CA- Cranbury

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letter brief stating UL's position on anticipated challenge by Twp of Cranbury to claims of builder's remedy

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School of Law-Newark • 15 Washington Street • Newark • New Jersey 07102 • 201/648-5561
S.I. Newhouse Center for Law and Justice

Writer's Direct Dial Number:

May 29, 1984

Hon. Eugene D. Serpentelli
Judge of the Superior Court
Court House
Toms River, New Jersey

Re: Urban League of Greater New Brunswick v. Borough of Carteret, No. C 4122-73

Dear Judge Serpentelli:

I am writing to state briefly the Urban League's position on the anticipated challenge by the Township of Cranbury to the claims of builder's remedy, which is based on the failure to exhaust remedies and on the "threat" exception to Mount Laurel II. Our position has been made known informally to each of the parties prior to preparation of this letter brief.

As to the exhaustion argument, the Urban League submits that none of the builder plaintiffs should be barred. After remand from the Supreme Court in 1983, Cranbury Township's intention to adhere to its master plan concepts was clear, this litigation was already in progress, and no useful purpose would have been served by requiring the builders to wait out lengthy administrative proceedings before joining issue on the constitutional violation.

As to the "threat" issue, the Urban League's position requires separate evaluation of each plaintiff. Clearly, there is no issue as to Cranbury Land or Garfield; the former's lengthy efforts to secure affordable housing in Cranbury will be stipulated, as will Garfield's prompt challenge after adoption of the present land use ordinance. Thus, as to these two builders, the availability of the builder's remedy (subject to argument later in the trial as to suitability) should be upheld.

The Urban League also believes that Toll Brothers should be entitled to pursue the builder's remedy, although we take this position without in any way wishing to endorse the propriety of the thirty day letter which has been testified to in this case. The good faith demanded of builder's remedy claimants is that they not use the threat of a Mount Laurel suit to secure non Mount Laurel zoning concessions from the municipality. On the face of it, Toll Brothers' letter states its intention to build low and moderate income housing, and thus its "threat," heavy handed as it is, is directly related to a permissible objective.

Under different circumstances, it is possible that the Toll Brothers letter could be regarded as proof of a failure to negotiate in good faith prior to instituting suit, which goes arguably to the exhaustion point noted above. As stated there, however, Cranbury's position could reasonably have been regarded as firm, so as to permit disregard of an exhaustion obligation. Moreover, given the overriding importance that the Supreme Court attaches to the objectives of the builder's remedy, the municipality should have an obligation to respond with an offer of negotiation before it can set up the builder's bad faith. Although it is manifest that the ordinance revisions could not have been completed within thirty days, as demanded in the Toll Brothers' letter, it is equally manifest that an offer to negotiate and enact revisions with appropriate speed would have undercut Toll Brothers rush to the courthouse. If Toll Brothers is to be penalized for the tone and style of its demand on Cranbury, the Court should make clear that it is doing so on general legal or ethical grounds, rather than on a basis limited to the language of _Mount Laurel II_.

In the Urban League's view, the more difficult question is presented by the Zirinsky complaint, and we have reluctantly concluded that the "threat" exception can be invoked as to it. Although the stipulation will not reveal an overt threat to bring a _Mount Laurel_ suit, it will establish that Zirinsky's original request was for rezoning to permit only office/research type development, without any _Mount Laurel_ component or contribution. Only when it became clear that the township would deny this request did Mr. Zirinsky evidence any interest in the use of the _Mount Laurel_ doctrine.

This situation is not directly addressed in the _Mount Laurel II_ opinion, but it is within its fair implication. The crudity of a direct threat is easily avoided by any reasonably sophisticated land developer, and the lurking potential of a _Mount Laurel_ suit will obviously be in the contemplation of the municipality, even if words of threat are not spoken. In the Urban League's view, the only way to give reasonable meaning to the Supreme Court's "threat" dictum is to establish a presumption as a matter of law that a proposal containing no _Mount Laurel_ component implies a threat of _Mount Laurel_ suit. This presumption would be rebuttable by the builder, if it can prove a context in which the switch from non-_Mount Laurel_ to _Mount Laurel_ housing is justified. For instance, a builder might be able to show that there was an extensive period of negotiation between itself and a municipality, and that the offer of _Mount Laurel_ housing was added or substituted at some point along the way, well before suit was brought. In a proper context, this could neutralize the initial inference of an implicit threat.

In taking this position, the Urban League wishes to emphasize that its concern is with the "public interest" dimension of the builder's remedy problem, beyond the specifics of this case. For the Mount Laurel II doctrine to succeed, it must not only achieve fair results, but it must be widely perceived as fair by society as a whole. This was the concern of the Supreme Court in allowing the "threat" exception and if that language is not given some effective meaning by this Court in the present matter, the overbreadth of the builder's remedy power may prove to be its undoing.

It is apparent that a clear rule on the limits of the builder's remedy is needed, and that this case presents an appropriate opportunity to fashion such a rule. Moreover, the minimally burdensome presumption that the Urban League has suggested will actually enhance the effectiveness of the builder's remedy technique. The procedure suggested here would force developers to think out in advance their willingness to include a Mount Laurel component in a project, as a means of enhancing their legal position vis a vis the municipality. Some will choose not to do so, as evidenced by the Morris participation in this case solely on a non Mount Laurel theory. It may be argued that many others will include a Mount Laurel component in their initial approach to the municipality, even though they would prefer not to do so. This argument is probably so, but that is to the good. A municipality faced with a Mount Laurel obligation can hardly require a developer to drop low and moderate income housing from a proposal, and a developer can hardly challenge a municipal action which accepts such a proposal. Thus, the effect will be to increase the pool of ready builders, reduce litigation, and thus speed the provision of low and moderate income housing, exactly the result that the Supreme Court intended.

The Urban League plaintiffs are aware that this procedure may eliminate some builders who have the capacity to construct actual Mount Laurel housing, and we do not intend the "threat" presumption to become a major loophole in the Mount Laurel doctrine. The Supreme Court, however, was also balancing fair play to the municipality against its pragmatic concern that housing production be encouraged. If only the latter had been of concern, the Supreme Court would have permitted even "threat" builders to claim the remedy, since they have the capacity in any event to produce the desired product. Moreover, if the Urban League's more general suggestions with respect to priorities among builders, and cut off points for late claims of the builder's remedy are followed, even a "threat" builder could be permitted to be heard at the remedial stage, to the extent that its land might satisfy a portion of the fair share left over after the builder's remedy claims have been dealt with.

The Court having permitted this issue to be raised at this stage of the proceedings, the Urban League plaintiffs believe that a basis appears to have been shown for a presumptive application of the "threat" exception as to Mr. Zirinsky's claim. As noted, however, rebuttal of this presumption should be permitted, and it would therefore be appropriate for the Court to conduct a supplemental fact hearing should one be requested, rather than concluding the matter on the basis of the present stipulation alone.

Respectfully submitted,

John M. Payne
Attorney for Plaintiffs

cc: All counsel