considerations the court articulated in Mount Laurel for interim relief. Why don't the movants confront that issue directly (because, in fact, they have no compelling case for interlocutory appeal).

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p.28, Point IIA: This argument is beside the point. The lesson of Mount Laurel I is that the Court cannot rely on legislative action to implement the constitutional holdings of that case. That is what happened between Mount Laurel I and Mount Laurel II and that is what Mount Laurel II is intended to prevent. Nothing that the trial court has done or is doing in this case prevents the legislature from acting when and if it can devise a program to its liking. As to the possible lapse of the SDGP as of 1/1/85, it is probably law of the case insofar as this litigation is concerned; at any rate, we do not understand Cranbury to be suggesting that its obligation ought to be recomputed on the basis of Mount Laurel I's "developing municipality" standard, which the Court in Mount Laurel II indicated would be the alternative.

p.29, Point IIB: nothing in this to respond to. BS

p.30, Point IIC: Bills introduced are no guarantee of legislation enacted. The "delicate negotiations" referred to as much signal the legislation's unpredictability and difficulty as it's "imminence." The argument is without merit.

p.31, Point IID: distinguish the reapportionment cases after reading them.

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p.33, Point III: a rehash of the issues raised and noted in the statement of facts.

p.34, line 4: it is true that litigation expenses mount, and that this court was concerned to limit them in Mount Laurel II by articulating a clear and workable set of rules that could easily be complied with. The experience in this case has shown that Mount Laurel II can be implemented readily; the expense of litigation that Cranbury repeatedly complains of is the expense of fighting losing, rear guard actions against a constitutional precept that it professes to support (see this brief, p.**) but which it repeatedly seeks to gut by quixotic non-compliance. Cranbury should not be heard to complain of its self-created obstinancy. The instant motion, for instance, is wholly without merit and little more than a public relations stunt, yet it took Cranbury months to prepare see Evans' affidavit) and now is diverting respondents (including the Urban League's volunteer attorneys) on an emergent basis to respond, rather than delaing with the useful business ahead, such as preparing for the Cranbury compliance hearing.

p.34, bottom: Switz case. Tax appeals are a little bit different on a scale of values from basic housing needs (our clients would love to have a house as to which they could mount a tax appeal!). And in Switz, the Court was dealing with a new problem, which it thought should fairly be given to the legislature to deal with. THe legislature did. (Someone needs to run this research). Here, the Court tried deference in 1975, and it didn't work. That is the whole point of Mount Laurel II.

p.35, bottom: Jackman (reapportionment). Don't know the facts. The "last resort" language described the position this Court found itself in in 1983 in Mount Laurel II.

p.36: ditto with the other cases cited.

p.37, line 11: ML has not halted sound land use planning. On the contrary, the suits have stimulated both local and state-level thinking about land use concerns that clearly would not have taken place without the litigation. To halt now would be to send a signal that the court is retreating the a Mount Laurel I posture, and that would be a white flag of surrender. MALLACH AFFIDAVIT

P.37, Line 13: brief implicitly equates ML remedy with 4:1 formula. Lots of other ways of doing it. Cranbury itself has proposed some senior citizen housing as a way of reducing the overbuilding. MALLACH AFFIDAVIT.

p.37, bottom: read Salorio. No one doubts the flexibility of equitable remedies. This is not an appropriate instance to stay the court's hand, however.

p.39, Point IV: Reconsider SDGP. The facts don't match the chaos that Cranbury sees. Consider O'Hagan affidavit, p.71a, cited at brief p.41. Colts Neck has a small designated growth area and the brief says it is mandated to have "massive expansion." Yet the trial court found, using the AMG methodology, that its fair share was only 200 units, of which some (does Alan know how many) are indigenous. The builder's contention was 2000 fair share, and the court has not yet ruled on whether the builder's remedy will be awarded. MALLACH AFFIDAVIT? Colt's Neck suggests not chaos but a carefully worked out process that is producing results that are not manifestly unfair.

p.43, line 12: rudimentary development plans. This is an open issue, although Urban League agrees with the Court that detailed plans not required at this stage. It is clear that no builder will obtain relief unless satisfactory ML units are constructed. No builder will endure the expense of litigation without being willing to make this commitment. Hence, a bare allegation of the ML units should be sufficient at this time. Moreover, more specific proposals have been presented at the master's hearings. As noted before, the township is trying to appeal interlocutorily an issue that can legitimately be raised when the final order issues.

p.43, line 29: Costonis affidavit. Professor Costonis' law-review-in-affidavit-form misstates the issue relied on in the brief. The infrastructure costs attending on new development will be borne by all the people, new and old, in the community, and the tax base will grow with the services demanded. It is rather antique to be setting "old" residents and "new" residents up as separate categories of political interests. That is what Mount Laurel II tries to get away from.

Can I give an affidavit as a planning scholar refuting his arguments? To answer the legitimacy point, I see Mount Laurel II as a necessary catalyst to public action, and that is just what is happening now. Moreover, we can cite lots of positive evidence that Mount Laurel II is working, beginning with the settlements in our case.

p.44, line 21. We agree that the court should give guidance, but within the framework of the interlocutory appeal rule announced in Mount Laurel II.

p.44, line 24: Mount Laurel II recognized the profit motivation; the trial courts are merely implementing the logic of the case.

p.45: The urban consequence. First, this is irrelevant to the Cranbury case. Long Branch is not before the Court and there is absolutely no factual record from which any conclusions can be drawn as to Long Branch's situation. It is inappropriate to raise this issue in an amicus posture. Second, Long Branch is in a growth area (all urban centers are) and it has a constitutional obligation to do its fair share. Thus, when Long Branch is attractive to builders, it is open to argument that such building must be accompanied by a set aside for low and moderate income housing. It is sheer nonsense, however, to suggest that Long Branch is unattractive to builders only because of the siren song of Mount Laurel building in the suburbs. Mount Laurel II may be an inadequate approach to urban housing problems, because the market mechanisms it harnesses do not favor the cities, but this is no reason not to use the Mount Laurel mechanisms where they do work.

p.46, line 23: Badly managed. The Trial Judge has shown great skill in managing the case, and, as we will argue, has shown great sensitivity to the interests of all the parties, including Cranbury's. Cranbury dislikes the result of the process, but one has only to look at the amount that has been decided over the last year to understand how effectively Mount Laurel is being administered.

p.46 line 24. Paradoxically. There is no paradox at all. The court has repeated invited legislative solutions, but it eventually became clear that the legislature would not act so long as the Court withheld effective remedies. Mount Laurel II creates effective remedies, and this has stimulated

legislative re-action. In the long run, this interplay between court and legislature may prove to be the most significant achievement of the Mount Laurel process.

put in FISC draft

BK:

1. Creative alternatives
2. Sewer/water
   new vs old

~~3.~~

SDGP – prior to 1/1/95
*welcome revision / vacant land
of land challenge

legislation – counter productive
keep pressure on legisl