UL. v. Carteret, Cranbury 12/11 (1985)

Reply Letter Brief responding to issues raised by UL

10 pgs

CA000316B
316

HUFF, MORAN & BALINT
COUNSELLORS AT LAW
CRANBURY-SOUTH RIVER ROAD
CRANBURY, NEW JERSEY 08512

J. SCHUYLER HUFF
WILLIAM C. MORAN, JR.
MICHAEL P. BALINT

DAVID E. ORRON

TELEPHONE
(609) 655-3600

December 11, 1985

Supreme Court of New Jersey
Hughes Justice Complex
CN-970
Trenton, New Jersey 08625

Attention: Stephen W. Townsend, Clerk

Re: Urban League of Greater New Brunswick vs. Carteret and Consolidated Cases

Dear Mr. Townsend:

I am writing this Reply Letter Brief pursuant to R. 2:6-2(b) in lieu of a more formal Brief. The purpose of this Brief is to respond to certain issues which have been raised in the Briefs submitted by the Urban League of Greater New Brunswick (now Civic League) and other parties plaintiff to this litigation. There is no change in the Statement of Facts and Procedural History which have been submitted prior hereto.

ARGUMENT

POINT I

CRANBURY TOWNSHIP AGREES IN SUBSTANCE WITH THE POSITION TAKEN BY PLAINTIFF URBAN LEAGUE WITH REFERENCE TO THE TRANSFERABILITY OF CRANBURY'S CASE TO THE AFFORDABLE HOUSING COUNCIL.

On page 98 of its Brief, Plaintiff Urban League makes the following point:

> As the Urban League respondents have demonstrated, the Act permits and the Constitution compels careful definition by this Court of the circumstances that might eliminate the manifest injustice of transferring older cases in which substantive determinations have been made and only compliance issues remain. First, if there are to be any transfers, they must be conditioned upon use of the techniques discussed in Point II to minimize the consequences of delay. Equally important, however, this Court must also construe the Act to remove its constitutional impediments, as discussed in Points III and IV.
>
> If all of these conclusions are reached, then the motion of Cranbury Township could be granted without either manifest injustice of constitutional infirmity.

The techniques referred to in Point II are essentially a two-part test with alternatives for the second part of the technique. The first part involves the conditioning of transfer upon recognition of the law of the case and collateral estoppel in any administrative proceedings before the Affordable Housing Council. Cranbury Township has no objection to this, provided however, that this is not construed to bar the Affordable Housing Council from making adjustments to Cranbury Township's fair share number as required by N.J.S.A. 52:27D-307C. It is submitted that even though Judge Serpentelli has already fixed a fair share number for Cranbury Township of 816 units, that that number is not yet the final law of the case. This position is supported by Judge Serpentelli, himself, who

at the oral argument on the Motion to Transfer on October 2, 1985 made the following comments :

> "Can the Court deal with preservation of historically important or important historically -- that looks like a typographical error, that's what it says -- hystorically or important architecture and sites?
>
> One of the pricipal issues in the Cranbury case is just that. And one of the principal reasons that the Court made a site inspection was just that. And it's one of the principal areas of the master's review, and I think one of the principal reasons why he has recommended a dramatic reduction in their obligation in terms of phasing.
>
> And I don't want to go down the whole list. There's too much to talk about. But what I am suggesting is that I don't believe that there's anything of a planning or -- planning nature that the Court cannot fairly accomplish presently, if that is given as the principal reason for transferring to the Council". (T) October 12, 1985 p. 12-1 to 20

This position of Cranbury is further borne out by the dialogue between the Judge and Council for the Township on that same date as follows :

> "And with specific reference to Cranbury, the Council on Affordable Housing has been directed to take into account in determining a fair share number questions such as farm land preservation and questions such as historic preservation.
>
> I realize the Court, in its comments this morning, indicated that there was nothing to stop the Court from dealing with that. But in reference to Cranbury, the Court specifically said not that they were going to adjust Cranbury's fair share number, which is the language used in the statute,

but they were going to deal with the problem perhaps through the phasing device which has been recommended by the master. There is a big difference.

THE COURT: There may be a big difference; there may not be.

MR. MORAN: Well --

THE COURT: If the Court finds that because of historical preservation or whatever, Cranbury can't absorb more than 200 units a decade for the next three decades, then your fair share's 200 units a year -- per decade. Doesn't make any difference what your true fair share is.

MR. MORAN: Well, that may very well be, Your Honor, depending on how things come out at this point. I don't think Cranbury's in a position to know how they will come out. At the moment, the only number they see is 816.

THE COURT: Well, they see a number by Mr. Caton that says -- I don't have his report in front of me, but my recollection, two hundred and some, for up to nineteen ninety-four. Isn't that about the number?

MR. MORAN: Just under three hundred, I believe.

THE COURT: Yeah, two eighty-seven, I think. And so that's -- hmm? That's a fair share obligation for fourteen years of 287 units.

MR. MORAN: That's by tracing it back to --

THE COURT: Where it's all calculated from 1980 to 1984.

MR. MORAN: The point that I am trying to make, though, is that at this point, it's still problematic whether or not that will or will not be the result in this case, whereas on a transfer motion, at least the Township has the assurance that the Council on Affordable Housing will be required to make an adjustment if it's -- if it determines that the fair share that it finally comes up with would be likely to impair historic preservation or impair the municipality's ability to preserve adequate

amounts of farm land preservation.

THE COURT: Aren't I obligated to do that under Mount Laurel II?

MR. MORAN: Historic preservation isn't mentioned at all in Mount Laurel II.

THE COURT: Well, I would think environmental considerations and planning includes historic preservation. I would so find, if you would like me to do that. I have always perceived it to be my obligation under Mount Laurel II to take that into account.

MR. MORAN: Taking it into account is different than making an adjustment in the number. I realize that you think that phasing has the same result, but I'm not satisfied yet that it does". [T] October 2, 1985 p. 83-3 to p. 85-17

The second point made by Urban League as a condition for transfer of Cranbury's case is expedited mediation and review for cases at the compliance stage. Cranbury Township has no objection to such a process, and in fact, welcomes expedited treatment so this matter can finally be brought to a conclusion. In this regard the Compliance Package submitted by the Township to the Court, approximately one (1) year ago, could form the basis for the housing element to be submitted by the Township to the Affordable Housing Council so that the lion's share of the work in that regard has already been accomplished.

Plaintiff Urban League also sets forth three standards regarding the interpretation of the Fair Housing Act so that it can meet constitutional tests which the Urban League has posited. The first of these three tests would require an interpretation of the Act to permit the Housing Council to award a builder's remedy, because otherwise there would be no incentive to seek substantive certification. As to the general question of the

builder's remedy, see Point II infra.

The second test is that the Act must be construed to permit either the Court or the Council to enter interim restraints to preserve status quo, in cases of limited infrastructure or developable land. Cranbury Township has no objection to this standard and in fact, asserts that the Courts probably already have jurisdiction to enter such Orders, even in cases pending before the Council, in order to satisfy a constitutional obligation.

The third test set up by the Urban League is a limiting constuction to the credits allowed for existing affordable housing under N.J.S.A. 52:27D-307(c)(1). The purpose of the credit is clear; it rewards towns that have already taken substantial steps to alleviate the problem of the shortage of low and moderate income housing. Existing formulas adopted by the Courts do not take into account prior good efforts of any given municipality, and in effect the municipality gets no benefit from those prior efforts. The same statutory section also requires adjustments for a variety of purposes, one of which is the lack of availability of vacant and developable land in the municipality. Judge Serpentelli, in developing the consensus methodology which was eventually used in his unreported opinion in AMG Realty Co. v. Warren Tp. (Law Div. 1984), made just such an adjustment. The way the adjustment was made was to add a factor, in that case 20% to the total regional need for low and moderate income housing. That factor was added to take

into account the fact that some towns might not have sufficient developable land in order to accommodate their full fair share. In order that the entire regional fair share be accommodated, the total regional fair share was adjusted upward by 20%. This permitted the Trial Court to make adjustments downward, in specific cases as necessary, and the Trial Court has already done that in the case of Piscataway. The same methodology can be applied on the question of credits. If we hypothesize a regional need of 100,000 units, and we further hypothesize that certain municipalities within the region would be entitled to a credit under this formula, and that the total amount of credits for existing low income housing would be 10,000 units, and that the given municipality's share of the regional need was 1%, then the formula could be expressed as a fraction as follows:

$$(a + b) \times c = d$$

a=total regional need
b=total regional credits to be allowed
c=municipality's percentage of regional need as a fraction
d=municipality's fair share allocation.

Applying that fraction to the facts under the hypothesis, it would look as follows:

$$(100{,}000 + 10{,}000) \times \frac{1}{100} = 1100$$

In other words, the given municipality's fair share number is 100, which was 100 units higher than it otherwise would be in order to take into account the credits being allowed on a regional basis for existing units of low and moderate income housing.

The same type of modification can be made to the formula for purposes of adjustment for historic preservation, agricultural preservation and the other adjustment factors set forth in N.J.S.A. 52:27D-307.

POINT II

IF CRANBURY'S CASE IS TRANSFERRED THE ISSUE OF A BUILDER'S REMEDY BECOMES MOOT.

One of the points by the Urban League in its Brief, is that the Act must be construed to permit the Affordable Housing Council to award a Builder's Remedy, because otherwise there is no incentive to seek substantive certification. If Cranbury's case is transferred to the Affordable Housing Council and if section 19 of the Act is construed to require expedited mediation and review, which Cranbury has agreed to, then the question of whether or not the Affordable Housing Council has the right to award a Builder's Remedy becomes a moot issue as far as Cranbury Township is concerned. Even the Urban League concedes that the moratorium on Builder's Remedy would be applicable to those cases which are transferred. As they said at page 91 of their Brief, "At one extreme, the moratorium is obviously unneccessary as to cases transferred to the Council, because the moratorium terminates on the deadline for submission of housing elements to the Council".

Cranbury has every incentive to seek substantive certification because it is clear and could be a condition of the approval of the transfer, that if it did not proceed

expeditiously, and delayed, the Court could have continuing jurisdiction to take the case back and impose whatever sanctions it desired and would also have the right, under any circumstances, and by any construction to impose a Builder's Remedy upon the expiration of the moratorium.

Also in Cranbury's case, there is no doubt about the fact that if any of the sites preferred by the Township in its Compliance Package are approved by the Council for development, the development would take place since the owners of all of the relevant sites expressed an intention and a willingness to sell the land for development, or develop it themselves, if given the opportunity.

CONCLUSION

Inasmuch as the Township of Cranbury is in substantial agreement with the position taken by the Urban League in their Brief, and since that position acknowledges the acceptability of a transfer to the Affordable Housing Council in Cranbury's case, it is urged that the decision of the Trial Court denying the Township's Motion to Transfer, be reversed and that transfer be permitted to occur.

Respectfully submitted,

HUFF, MORAN & BALINT
Attorneys for Defendant-
Township of Cranbury

BY: _____
WILLIAM C. MORAN, JR.
A member of the firm