

CA - North Brunswick

6/13/84

Pretrial memo on behalf of plaintiff.

Pgs 14

CA 002298D

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ATTORNEYS FOR PLAINTIFFS

| | |
|----------------------------|------------------------------|
| URBAN LEAGUE OF GREATER) | SUPERIOR COURT OF NEW JERSEY |
| NEW BRUNSWICK, et. al.,) | CHANCERY DIVISION-MIDDLESEX |
|) | COUNTY |
| Plaintiffs,) | |
|) | Docket No. C 4122-73 |
| vs.) | |
|) | Civil Action |
| THE MAYOR AND COUNCIL OF) | |
| THE BOROUGH OF) | |
| CARTERET, et. al.,) | |
|) | |
| Defendants.) | |
|) | URBAN LEAGUE PLAINTIFFS' |
|) | PRETRIAL MEMORANDUM |

1. NATURE OF ACTION

Consolidated Mount Laurel action against the Townships of Old Bridge and North Brunswick. The instant proceeding seeks to modify this Court's Judgment of July 9, 1976 in light of Mount Laurel II, and requires a determination of each municipality's fair share of the regional need for low and moderate income housing and a determination of the zoning ordinance revisions and affirmative measures needed to provide a realistic opportunity for the construction of

that housing.

2. ADMISSIONS AND STIPULATIONS

None

3. FACTUAL AND LEGAL CONTENTIONS

General

On May 4, 1976, Judge Furman, after the first trial in this action, declared the zoning ordinances of North Brunswick, Old Bridge and nine other municipalities to be unconstitutional. Urban League v. Carteret, 142 N.J. Super. 11, 31-32 (Ch. Div. 1976). On July 9, 1976, he entered a Judgment in accordance with that opinion requiring the defendant towns to amend their ordinances and take affirmative steps to meet their fair share of the regional housing need for lower income households. Neither North Brunswick nor Old Bridge appealed that Judgment, as did seven other municipalities. Nor did they obtain an order of dismissal or compliance or otherwise seek relief from the Judgment.

On January 20, 1983, in Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 456 A.2d 390 (1983), the New Jersey Supreme Court affirmed Judge Furman's holding insofar as he found the defendants' zoning ordinances to be unconstitutional. However, the Court found fault with certain aspects of Judge Furman's approach toward determining each municipality's Mount Laurel obligation. Id., 92 N.J. at 349-50. Accordingly, the Court vacated Judge Furman's determination of region, regional need, and fair share allocation and remanded to this Court solely for

redetermination of those issues "and, thereafter, revision of the land use ordinances and adoption of affirmative measures to afford the realistic opportunity for the requisite lower income housing." Id. at 350-51. The Court added that "on remand there need be no trial concerning non-compliance with the Mount Laurel obligation (unless the municipality's land use ordinance has been substantially amended) . . . for that has already been amply demonstrated." Id. at 350.

In light of the passage of time and the Supreme Court's rulings in Mount Laurel II on region, regional need and fair share allocation, plaintiffs submit that it would be appropriate for this Court to modify the fair share determinations regarding Old Bridge and North Brunswick contained in the Judgment of July 9, 1976. See Johnson & Johnson v. Weissbard, 11 N.J. 552, 555-56, 95 A.2d 403, 405 (1953). Plaintiffs further submit that, in modifying these determinations, this Court should follow the procedure outlined by the Supreme Court for remand against the seven municipalities which did appeal from the original judgment in this case.

Under that procedure, this Court must first determine the appropriate region, regional need and fair share allocation for each of the municipalities. Plaintiffs bear the burden of going forward and of persuasion on these issues. Once the Court determines the formulaic fair share for each township, the defendants bear "the heavy burden" of going forward and of persuasion on the following issues, to

the extent they raise them: (1) whether there is insufficient vacant land currently available for residential development to meet their full fair share obligation; (2) whether they have made substantial amendments to their zoning ordinances and land use regulations since entry of the Judgment of July 9, 1976; (3) whether those amendments have produced compliance with the Mount Laurel obligation as embodied in the modified Judgment; and (4) whether they are entitled to credit against their fair share for any housing constructed after 1980. Mount Laurel II, 92 N.J. at 222-23; Morris County Fair Housing Council v. Boonton Township, et. al., No. L-6001-78-P.W., Transcript of Judge's Decision, at 9 (Super. Ct. Middlesex County, Jan. 27, 1984). Finally, if, following this hearing, either township has failed to carry its burden of persuading the Court that there have been substantial amendments or that the amendments have indeed produced compliance with the Mount Laurel obligation as embodied in the modified Judgment, the Court should immediately appoint a master to aid the municipality in revising its ordinance and devising appropriate affirmative measures to meet its obligation. Mount Laurel II, 92 N.J. at 282-83, 351.

Plaintiffs' contentions with respect to the regional issues, including definition of housing region, determination of present and prospective housing need, fair share methodology and definition of median income and affordability are set forth in Alan Mallach's Expert Report, dated December 1983, as modified by his trial testimony

during the remand proceedings in this matter and in his letter memorandum of May 11, 1984, attached hereto as Appendix A.

Plaintiffs contend that neither township has amended its land use and zoning ordinances to bring them into compliance with this Court's Judgment of July 9, 1976 or the requirements set forth by the Supreme Court in Mount Laurel II. Plaintiffs further contend that the discussion of cost-producing elements and other provisions contained in part II of the Mallach Report and the Memorandum attached as Exhibit D to the Affidavit of Eric Neisser submitted in support of plaintiffs' Motion to Modify and Enforce the Judgment demonstrate that neither of the defendant townships is in compliance with their Mount Laurel obligation.

Plaintiffs make the following additional contentions with respect to each of the defendant municipalities.

North Brunswick Township

Plaintiffs contend that North Brunswick Township's fair share of the regional lower income housing need is 1508 units of low and moderate income housing.

Plaintiffs contend that the land use regulations of the Township of North Brunswick, declared unconstitutional in 1976, have not been revised in the intervening eight years to provide a realistic opportunity for the development of the township's fair share of low and moderate income housing. The North Brunswick Township Land Use Ordinance, adopted August 21, 1978, does not contain a mandatory set-aside which, under current conditions, is necessary to

provide for construction of lower income housing. Nor does it contain any density bonuses or other incentives for the construction of such housing, with the exception of a small zone for nonprofit senior citizens housing which is now fully developed. From the materials now available to the plaintiffs, there is no indication that North Brunswick has undertaken affirmative efforts to promote the development of low and moderate income housing, with the exception of a senior citizen project developed several years ago. Finally, as the township's planning consultant concedes, the North Brunswick Land Use Ordinance "continue[s] to contain exclusionary provisions such as minimum floor area requirements and bedroom mix limitations" and "cost-generating design guidelines and restrictions...." Expert Report Prepared by Thomas A. Vigna, Eugene Oross Associates, May 23, 1984. See also Memorandum of Alan Mallach attached as Exhibit D to the Affidavit of Eric Neisser submitted in support of plaintiffs' Motion to Modify and Enforce the Judgment.

Old Bridge Township

Plaintiffs contend that Old Bridge's fair share of the lower income regional housing need is 3538 units of low and moderate income housing.

Plaintiffs contend that the Old Bridge Township Land Development Ordinance, adopted May 16, 1983, demonstrates facial noncompliance with the Judgment of July 9, 1976 and the requirements of Mount Laurel II in that it fails to provide a realistic opportunity for construction of the

township's fair share of low and moderate income housing. Old Bridge Township's ordinance fails to contain a mandatory set-aside which, under current conditions, is necessary to provide a realistic opportunity for the development of low and moderate income housing. The ordinance does provide, in its PUD zones, for a density bonus of 0.2 units per acre if 10% of the units are set-aside for "affordable" housing, defined as housing affordable to families earning up to 120% of the median income for the New Brunswick-Perth Amboy-Sayreville SMSA. Plaintiffs contend that this provision is wholly inadequate to meet the township's Mount Laurel obligation, since it includes no price or occupancy controls, its standard of affordability is totally inconsistent with that set forth in Mount Laurel II, and its "bonus" is so minimal as to raise questions regarding the seriousness of the municipality's effort. From the material now available to the plaintiffs, there is no indication that Old Bridge has undertaken any affirmative measures to provide support or incentives for the development of low and moderate income housing. Finally, the township's ordinance contains numerous cost-generating requirements and exclusionary provisions unrelated to health and safety that are inconsistent with the Township's obligations under Mount Laurel II. See Memorandum of Alan Mallach attached as Exhibit D to the Affidavit of Eric Neisser submitted in support of plaintiffs' Motion to Modify and Enforce the Judgment.

5. DAMAGE AND INJURY CLAIMS

Plaintiffs make no claims for monetary damages.

6. AMENDMENTS

None.

7. ISSUES AND EVIDENCE PROBLEMS

Plaintiffs contend that the issues to be resolved at trial are region; present unmet and prospective regional need for low and moderate income housing; fair share allocation formula; fair share of each defendant township; definition of median income and low and moderate income households; definition of housing affordable, for rental or sale, by low and moderate income households; whether the townships' zoning ordinances have been substantially amended since July 9, 1976, and, if so, whether those modifications have produced compliance with the July 9, 1976 Judgment and Mount Laurel II; conditions required for housing constructed since 1980 to be credited towards the fair share of either defendant; and revision of each defendant's zoning ordinances and land use regulations and adoption of affirmative measures necessary to effect compliance with their fair share obligations.

8. LEGAL ISSUES ABANDONED

None.

9. EXHIBITS

Fair Share: Alan Mallach's Expert Report, December 1983; Memorandum from Alan Mallach attached as Exhibit D to the Affidavit of Eric Neisser submitted in support of

plaintiffs' Motion to Modify and Enforce the Judgment; and Letter Memorandum from Alan Mallach to Eric Neisser, dated May 11, 1984 and attached hereto as Appendix A.

North Brunswick: North Brunswick Township Land Use Ordinance, Chapter 145 of the Code of the Township of North Brunswick, adopted August 21, 1978.

Old Bridge: Land Development Ordinance of the Township of Old Bridge, Ord. No. 1-83 adopted May 16, 1983.

10. EXPERT WITNESSES

Alan Mallach, Planning Consultant, 15 Pine Drive, Roosevelt, New Jersey 08555.

11. BRIEFS

As required by the Court.

12. ORDER OF OPENING AND CLOSING

Plaintiffs should open and close on the issues of region, regional need, and fair share allocation. Once a fair share is determined, defendants who wish to raise the following issues will have to open and close on the issues of amount of vacant land remaining available for residential development; whether substantial amendments have been made to zoning ordinances and land use regulations since entry of the Judgment of July 9, 1976; whether these amendments have produced compliance with Mount Laurel obligations; and whether the township is entitled to credit towards the fair share for housing constructed since 1980.

13. ANY OTHER MATTERS AGREED UPON

None.

14. TRIAL COUNSEL

Bruce Gelber, Eric Neisser, John Payne.

15. ESTIMATED LENGTH OF TRIAL

One week for regional issues; three days for each compliance hearing, if any, exclusive of hearings on builders' remedies and proceedings before a master.

16. TRIAL DATE

July 2, 1984.

17. ATTORNEYS FOR PARTIES CONFERRED

North Brunswick May 31, 1984

Old Bridge May 31, 1984

MATTERS AGREED UPON

None.

18. IT IS HEREBY CERTIFIED THAT ALL PRETRIAL DISCOVERY HAS BEEN COMPLETED, EXCEPT:

Submission of an expert report by defendant Old Bridge Township which was due by Court order on June 6, 1984.

Submission of all answers by defendant Old Bridge Township to interrogatories served by plaintiff Urban League on November 29, 1983, in accordance with the following schedule: all documents called for by interrogatories 20(b), (d), (h), 22(b) and (c), 23(c), 24, and 26 by June 6, 1984; and complete answers to all other interrogatories by June 15, 1984, except for answers to interrogatories 27, 28, 29, 33(b) and (c), and 45-51 which are due on June 22, 1984.

Completion of answers by defendant North Brunswick Township to interrogatories served by plaintiff Urban League on November 29, 1983, in accordance with the following

schedule: complete answers to interrogatories 19, 34, 41(b), 42(b), 53, and 54 and all documents called for by interrogatories 20(b), (d), (h), 22(b) and (c) and 24 by June 15, 1984; and complete answers to interrogatories 27, 28, 29, 33(b) and (c) and 45-51 by June 22, 1984.

Pretrial depositions of Thomas Vigna, Paul Keller, Arthur Vitale, and Carl Hintz, and other expert witnesses, if any, identified in answer to plaintiffs' interrogatories.

19. PARTIES WHO HAVE NOT BEEN SERVED

None.

PARTIES WHO HAVE DEFAULTED

None.

Dated: June 13, 1984

BRUCE GELBER
ERIC NEISSER
JOHN PAYNE

Attorneys for Plaintiffs

By: _____

May 11, 1984

Eric Neisser, Esq.
Constitutional Litigation Clinic
Rutgers University School of Law
15 Washington Street
Newark, New Jersey 07102

RE: Fair Share Housing Allocation
North Brunswick and Old Bridge
Townships

Dear Eric:

As you requested, I have modified the fair share housing allocation figures for North Brunswick and Old Bridge Townships from those given you in my letter of December 21, 1983, on the basis of the following elements:

(1) I have substituted the indigenous need figures given in Ms. Carla Lerman's letter to Judge Serpentelli of March 27, 1984. As you will recall, it is my conclusion that her numbers are technically preferable to those I used previously, for reasons which I gave in trial testimony last week.

(2) I have added an adjustment for median income, utilizing as the regional median the 11-county figure given in Ms. Lerman's letter. The adjustment factor for North Brunswick is 1.04 (the ratio of local to regional median income) and for Old Bridge is .96, so the effect of the factor is not great.

(3) I have tabulated the nubmer of low and moderate income renter households in each community spending more than 35% of gross income for shelter. Since the consensus report recommends a standard of 30% as reasonable, consistent with current HUD policy, and since the Census data provides break points of 25% and 35% only, I felt that use of the latter cutoff point would be more conservative.

The adjusted fair share housing allocation figures, with and without the addition of net financial housing need (financial housing need less other indigenous need; i.e., based on an assumption of 100% overlap) are as follows:

| | North Brunswick | Old Bridge |
|---------------------|-----------------|------------|
| Previous Categories | 1041 | 2645 |
| With financial need | 1508 | 3538 |

609-448-5474

Eric Neisser, Esq.

May 11, 1984

The attached table provides more detail, and a breakdown by category.

I hope you will find this useful. Please let me know if you have any questions or need more information.

Sincerely,

Alan Mallach

AM:ms

enc.

cc: B.Gelber, Esq.

ADJUSTED FAIR SHARE HOUSING ALLOCATION FOR NORTH BRUNSWICK AND
 OLD BRIDGE TOWNSHIPS

| NORTH BRUNSWICK | PREVIOUS ALLOCATION | ADJUSTED ALLOCATION |
|-------------------------------------|-------------------------|--------------------------------------|
| Indigenous Need | 167 | 182 |
| Present Need | 255 x 1.04 ¹ | 265 |
| Prospective Need | <u>571</u> x 1.04 | <u>594</u> |
| Allocation | 993 | 1041 |
| Net Financial Need | | (649 - 182) ² <u>467</u> |
| Allocation including financial need | | 1508 |
| | | |
| OLD BRIDGE | | |
| Indigenous Need | 409 | 476 |
| Present Need | 697 x 0.96 ¹ | 669 |
| Prospective Need | <u>1563</u> x 0.96 | <u>1500</u> |
| Allocation | 2669 | 2645 |
| Net Financial Need | | (1369 - 476) ² <u>893</u> |
| Allocation including financial need | | 3538 |

¹ adjustment for median income factor

² total financial need (low and moderate income renters spending more than 35% for shelter) less indigenous need (households lacking plumbing or heating, or overcrowded) equals net financial need

AM
 5/84