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April 13, 1976

The Honorable David D. Furman
Middlesex County Court
Court House
New Brunswick, New Jersey 08903

Urban League of Greater New Brunswick, et als vs. Mayor and Council of the Borough of Carteret, et als
Docket No. C-4122-73

Dear Judge Furman:

I enclose with this letter the original and one copy of the Brief submitted by the New Jersey and Middlesex County Leagues of Women Voters on the issue of remedy.

Respectfully,

William J. O'Shaughnessy

William J. O'Shaughnessy

WJO:gl
Enc.

cc: All Counsel
(w/enc.)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
Docket No. C-4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	:	
Defendants.	:	

AMICI CURIAE'S BRIEF ON ISSUE OF REMEDY

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I

INTRODUCTION

This brief is submitted by the New Jersey League of Women Voters and the Middlesex County League of Women Voters, amici curiae, on the issue of remedy. It is addressed principally: (a) to the propriety of an order requiring the defendant municipalities to develop a joint regional plan to promote the fair distribution of low-and moderate-income housing needs in Middlesex County, and (b) to the power of the Court to order defendants to attempt to obtain federal and State housing subsidies or to grant tax abatements or expend public monies as a means of facilitating the construction of low-and moderate-income housing. In New Jersey, of course, these issues can only be analyzed against the back-drop of Mt. Laurel.

II

THE BACKGROUND -- DEFENDANTS HAVE THE AFFIRMATIVE OBLIGATION TO PLAN AND PROVIDE FOR LOW-AND MODERATE-COST HOUSING.

The thrust of Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975) ["Mt. Laurel"], is that each developing municipality must now both plan and affirmatively provide for its "fair share" of the regional need, present and prospective, for low-moderate-income housing. 67 N.J. at 188-89.

The pressing issue at this stage of the proceedings then, is: how far can the Court go in seeing to it that houses actually get built? This crucial issue of remedy was expressly left open in Mt. Laurel:

> "It is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any such power." Id., at 192.

It would be a mistake, however, to take the Court's decision not to delineate its remedial powers for an unwillingness to exercise them. As Justice Hall stated at the November 19, 1975 Convention of the New Jersey League of Municipalities:

> "I sense that the Court will not tolerate evasion or avoidance and will move forward to direct further steps in the process as found necessary.
>
> "Although the court has a full arsenal of weapons to combat recalcitrance, I earnestly trust they will not have to be used."

III

DEFENDANTS SHOULD BE GIVEN A REASONABLE PERIOD OF TIME TO DEVELOP A REGIONAL PLAN, SUBJECT TO PERIODIC SHOWINGS OF PROGRESS MADE. THE COURT SHOULD RETAIN JURISDICTION TO DEVELOP A PLAN ITSELF, WITH PROFESSIONAL PLANNING

ASSISTANCE, IF AND WHEN FOUND NECESSARY.

What can realistically be accomplished by this litigation? To be sure, there have been certain real advances already. The litigation itself, for example, has impelled several municipalities to purge their ordinances of a variety of exclusionary provisions. But surely, removing illegal obstacles to low-and moderate income housing construction is not the equivalent of meeting one's affirmative obligations to plan and to provide for its housing needs.*

On the other hand, Mt. Laurel cautions us that "Courts do not build housing nor do municipalities" (67 N.J. at 192 (Emphasis Added). The question, then, is how far, beyond the invalidation of exclusionary zoning provisions, should the Court go in requiring defendants to provide for the housing needs found to exist in Middlesex County? Amici submit that, at this stage of the litigation, the court should do no more than: (a) fix the regional need, (b) direct defendants actively to pursue all available federal and state subsidies; (c) establish guidelines and timetables for the voluntary development and implementation

*-The suggestion that the complaint should be dismissed as to the amending muncipalities on the ground of "mootness" should be rejected. Cf., "The zoning amendment shuffle" in Mytelka, Exclusionary Zoning; A Consideration of Remedies, 7 Seton Hall L. Rev. 1, 29-30 (Fall 1975).

of a plan allocating and generally designating the locations of the housing units; and (d) retain jurisdiction for a reasonable time for purposes of (i) reviewing the progress made by defendants towards the development of a plan, and the satisfactoriness of any plans as may be developed, and (ii) issuing whatever supplemental orders prove necessary.

The fixing of the regional need must obviously be done by this court. However, the Leagues question whether the court can at this time allocate that need without substantially more professional planning assistance.

They strongly believe that a truly "fair" allocation, as that term is used in Mt. Laurel, must be based upon and part of a coherent regional plan, one which takes into account all the competing environmental, economic and social factors necessary to ensure a balanced and orderly approach for meeting countywide housing needs. Cf., Pashman concurring, 67 N.J. at 215-16, n. 17; to allocate now, would seem to require some form of across-the-board formula which would necessarily ignore possibly unique, critical environmental, ecological or other considerations. Here, as in Swann v. Charlotte-Meckleburg Bd. of Ed., 402 U.S. 1, 24, 28 L. Ed.2d 554, 571, "... the use made of mathematical ratios [should be] no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." See also criticism by N.C. English, Esq. in 98 N.J.L.J. 684 of the formula pro-

posed by Carl Lindbloom in Defining "Fair Share" of - "Regional Need", A Planner's Application of Mt. Laurel, 98 N.J.L.J. 633, 644.

The next question is: By whom, when, and under what conditions should such a plan be developed? Whether or not the Court has the power in the first instance to draft its own regional plan, amici do not believe that such power should be exercised in this case. Rather, amici favor an order giving to the municipalities the opportunity to come up with a regional plan themselves,* subject to judicially prescribed guidelines, timetables and review. Of course, plaintiffs should be given the opportunity to comment on any such plan. If defendants elect not to do so, or if their plan is not satisfactory, then the Court will have to develop a plan.**

This "conditional" approach is strongly suggested by reasons of practicality. First, it would give interested citizens the opportunity to participate in this important decisional process. Second, no one is better suited than the defendants themselves to determine how best to provide for their "fair share" of regional housing needs: whether water, sewer, educational, recreational and other facilities

*- Precedent for the power to require a regional plan is found in Guatreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974); and Crow v. Brown, 332 F. Supp. 382, 396-7 (N.D. Ga. 1971), aff'd, 457 F. 2d (5th Cir. 788 1972).

**-Or if defendants stipulate now that it it would be impractical for them to develop such a plan, the Court should do so immediately.

or services can be shared or "regionalized". They, better than the Court, can assess the suitability of such modern planning tools as bonus densities, cluster zoning, the use of special exceptions for multiple housing keyed to subsidy programs or other "inclusionary" zoning techniques.

The desirability of the two-step or conditional approach to zoning relief is also reflected in the case law. Thus in Mt. Laurel, the trial court was reversed for imposing a new ordinance on the municipality immediately on the ground that "The municipality should first have full opportunity to itself act without judicial supervision." 67 N.J. at 192. Likewise, in Pascack Assn'n Ltd. v. Twsp. of Washington, 131 N.J. Super 195 (L. Div. 1974), rev'd on other grounds, Nos. A-3790-72, A-1841-73 (App. Div., June 25, 1975) cert. granted, No. 11754 (N.J. Oct. 14, 1975) Judge Gelman's "limited intervention ... in the zoning process" (131 N.J. at 207) took place only after the Township failed to act during the court-imposed grace period of sixty days (Id., at 200).

IV

THE COURT SHOULD ORDER DEFENDANTS AFFIRMATIVELY TO TAKE FULL ADVANTAGE OF ALL AVAILABLE SUBSIDY PROGRAMS AND WHATEVER ADDITIONAL ACTION IS NECESSARY TO PROVIDE THEIR "FAIR SHARE"

As observed by Justice Pashman in his concurring opinion in Mt. Laurel: "There is little hope that the private housing construction industry will be able to satisfy

the State's housing needs in the forseeable future, even if all exclusionary barriers are removed. To meet these needs, State or federal assistance will be required." 67 N.J. at 211. (citations omitted); see also majority opinion, Id., at 188, n. 21. The Leagues agree. Surely, a community should be enjoined from thwarting efforts to obtain such funds or from misapplying them. City of Hartford v. Hills, 44 U.S.L.W. 2356 (D. Conn., Jan. 28, 1976); Edison Branch of the N.A.A.C.P v. Hills, (D.N.J. Jan. 15, 1976) (consent order). The question, then, may be refined to: What is the nature and extent of the municipality's affirmative obligation in obtaining -- or in giving -- such financial assistance?

Amici submit that defendants should be directed immediately and fully to participate in the existing Federal and State subsidy programs. Such an order would not have any extraordinary economic impact on any community. Of the federal and state subsidy programs presently in effect, whether they be "community development" funds, "Section VIII" rent supplements, or State HFA mortgage money, it appears that none of them requires more than active cooperation by the municipality. While the cooperation might entail the creation of a Housing Authority (See Mt. Laurel, 67 N.J. at 192) or a limitation on tax as sessments (e.g., a fixed percentage of gross rents), no program requires

direct, substantial expenditures by the community.*

Moreover, the proofs do seem to warrant some judicial "prodding" in this respect. We understand the proofs to be that the vast majority of the subsidies applied for by the defendant municipalities have been the community development funds available under Title I of the Housing and Community Development Act of 1974. Such long-standing inaction as to other subsidy Programs is, we believe, adequate basis for the entry of an order immediately directing defendants to participate fully in all available Federal and State subsidy programs.

There are a number of decisions supporting the propriety of affirmative relief, such as that urged here. Thus, in Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), aff'd, 436 F.2d 108 (2 Cir.), cert. denied, 401 U.S. 1010 (1970), the defendant muncipality was ordered to affirmatively take whatever steps were necessary to permit the construction of a low-income housing project, including the provision of sewer service. Accord, United Farmworkers of Florida Housing Project Inc. v. City of Delray Beach, 493 F.2d 799 (5 Cir. 1974). And upon the remand of Southern Alameda Spanish Speaking Org. ["Sasso"] v. Union City, 357 F. Supp. 1188, 1197-9 (N.D. Calif. 1970),

*-We use the term "direct" expenditures in contradistinction to "ancillary" expenses routinely incurred by a community in expanding schools or other municipal services to meet the needs of any building(s) or project.

the defendant municipality was ordered to take whatever affirmative steps were necessary to meet the housing needs of its low-income residents, specifically: (i) participating in federal subsidy programs and (ii) exercising its "fiscal and eminent domain powers". And last, but by no means least, see Justice Pashman's concurring opinion in Mt. Laurel, 67 N.J. at 211.

We recognize that, if the subsidies are utilized, and Projects are built, the communities involved may have to provide, roads, sewers and other secondary facilities, and to pay for them out of their general tax revenues. That such expenditures do not constitute a valid objection to a Project is not only clear from Mt. Laurel's rejection of "fiscal zoning" (67 N.J. at 185-6), but also from the traditional obligations of a municipality to provide essential service to all residents, poor or rich:

> The inadequacy of facilities presently available in a neighborhood cannot support the objection to a building project otherwise permissable under the zoning ordinances and the building code. It is the duty of the municipal authorities to supply all such facilities as the town grows and expands in population and as the need for increased facilities arises. [T] he court is not concerned with the economics involved in the performance of the duty resting on the municipal authorities to furnish required facilities as and when and to the extent needed. The duty is paramount." (citations omitted). Twsp. of Springfield v. Bensley, 19 N.J. Super. 147, 158 (Ch. Div. 1952).

Again, however, we see no reason at this time for the Court to require more of the defendants than to participate fully in subsidy programs. The reason can be stated simply: that it is not yet established that private developers, freed of exclusionary zoning restrictions, and given full cooperation in obtaining available subsidies, will be unable to meet any particular municipality's low-and moderate-income housing needs.

On the other hand, if a reasonable period of time goes by, and it appears that private developers still cannot meet a given municipality's needs, then the Court should consider requiring additional measures, including giving further assistance to developers by requiring direct tax abatements (independent of federal or state subsidy programs) the dedication of its own property (land or money), or the use of its eminent domain powers. We believe there would be ample legal justification for such further relief, Sasso, supra, 357 F. Supp. at 1197 et. seq.

It must be borne in mind that Mt. Laurel rests upon "the basic constitutional requirements of substantive due process and equal protection of the laws". 67 N.J. at 192.* Where a fundamental constitutional right turns on the availability of funds, any judicially acceptable plan to remedy violations of that right must include meaningful assurances that sufficient

*-The Court found the equal protection and due process clauses of the Federal Constitution to be embraced by the "general welfare" clause of Article 1, Section 1 of the State of Constitution.

moneys will in fact be made available. E.g., Griffin v. School Bd. of Prince Edward Cty., 377 U.S. 218, 233 (1964); United States v. State of Missouri, 515 F.2d 1365, 1371-73 (8 Cir. 1975), cert. denied, 420 U.S. 959 (1975); Bradley v. Milliken, 345 F. Supp. 914, 938 (E.D. Mich. 1972), aff'd, 484 F.2d 215, 258 (6 Cir. 1973) (en banc), rev'd on other grounds and remanded, 418 U.S. 717 (1974) (citing prior cases). Cf., Robinson v. Cahill, 67 N.J. 333, 354, cert. denied, 44 U.S.L.W. 3238, 96 S. Ct. 217 (Oct. 20, 1975) (Robinson IV); See also Judge Gelman's discussions concerning equitable remedies in Pascack, supra, 131 N.J. Super at 202-4.

In any event, we should address ourselves to two procedural questions raised by the nature of the order sought herein: (i) how detailed can or should such order be? and (2) what sanctions might be imposed for non-compliance?

Whether such an order be regarded as in the nature of a mandatory injunction or mandamus * amici believe that the order must be sufficiently specific to comply with Rule 4:52-4. Rule 4:52-4, as was true with the cognate federal Rule 65(d), was obviously designed "to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a

*-This court has, of course, ancillary jurisdiction to issue "legal relief" in this proceeding under N.J.S.A. Const. Art. 6,§3, par. 4.

contempt citation on a decree too vague to be understood." Schmidt v. Lessard, 414 U.S. 473, 476, 38 L. Ed. 2d. 661, 664 (1974). We have not yet seen the form of judgment proposed by plaintiffs but it must be tested by this standard.

While the question of sanctions for non-compliance is not presently before the Court, it is worthwhile to look ahead . . . to see whether the kind of order urged here can be enforced. It is hardly likely, for example, that criminal sanctions in the form of jail sentences would be imposed. "The traditional method of enforcing judicial decrees through contempt proceedings is singularly inappropriate in resolving a zoning controversy", Pascack Ass'n, supra, 131 N.J. Super at 206. Nor is there any statute authorizing the imposition of criminal fines as an enforcement mechanism in this area.

Amici suggest that, if it ever comes to that, the Court already has effective enforcement tools uniquely suited to this kind of case: (a) the power to develop a plan itself and to order the defendants to pay for same, Garrett v. City of Hamtramck, 394 F. Supp. 1151,1159 (6 Cir. 1975); and (b) the imposition of a contingent compliance fine under Rule 1:10-5. As the comments to the Rule indicate, "it is the coercive response [to contempt] which advances the private interest of litigants in the enforcement of court order." See also Grad, I Environmental Law, §2.03 (1973).

In this case, a penalty of $X for past violations and $Y per day for further violations would be the best way of providing "meaningful deterrence against violations whose effect is continuing and whose detrimental effect could be terminated or minimized by the violator at some time after initiating the violation." United States v. ITT Continental Baking Co., 420 U.S. 223, 43 L. Ed. 2d 148, 159 (1975) (under Federal Trade Commission Act). See also N.L.R.B. v. Local 825, etc., 430 F.2d 1225, 1230 (3 Cir. 1970).

CONCLUSION

In this rapidly developing, unchartered area of the law, it is difficult to speak with certitude as to how far the Court can or should go, legally or practically, in attempting to fashion a meaningful remedy. However, amici belief that the approach suggested herein, subject, as it is, to on-going judicial review, does strike a workable balance between furthering the objective of Mt. Laurel through the award of definitive relief without imposing an unfair economic strain on the municipalities, and leaving to the municipalities the right (albeit a conditional

one) to decide for themselves how best to deal with their housing-need problems.

Respectfully submitted,

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