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CA000795B

January 4, 1985

VIA HAND DELIVERY

Ms. Elizabeth McLaughlin
Clerk, Superior Court of New Jersey, Appellate Division
CN 006
Trenton, New Jersey 08625

Attention: Mr. Fred Moore

Re: Urban League of Greater New Brunswick v. Mayor and Council of Borough of Carteret, No. C 4122-73
AM-390-84T5
Motion: M-1563-84

Dear Mr. Moore:

I am enclosing the original and four (4) copies of plaintiff's "Brief and Appendix in Opposition to Defendants' Motion for Leave to Appeal and a Stay" in relation to the above-referenced matter.

Two (2) copies of this document are being hand delivered to counsel for the appellant today and today will be placed in the regular mail, postage prepaid, to the individuals listed below.

Very truly yours,

Barbara J. Williams
Attorney for Plaintiff

encls

cc/The Hon. Eugene D. Serpentelli, J.S.C.
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: AM-390-84T5
Motion No.: M-1563-84

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiff/Appellee,

vs.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,

Defendant/Appellant.

Sat below:
Hon. Eugene D. Serpentelli

BRIEF AND APPENDIX IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL AN INTERLOCUTORY ORDER AND STAY ENFORCEMENT PENDING APPEAL

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*The Defendant/Appellant, Township of Piscataway, has utilized in its Appendix the nomenclature "Pa" to label its various documents. In order to avoid confusion and distinguish the documents included in the Appendix of the Urban League, Plaintiff below, the "Da" label is used in this brief.

TABLE OF CITATIONS

STATEMENT OF FACTS AND PROCEDURAL HISTORY

a. Initial proceedings in the Urban League case: This Mount Laurel action was brought in 1974, the year before Mount Laurel I was decided by the Supreme Court. The case, originally naming the Township of Piscataway among twenty-three municipal defendants in Middlesex County, was tried fully by Judge Furman in 1976 and resulted in a finding that the land use ordinances of Piscataway and other defendants unconstitutionally denied opportunity for the construction of low and moderate income housing. Urban League of Greater New Brunswick v. Borough of Carteret, 142 N.J. Super. 11 (Ch. Div. 1976).

In 1979 the Appellate Division reversed, 170 N.J. Super. 461, 475 (App. Div. 1979), concluding that the trial court's method for determining the relevant housing region did not comport with the language of the Supreme Court's subsequent opinion in Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977). Upon further appeal to the Supreme Court, the case was consolidated with five other appeals raising Mount Laurel issues and, after extensive consideration in the Supreme Court, was decided as part of the Mount Laurel II decision in January 1983. See Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983)(Mount Laurel II).

As to Piscataway and the other Middlesex County defendants, the Supreme Court specifically approved Judge Furman's finding of unconstitutionality, "for that has already been amply demonstrated," 92 N.J. at 350. The Urban League case was remanded solely for redetermination of region and fair share as those concepts were explicated by Mount Laurel II, and for judicially supervised revision of the ordinances. Id. at 350-51.

b. The Urban League remand: Nine years after filing suit and seven years after first winning on the issue of unconstitutionality, the Urban League returned to the trial court to pursue its remedy. Of the nine municipalities that remained in the litigation at the time of the remedial remand in 1983, the Urban League was able to reach negotiated, court-approved dispositions with respect to six of them prior to the retrial, resulting in an aggregate fair share provision of 8803 units through 1990. Piscataway Township (along with Cranbury and Monroe Townships) did not settle and a plenary methodology trial was conducted by Judge Serpentelli on eighteen trial days in May and June, 1984, covering issues of region, fair share, and compliance.

The major doctrinal result of this trial was the so-called AMG/Urban League methodology, by which housing region, regional need, and fair share allocations can be numerically determined. This methodology was developed under a court-

approved procedure by the court's separate expert in the Urban League case, Carla Lerman, who consulted extensively with the individual retained experts in this case and in AMG Realty Company, et al. v. Township of Warren et al. (unreported), Docket Nos. L-23277-80PW, L-67820-80PW (L.Div., July 16, 1984)[Da 1-5], another Mount Laurel action which was then pending before Judge Serpentelli. The methodology was first adopted in the AMG opinion, which is as yet unreported, and was thereafter applied to Cranbury and Monroe Townships in an unreported letter opinion dated July 27, 1984. The Court found both townships in non-compliance and appointed a master to assist each in the revision of its ordinances, by an order entered on August 13, 1984 (Da 6-13). Their aggregate fair share was found to be an additional 1590 units, bringing the Urban League total to 10,393 units. The initial revision process was completed in Cranbury on December 21, 1984, and is due to be completed in Monroe in late January, 1985.

Thus, eleven years and twenty-two defendants later, Piscataway Township remains the only defendant in the Urban League case with neither a constitutionally acceptable ordinance nor an ordinance revision process underway. At trial, moreover, the Township's planner essentially conceded that Piscataway's present ordinance does not meet Mount Laurel standards. Relying on a voluntary density bonus approach, it provides for no more than 462 units of low and

moderate income housing, and it contains neither mandatory set asides nor price and occupancy controls. If the AMG/Urban League methodology were applied, Piscataway's fair share obligation works out to 3806 low and moderate income units. This is by far the largest fair share obligation of the nine municipalities involved in this litigation, and results principally from Piscataway's explosive business and commercial growth along the I-287 corridor in recent years.

Piscataway's anomalous position in having delayed its remedial obligation longer than any other defendant municipality arises from its success as an office building center. So much of Piscataway's vacant land has been used without regard to regional housing need in recent years that the Township has raised as its principal defense that there is insufficient suitable land left to meet a fair share obligation of 3806 units. Recognizing this problem, the Trial Court decided not to enter judgment as to Piscataway when the joint trial with Cranbury and Monroe was concluded, but instead directed the court-appointed expert, Carla Lerman, to "assist the Court in determining the amount of available acres and specific sites in Piscataway Township which are suitable for development of Mount Laurel housing and the appropriate densities for development of each such site." [Da 15:1-10] The Court has indicated that after submission of Ms. Lerman's report and consideration of any objections thereto, it would

consider adjusting the numerical fair share in light of the amount of land realistically available. [Da 15:40]

Ms. Lerman submitted a preliminary report to the Court on July 12, 1984, [Da 17-25] but was not able to submit a final report until November 10, 1984, [Da 26-52] because of difficulty in obtaining necessary information relevant to densities from township officials. She has recommended as suitable approximately half of the sites suggested by the Urban League; the Urban League has noted to the Court its continued belief that four additional sites are appropriate, and Piscataway has noted its objections to all of the recommended sites. The Court has scheduled a hearing on these objections for January 16, 1985 [Da 53], at the conclusion of which the Urban League's case against Piscataway can be submitted for judgment on issues of fair share and compliance. (By letter dated December 21, 1985, received by counsel for the Urban League on January 2, 1985 [Da 54-56], Piscataway has asked for a substantial delay in the date of this hearing. The Urban League will in due course oppose this request.)

c. The temporary restraints. Despite Piscataway's clear Mount Laurel obligation and its reliance on the defense of insufficient land, it has continued to entertain commercial development proposals for sites that could be used for low and moderate income housing. In May, 1984, when three such proposals came to the attention of then Urban League during

the trial of this action, it sought and obtained temporary restraints against Planning Board approval, because the sites were deemed suitable for low and moderate income housing by the Urban League's housing consultant, Alan Mallach. [Da 57-60] But for this action, vested rights for non-Mount Laurel use could have been created on each of these three sites, totaling 84 acres.

The Court's Order, converted into a preliminary injunction after further hearing on June 26, 1984, permitted Planning Board processing of the three subdivision applications, but provided that no rights would vest as against the Urban League's Mount Laurel claims pending the outcome of the trial. The Court also required that the Urban League be given continuing notice of proposed development actions so that it could seek further restraints it necessary. Da 14-16]

Application for further restraints did become necessary in September and November, 1984. By an order entered on September 11, 1984 [Da 61-62] an additional tract, whose potential development status had not been disclosed previously to the Urban League, was made subject to the May and June restraints. The restraint as to this site was dissolved by order of the Court dated November 5, 1984, after Ms. Lerman inspected the parcel and the Urban League accepted her conclusion that it would not be practical to develop it for

Mount Laurel purposes. [Da 63] In November, upon learning that several additional proposals were pending, these involving sites on Ms. Lerman's list of suitable locations, the Urban League sought and obtained general restraints as to any site deemed suitable for Mount Laurel housing in Ms. Lerman's final, November 11 report. It is this Order, signed by Judge Serpentelli on December 11, 1984 [Da 32-34], which Piscataway seeks to bring before the Court on interlocutory appeal.

The December 11 Order was carefully tailored to the objective of preserving the status quo until the Trial Court could finally rule on the fair share and compliance issues in Piscataway. Development applications can continue to be processed, subject to the no-vesting procision included in the previous orders; applications containing a 20% set aside for low and moderate income housing can be given final approval; and any landowner aggrieved by the restraint can move on short notice to have it lifted as to his property. The requirement of Court approval of any building permit (probably moot in any event since none of these proposals is anywhere close to actual construction) was intended by Judge Serpentelli to insure that satisfactory price and occupancy controls would be in place for any development reaching the final approval stage with a Mount Laurel component, a necessary provision since Piscataway at present includes no such controls in its land use ordinances. The Order applies only to those sites found

acceptable by Ms. Lerman, about half the sites originally suggested by the Urban League, so that for any others the Urban League seeks to preserve it must make individual applications to the Court under the May and June orders. The December 11 Order will continue in force only until the hearing on Ms. Lerman's report in a few weeks.

Defendant's moving papers were received by counsel for the Urban League on December 26, 1984. By leave of Court, the Urban League was given until Friday, January 4, 1985, to respond.

POINT I

LEAVE TO APPEAL THIS INTERLOCUTORY ORDER SHOULD NOT BE GRANTED BECAUSE THE ORDER IS CAREFULLY TAILORED TO PRESERVE THE STATUS QUO AND THEREFORE DOES NOT MEET THE EXTRAORDINARY STANDARDS FOR INTERLOCUTORY APPEAL ESTABLISHED BY MOUNT LAUREL II

This is a Mount Laurel case, and the standards for interlocutory appeal are those established by Mount Laurel II, not the conventional standards noted by Piscataway in its brief at pp.3-5.

In Mount Laurel II, the Supreme Court sought to eliminate the unfairness to plaintiffs that had occurred because of the lengthy litigation delays permitted under Mount Laurel I. In particular, it held that under almost all circumstances, each Mount Laurel action should be completed through adoption of remedial ordinances, if necessary, before the underlying judgment of non-compliance with the Constitution could be tested on appeal. 92 N.J. at 285. The Court recognized that some "wasted effort" might occur if the non-compliance judgment were later to be overturned, but concluded that there was an offsetting advantage not only in providing timely remedy for the plaintiff but also in assuring that "the appellate court will have before it everything needed to fully determine the issues." Id. at 290.

The Court did not wholly rule out interlocutory appeals, but held that they could be "taken (or attempted)" only "[i]n the most unusual circumstances." Id. at 290-91. In advising the trial courts when an interlocutory issue should be certified, it stated that the court

> "should ordinarily do so only when it entertains substantial doubts as to the correctness of its position and concludes that on balance an immediate appeal is clearly preferable to any procedures that might otherwise follow the interlocutory judgment of invalidation." Id. at 291.

From the foregoing statement of the history of this case, it should be obvious that there is no reason to entertain an interlocutory appeal at this time. The Order itself will have only a short additional life, terminating at the January 16 hearing on Ms. Lerman's report. Even in the unlikely event that the hearing is delayed somewhat, the Order could well expire before this Court is able to consider the interlocutory issue on its merits.

More than this, however, the Order itself is carefully limited in its effect and serves only to prevent harm, rather than to cause it. Because of this care, it cannot be said either that the issue presents a "most unusual circumstance" or that "on balance an immediate appeal is clearly preferable" to any other procedures. In effect, the December 11 Order merely continues the earlier system of interim restraints

developed in Judge Serpentelli's Orders of June 7 and June 26, a system that since May 7 has infringed one of Piscataway's "primary municipal functions -- the power to regulate land use" [Db 5] but which Piscataway nevertheless accepts and extols. Id. p.7.

The only significant addition in the December 11 Order is that the moving burden has been shifted from the Urban League to either the municipal defendant of the individual landowner to question the application of the interim restraint to a specific parcel of land. Relieving the Urban League of the burden of scrutinizing each Planning Board agenda, often on the eve of the scheduled meeting, to see whether a "Mount Laurel" parcel is involved, is amply justified given the township's demonstrated unwillingness to preserve the status quo voluntarily. At the same time, there is ample protection against error, both in the limitation to those parcels which have already survived the scrutiny of the Court's independent expert, Ms. Lerman, and in the procedure for lifting the restraints on short notice. The Urban League has already demonstrated its commitment to fair play by agreeing promptly to dissolving the restraint on one site that Ms. Lerman's additional information showed to be unacceptable. Finally, it should be noted that the procedures at issue here do not restrict land development rights at all, except in the sense that the Mount Laurel doctrine itself conditions those rights on compliance (at a profit) with the Constitution.

Piscataway also argues that it can meet its fair share without new construction, by taking credit for existing housing that is said to serve low and moderate income needs. The inference is that the December 11 Order is oppresive because no new construction will be necessary (although Piscataway does not explain why the May 7 and June 26 Orders, which also presume the possibility of new construction, are acceptable to it). By making this argument, Piscataway unfortunately projects this Court into matters upon which the Trial Court has not yet ruled (thereby illustrating the wisdom of the Supreme Court's preference that appeals not be taken until the Appellate Court has before it "everything needed to determine fully the issues"). The Urban League here states its position briefly on the issue of credits not to anticipate the ruling of the Trial Court, but to demonstrate that Piscataway's position is sufficiently improbable that it cannot be used as a basis for interlocutory appeal.

Piscataway's inventory of existing garden apartments, upon which it heavily relies, consists completely of units built prior to 1980, meaning that they are already incorporated into the statistical base from which additional need is calculated, and at least half rent at levels beyond the Mount Laurel affordability range. (None, it should be noted, are within the low income, as opposed to moderate income, range.) In addition, none are subject to occupancy

controls and thus are wholly excludable on that basis. Even if such controls could be successfully added at this point, a matter of some possible legal difficulty, it is wholly unrealistic to anticipate that any significant portion of the 2600 units relied upon can meet Mount Laurel standards.

Similarly, Piscataway's claim of 1200 "affordable" single family homes is based on a theory of tax valuation that was discredited at trial by plaintiffs' expert, and its reliance on Rutgers dormitory housing is incorrect since such "group quarters" housing is excluded from the census data on which the AMG/Urban League methodology is based. Indeed, if these data were included, Piscataway's fair share obligation would rise dramatically, since dormitory rooms almost invariably meet the census definition of "overcrowded," one of the major surrogates for housing need used in the methodology. The Urban League's expert conceded at trial that the 320 units of Rutgers married student housing in Piscataway should be credited towards the fair share obligation, since it is included in the census base, but this is a far cry from the 3806 unit total. The "credit" claim should have no bearing on the question of this interlocutory appeal.

Since Piscataway has demonstrated its unwillingness to voluntarily preserve the status quo pending the outcome of the main action (an outcome delayed by the Trial Judge solely to give Piscataway a fair opportunity to develop its

"insufficient land" defense), it has been necessary for the Urban League to seek the aid of the Court in doing so. This case has been in litigation for eleven years, and Piscataway was first held to have a fair share obligation nine years ago, in a ruling that the Supreme Court held two years ago to be "amply demonstrated." During those nine years, Piscataway has enjoyed the fruits of spectacular growth without taking any effective steps to deal with the housing need that its growth policy has impacted.

Piscataway, in short, stands as one of the great lost opportunities for planning that could have created a socially responsible mix of housing and jobs. It was to prevent such lost opportunities henceforth that Mount Laurel II was framed with the vigorous remedial powers that have been employed in this case by Judge Serpentelli. Indeed, if there is any "most unusual circumstance" in this case, it is that Piscataway should be attempting to give away what little land it has left while simultaneously defending the Urban League's case on the ground that it has too little land to comply. It goes without saying that its conduct has been inconsistent both with Mount Laurel II and with the "interests of justice" that its own motion sets up.

The motion should be denied.

POINT II

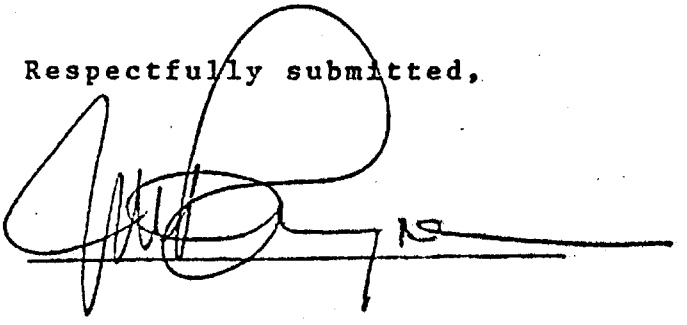
THE DECEMBER 11 ORDER SHOULD NOT BE STAYED PENDING APPEAL BECAUSE THERE IS NO EXTRAORDINARY CIRCUMSTANCE WHICH WARRANTS DOING SO

Interlocutory stays in Mount Laurel actions are to be granted only on the same "most unusual circumstances" standard as for interlocutory appeals. 92 N.J. at 290. As Point I, supra, demonstrates, there are no such extraordinary circumstances here. The December 11 Order is carefully limited to preserving the status quo, it will operate for only a short additional time, and provides for fair and speedy relief from its provisions should any land be erroneously restrained from development.

CONCLUSION

For the forgoing reasons, the motion for leave to bring an interlocutory appeal and for a stay of the December 11, 1984 Order pending appeal should be denied.

Respectfully submitted,



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