

UL v. Cestret (Cranbury) 2/4 (1985)
Letter updating status of Cranbury litigation

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School of Law-Newark • Constitutional Litigation Clinic
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February 4, 1985

Jeffrey Shanaberger, Esq.
93 Bayard Street
New Brunswick, New Jersey 08903

Re: Urban League v. Carteret, Civ C 4122-73

Dear Mr. Shanaberger:

We write, per your request to Bruce Gelber, to update you on the status of the Cranbury litigation.

In late December, the Township submitted to Judge Serpentelli its compliance plan. The main features of this very large document are: (1) that it proposes to restrict development, as does the Township's Master Plan, to the portion east of Route 130 (between Route 130 and the Turnpike); and (2) that it seeks to phase in the development of the approximately 4000 units required to meet the Mount Laurel fair share over a period of either 18 or 24 years. Feature (1) means that two of the three builders who participated at trial (Zirinsky and Cranbury Land Co.) and the builder who sued just as trial began (Toll Brothers) would be precluded from developing their land. Only the site of Garfield and Co., the first builder to sue, is within the Mount Laurel development zone proposed by the Township. The Master, Philip Caton, will report on the Cranbury compliance plan soon -- probably within 3 weeks, although the Court has not yet set a specific deadline. At some point thereafter, clearly not before March, the Court will schedule an evidentiary hearing on the compliance plan.

At the hearing, the key issues will be whether the three builder-plaintiffs who participated at trial are entitled to a builder's remedy, and how much staging the Township is entitled to. With regard to the former, it is clear that the only question is whether the sites of Cranbury Land and Zirinsky can be shown by the town (which clearly has the burden of proof) to be contrary to "sound land use planning" or unsuitable because of "significant environmental or other planning considerations." Nothing in the Mount Laurel opinion or subsequent decisions gives guidance as to the meaning of those standards, and thus this will be the first case to define those crucial terms. With regard to staging, the questions will be how long a period is justified when a small town, that has assiduously avoided growth in the past, is called upon to absorb a 5-fold increase in housing and provide the necessary infrastructure, and, on the other hand, what limits on staging are

necessary to maintain the viability of the builder's remedy and the realistic incentive to build low and moderate income housing, given a builder's large carrying costs.

The Urban League's position has been that builders who participated in the trial leading to invalidation of the ordinance and establishment of the fair share should have a builder's remedy, as a matter of law, unless their site is clearly unsuitable, not just less suitable than others preferred by the town even on an entirely rational planning basis. This means we believe Toll Brothers is not entitled regardless of suitability. We recognize, however, that the Cranbury Land site, if fully developed, would threaten to create significant development pressures in the midst of the farm preservation area. Thus, we feel the Court could/should trim the project down to minimize that risk, while preserving the builder's remedy. Alan Mallach is prepared to testify on how this could be accomplished.

As for staging, we believe that some extension beyond the 5 years remaining in the 6-year fair share period is reasonable, but that 18-24 years is way out of line. Specifically, Alan Mallach believes that all builders entitled to a remedy should be allowed to start construction at the same time (rather than one building out before the others start, as the Township has proposed) and that each builder must be allowed to construct each year a minimal number, probably in the area of 200 units, to permit efficient construction. However, any land not subject to a builder's remedy could be precluded from starting until the others were completed. Under his calculations, this approach would lead to approximately an 11-year construction cycle, with an additional start-up year. Again, this would be the first case to address this crucial and no doubt recurring issue.

Two builders, Garfield and Cranbury Land, have recently moved for summary judgment on their entitlement to a remedy. Although Garfield might be entitled to such a ruling, Cranbury Land clearly is not, because the Township will sharply contest its suitability for any construction. In any case, the judge will have to understand in detail the density, scope, and nature of each development to resolve the staging issue.

Because of the intense interest of the affected developers, each of whom has experienced and competent counsel, we do not believe that the public interest requires major Urban League plaintiff involvement in all details of the evidentiary hearing. We are primarily concerned with the legal issue of entitlement, the scope of authority for a Township or court to modify a builder's remedy to accommodate legitimate planning concerns, and with defining staging to insure a realistic opportunity that developers will remain interested and actually build. Alan Mallach, our planning expert, who would be our only witness at this hearing, is fully conversant with the legal and planning issues in Cranbury and is a wonderfully easy witness to prepare and work with. We suspect that the only major cross-examination Urban League plaintiffs may wish to consider is of the Township's planning expert, on the issues of suitability of Zirinsky and Cranbury Land, and of the considerations relative to staging.

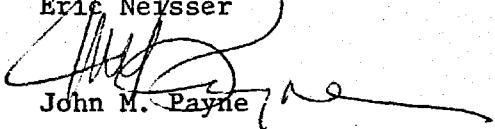
At the earliest, the hearing would commence sometime in March, although we are quite confident that the judge would afford us a small extension of any initial date, if necessary, as in the past we have never sought to delay a hearing.

We are hopeful that your schedule would permit you to assist the Urban League in the conduct of this hearing. We recognize that any daytime trial involvement would be more difficult for you but believe that this problem can be alleviated in two ways. First, we anticipate that the students presently assigned to our Cranbury team could assist in preparing a trial brief on the key issues. Second, Alan Mallach certainly could make himself available on an evening or over a weekend for final evidentiary preparation.

We look forward to hearing from you about your availability and thank you in advance for your consideration of our request.

Sincerely yours,


Eric Neisser


John M. Payne