CA - General

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Plaintiff's letter to judge to provide the plaintiff's views of the significance of the Mt Laurel opinion

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NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, INC.

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April 18, 1975

The Hon. David D. Furman
P. O. Box 788
New Brunswick, New Jersey 08903

Re: Urban League of Greater New Brunswick, et al. v. The Mayor and Council of the Borough of Carteret, et al.

Dear Judge Furman:

On April 8, 1975, we requested that the Court convene a conference of all counsel in the above-captioned case to discuss the implications of the recent decision of the Supreme Court of New Jersey in Southern Burlington County NAACP v. Township of Mt. Laurel (hereinafter Mt. Laurel). On April 11, 1975, the Court granted this request and scheduled an informal conference at 1:30 P.M., Friday, April 25, 1975. The Court requested that we notify all attorneys of the scheduled conference and we have done so.

The purpose of this letter is to provide the Court and all attorneys with the views of plaintiffs of the significance of the Mt. Laurel opinion, */ both in terms of the legal principles that the Supreme Court enunciated regarding the validity of exclusionary zoning and other land use practices, and the application of those principles to the instant case. We provide these views in the hope

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*/ All references to the Mt. Laurel opinion are to the Slip Opinion.

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that, together with the views of opposing counsel, they will assist the Court and the parties in sharpening, and perhaps narrowing, the issues and thereby expediting resolution of the case.

The legal question presented to the Supreme Court in Mt. Laurel is precisely the same as that presented in the instant case. The Supreme Court framed the question as follows:

> [W]hether a developing municipality ... may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby ... exclude such people from living within its confines because of the limited extent of their income and resources. Necessarily implicated are the broader questions of the right of such municipalities to limit the kinds of available housing and of an obligation to make possible a variety and choice of types of living accommodations. Mt. Laurel at 25.

The Court immediately answered this question:

> We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do. Id. at 25-26.

The Supreme Court held that provision of adequate housing for all categories of people is an "absolute" essential in promoting the general welfare and that it is "required in all land use regulations." Id. at 34.

Thus, the Supreme Court, in Mt. Laurel, made it clear that developing municipalities have a heavy obligation to meet the housing needs of low and moderate income families and that they will be excused from satisfying that obligation only under the most extraordinary circumstances. First, municipalities not only have the negative obligation of assuring that their land use regulations do not preclude housing for low and moderate income families, but also the obligation affirmatively to provide reasonable opportunity for such housing. Second, these obligations "must" be met unless the municipalities "can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do." (emphasis added).

The Court also reaffirmed the fundamental principle enunciated by this Court in Oakwood at Madison, */ that the low and moderate income housing obligation of a municipality extends not only to families who already reside within its borders, but also to its "fair share of the present and prospective regional need." Further, the Supreme Court made it clear that a municipality's failure to meet its obligations will not be excused on grounds that its conduct is unintentional if "the effect is substantially the same as if it were." Id. at 26, n. 10. In addition, the Court, in invalidating Mt. Laurel's zoning ordinance, noted that the principles it applied were not confined to Mt. Laurel alone, but were also "guidelines for future application in other municipalities." Id. at 37.

The Supreme Court detailed the kinds of residential uses municipalities must make "realistically possible" in order to satisfy their obligation to meet the housing needs of low and moderate income families:

> It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and

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*/ Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438 (Law Div. 1974), appeal pending.

> unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply of these needs. Id. at 45-46.

Under the Court's holding, failure to provide any of these residential uses is presumptively unlawful. The Supreme Court also detailed the particular elements of Mt. Laurel's land use regulations which prevented the provision of low and moderate income housing and were thereby presumptively invalid under the state Constitution:

- Provision for only one type of housing -- single family detached dwellings. Id. at 37.

- Resulting effective prohibition of all other types -- multi-family, including garden apartments and other kinds housing more than one family, town (row) houses and mobile home parks. Id.

- Restrictions on number of families having school-age children.

  -- restrictions on number of apartments having more than one bedroom. Id. at 39.

  -- financial penalties imposed on developers for exceeding permitted percentage of children per multi-family units. Id. at 17.

- Restrictive minimum lot areas, lot frontage, and building size requirements. Id. at 40.

- Zoning of unreasonable amounts of land for industrial purposes. Id. at 41.

- Requirements of low density, expensive amenities, and specified developer contributions, such as cultural centers and township libraries, which increase rents and sales prices to high levels. Id. at 18.

Applying these principles to the instant case, if plaintiffs prove that the defendant municipalities maintain any of these land use regulations they have satisfied their burden of making out "a facial showing of violation," shifting the burden to the defendant municipalities to

justify these regulations through "peculiar circumstances" which dictate continued maintenance of such regulations. Plaintiffs also contend that under Mt. Laurel if they can adduce evidence to prove that land use regulations in addition to those specified by the Supreme Court in Mt. Laurel in fact prevent the provision of low and moderate income housing, this too will make out a "facial showing of violation" and shift the burden to the defendant municipalities.

Although the Court was concerned in Mt. Laurel only with that municipality's exercise of land use regulation authority, it recognized that other exercises of local government power can be important factors in determining whether low and moderate income housing is provided. The function of building housing, the Court noted, is not performed by municipalities, but by other parties -- in the case of public housing, by special agencies created for that purpose. Id. at 53. "The municipal function," the Court said, "is initially to provide the opportunity through appropriate land use regulations ... ." Id. The Supreme Court left open the question whether the failure of a municipality to establish a local housing agency to provide housing for its resident poor was, in and of itself, a violation. The Court noted, however, that "there was at least a moral obligation" to do so, id. and that such action was what "[w]e have in mind" in the way of "additional action" for Mt. Laurel to fulfill its fair share of the regional need for low and moderate income housing.

Justice Pashman, in his concurring opinion, viewed this obligation as legal as well as moral. He recognized the obvious fact that governmental subsidies are necessary to satisfy housing needs in the foreseeable future and stated that "developing municipalities have a duty to make all reasonable efforts to encourage and facilitate private efforts to take advantage of these [state and federal] programs." Id., Pashman, J. concurring, at 29. Justice Pashman added that there may be circumstances in which municipalities have an affirmative duty to provide housing for low and moderate income persons through public construction, ownership, or management. Id. at 29-30.

The Supreme Court also discussed possible defenses municipalities might offer in an effort to "sustain the heavy burden of demonstrating peculiar circumstances" that

dictate continued maintenance of exclusionary land use regulations. The Court did not specify what defenses would be sufficient to satisfy a municipality's burden, but was clear in ruling out as inadequate certain traditional defenses.

First, while the Supreme Court reaffirmed the principle that municipalities may properly zone for industry and seek industry for purposes of creating a better economic balance, it stressed that they may not exercise their zoning power to exclude types of housing and kinds of people for the same local financial end. The Court said:

> We have no hesitancy in now saying, and do so emphatically, that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose. Id. at 44.

Second, the Court ruled out the defense that the area is without sewer or water facilities, pointing out that where the land is amenable to such utility installations, the municipality can require them as improvements by developers or install them under special assessments or other appropriate procedures. Id. at 44-45.

Third, while recognizing the importance of ecological or environmental factors, the Court stressed that "the danger and impact must be substantial and very real" (Id. at 45) and that generally only a relatively small portion of a developing municipality will be involved. Further, the Court said that the regulation must be "only that reasonably necessary for public protection of a vital interest." Id.

In addition to the important substantive issues the Supreme Court decided in the Mt. Laurel case, the Court also resolved several procedural issues of importance in the instant case. Thus, the Court made it clear that non-residents have standing to challenge exclusionary land use practices by municipalities. Further, the fact that the challenge in Mt. Laurel, as in the instant case, was a general one to the municipal exercise of zoning and other land use power, was no bar to the litigation. In addition,

the fact that the low and moderate income plaintiffs in Mt. Laurel, like the plaintiffs in the instant case, had not requested a variance, building permit, or otherwise sought to secure relief through an administrative process, was similarly no bar to instituting the litigation.

We noted in our letter of April 8 that among the beneficial results that could flow from a conference exploring the significance of the Mt. Laurel decision would be that of shortening the process of discovery. Under plaintiffs' view of the legal principles enunciated in that decision, discovery could indeed be considerably telescoped. Under this view, plaintiffs would require no additional discovery for purposes of establishing their prima facie case of economic discrimination against each of the defendant municipalities. By the same token, defendants, in seeking to carry their heavy burden of justifying maintenance of their land use regulations, would similarly appear to require no further discovery. The facts upon which the defendants must rest their defenses are entirely within their own knowledge and control. Further, the procedural defenses, which defendants have stressed in depositions they have already conducted, would appear to be foreclosed by the Mt. Laurel decision.

In the interest of resolving the instant case expeditiously, plaintiffs suggest that the following procedure be followed, under the supervision and control of the Court:

> First, plaintiffs would submit to each defendant within 20 days a list of the various zoning ordinances and other land use practices which they challenge as unlawful.
>
> Second, within 20 days from receipt of the list, each defendant would respond by affirming or denying that they still maintain such zoning ordinances and other land use regulations. Each defendant also would state the facts upon which it relies in justifying maintenance of such ordinances or regulations.
>
> Third, within ten days following receipt of defendants' responses, a pre-trial conference would be held to determine the following matters: factual issues in dispute; extent of further discovery required by the parties; and a trial date.

We believe that this procedure could serve the purposes of eliminating needless discovery, reducing the number of factual issues, expediting trial, and perhaps eliminating the necessity for a full-scale evidentiary hearing.

We hope this expression of plaintiffs' views will be of assistance to the Court and the parties.

Sincerely,

Martin E. Sloane

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cc: All Attorneys
All Plaintiffs