CA Cranbury 5-17-84

Memo to Judge Serp.
regarding Standing issue &
exhaustion of Admin remedies.
By TWP.

PJS. 6

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rec'd 5/18

May 17, 1984

Honorable Eugene D. Serpentelli, J.S.C.
Superior Court Ocean County
Court House
Toms River, New Jersey 08754

Re: URBAN LEAGUE OF GREATER NEW BRUNSWICK
et als. vs. CARTERET, et als.

Dear Judge Serpentelli:

I am writing you to state for the record my extreme concern over the position which you appeared to take in Chambers at the conclusion of the trial day on Tuesday, May 15th.

It is my understanding of the position that you took that despite the fact that the issue of exhaustion of administrative remedies which you described as a standing issue had been raised by the pleadings in the case, and by the Pretrial Order, that this should have been addressed in a motion made by the defendant as you said, "six months ago".

I believe that this position is extremely unfair to the defendant, Township, and beyond the contemplation of any of the parties to the case, be they plaintiff or defendant.

In regard to the Township's position concerning this issue, I have several points to make as follows:

1. The pleadings in all of the Mt. Laurel complaints, filed outside of the forty-five day period from the adoption of the Ordinance provided by rule, raised the issue of standing and exhaustion of administrative remedies as an affirmative defense.

2. In the Mt. Laurel opinion itself, under the heading of Judicial Management, the court used the following language: "The judges assigned to Mt. Laurel cases should confer with counsel as soon as the pleadings are complete or before, if that seems desirable. Those conferences should result in special orders that establish definite limits and schedules for discovery, determine what motions will be required, and when they shall be prepared and argued..." So. Burlington Cty. NAACP v. Mt. Laurel Tp., 456 A 2d. 390 at 459 (1983). Despite the fact that several case management conferences were held in this matter, at no time did either the court or any of the parties indicate that motions regarding the question of exhaustion of administrative remedies or standing should be made prior to the time of trial.

3. A review of the rules of court regarding required motions does not indicate anywhere that motions on the issues in question are required to be made prior to trial. Specifically R.4:6-3 deals with required motions and makes reference to the defenses set forth in R.4:6-2. Defenses involving lack of jurisdiction or insufficiency of process or service of process must be made within ninety days after the service of answer. Defenses involving lack of jurisdiction over the subject matter, failure to state a claim or failure to join an indispensable party, should be determined before trial on application of any party unless the court orders otherwise. There is nothing in the rules at all regarding the issue of exhaustion of administrative remedies, or the appropriate time to raise that issue.

4. The Pretrial Order signed by Your Honor and counsel for all parties lists among the legal issues the following:

> "7. a. 1) f. Whether plaintiffs are entitled to a BR" (builder's remedy).
>
> 7. c. 2) Whether the Mt. Laurel developers in Cranbury should be barred from proceeding on

an exhaustion of administrative remedies theory or on a theory of failing to comply with the rule limiting time for filing a Prerogative Writ."

It is of note that while the form of Pretrial Memo simply lists item 7 as "legal issues", the rule of court referring to pretrial orders lists item 7 as "a specification of the issues to be determined at the time of trial..." R. 4:25-1(b)(7).

5. The issues concerned were specifically raised in Points III and IV of the trial brief submitted by the Township on March 30th of this year.

In addition to the above specifics, throughout the case, there has been much discussion of the question of "entitlement to a builder's remedy". Apparently, the court now views this question of entitlement as being limited to the issue of the suitability of the plaintiff's property for a builder's remedy and not the personal qualification of the builder for a builder's remedy. It is submitted that nothing has occurred in the procedural context of this case until the present time, to, in any way, indicate to counsel for any of the parties that this was or would be the court's position.

The use of the term "entitlement to a builder's remedy" implies something more than the mere fitness of the plaintiff's property for development.

It is important to indicate that the court has apparently seen fit to deviate from the scheduling set forth in Mt. Laurel itself, with regard to the question of builder's remedy. Specifically, the court has indicated that, "if a trial court determines that a Municipality has not met its Mt. Laurel obligation, it shall order the Municipality to revise its zoning ordinance within a set time period to comply with the constitutional mandate; if the Municipality fails adequately to revise its ordinance within that time, the court shall implement the remedies for non-compliance outlined below; and <u>if plaintiff is a developer the court shall determine whether a builder's remedy should be granted</u>."

In the present procedural context of this case, the court has not even determined what each Municipality's Mt. Laurel obligation is, let alone whether or not the Municipalities

have met it. It seems clear that the next stage is to order the Municipality to revise its zoning ordinance with or without the assistance of the Master, and only if the Municipality does not revise its ordinance to then make a determination as to the suitability of a builder's remedy. It seems clear from a reading of this language, that the determination as to the suitability of a builder's remedy or in fact the entitlement of a builder to a builder's remedy, must await the outcome of the attempt of the Municipality to revise its ordinance to bring it into compliance with Mt. Laurel. Only then does the court ascertain whether or not the builder complies with the five requirements for a builder's remedy outlined in the opinion. Those are as follows:

1. It has acted in good faith;
2. It has attempted to obtain relief without litigation;
3. It has proposed a specific and detailed project for construction;
4. Its proposed project includes an appropriate proportion of lower and moderate income housing (i.e. it is insufficient if the project includes only "least cost" housing);
5. Its project is located and designed in accordance with sound zoning and planning concepts.

These five criterion are set forth at 456 A 2d. at page 420. In the instant case, none of the plaintiff builders has proposed any project of any kind to the Township within the last decade. Only one has ever proposed a project at all, and that project was proposed originally over a decade ago.

It is submitted that this is not the kind of attempt to obtain relief without litigation or the type of proposal for a specific and detailed project for construction that is set forth by the court as a requirement for a builder's remedy.

The court has indicated that while builder's remedies will be granted more freely than in the past, they also emphasized that "[O]ur decision to expand builder's remedies should not be viewed as a license for unnecessary litigation when

builders are unable, for good reason, to secure variances for their suggested parcels... Trial courts should guard the public interest carefully to be sure that plaintiff-developers do not abuse the Mt. Laurel doctrine." 456 A 2d. at 453.

Despite the language in the case that "care must be taken to make certain that Mt. Laurel is not used an an unintended bargaining chip in a builder's negotiations with the municipality, and that the courts not be used as an enforcer for the builder's threats to bring Mt. Laurel litigation if municipal approvals for projects containing no lower income housing are not forthcoming." One of the builders in this case specifically threatened the municipality with this litigation if the municipality did not make specific amendments in some detail to its zoning ordinances without ever setting forth before the municipality a specific site plan for the development that it contemplated.

It should also be pointed out that one of the main purposes of granting a builder's remedy, as the court has indicated, is to assure that these types of cases are brought and thereby guarantee that significant amounts of low and moderate income housing will actuall be built. In the instant case, there has been a plaintiff for some time. This matter is in remand from the Supreme Court. The plaintiff-developers are so-to-speak "Johnny come latelys". The municipalities, including Cranbury, would have been required to comply with Mt. Laurel II regardless of whether or not any of the builder-plaintiffs ever instituted their own litigation.

In any event, the main purpose of this letter is to emphasize that the municipality, Cranbury Township, should not be denied the opportunity to vigorously pursue the question of entitlement to a builder's remedy because it did not make a motion when there was no indication that such a motion was called for. It should also be pointed out that a motion on those issues was equally available to any of the plaintiffs who felt threatened by the issue. I intend to present evidence at the appropriate time on the question of the efforts made by the respective plaintiffs to obtain relief from the Township. To deny me that opportunity would be a most fundamental denial of

procedural due process and I respectfully request the court to reconsider its position.

Respectfully submitted,

WILLIAM C. MORAN, JR.

WCM:Dak

cc: All counsel of record
Township Committee-Township of Cranbury