CA-Cranbury 4/11/84

Letter memorandum opposing motion of Twp of Cranbury for an Order recusing Judge Serpentelli in case

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PLEASE REPLY TO: PRINCETON

April 11, 1984

Honorable Eugene D. Serpentelli, J.S.C.
Ocean County Superior Court
Ocean County Court House
CN 2191
Toms River, New Jersey 08758

Re: Garfield & Company v.
Township of Cranbury, et al.
Docket No.: L-055956-83

Urban League of Greater New
Brunswick v. Carteret, et al.
Docket No.: C-4122-73

Dear Judge Serpentelli:

This office represents Garfield & Company, one of the plaintiffs in the above captioned consolidated action. The defendants in the particular action in which Garfield & Company is the plaintiff are the Mayor and Township Committee of the Township of Cranbury and the Planning Board of the Township of Cranbury. Garfield & Company submits this letter in opposition to the motion of the Township of Cranbury for an Order recusing your Honor from the above captioned proceeding.

Neither Cranbury nor any other party has submitted any affidavit or certification in support of this motion. It is, therefore, somewhat difficult to prepare a factual response to this motion. Should any other proponent of this recusal motion subsequently submit an affidavit or certification in support of this motion, Garfield & Company would request the opportunity to submit responsive certifications.

Provision for low and moderate income housing throughout the State of New Jersey is best left to legislative initiative. The Supreme Court acted as it did in deciding South Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158 (1983) (hereinafter "Mount Laurel II"), only because the Legislature refused to act.

> "Nevertheless, a brief reminder of the judicial role of this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is better left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them.... So while we have always preferred legislative to judicial action in this field, we shall continue - until the Legislature acts - to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine" [Id. at 212, 213].

Because this Court is acting in a quasi-legislative capacity, it has had to adopt procedures which are not ordinarily used in a judicial forum. However, the Supreme Court in Mount Laurel II recognized that such procedures would probably have to be adopted and even encouraged their adoption. Mount Laurel judges were ordered to "use any aids that may sensibly dispose of this litigation fairly, practically, promptly and effectively." 92 N.J. at 293. The Supreme Court was well aware that "confusion, expense, and delay have been the primary enemies of constitutional compliance in this area." 92 N.J. at 292. The solution proposed by the Court was "the strong hand of the judge ...." 92 N.J. at 292.

There are at least 13 different parties in interest in this consolidated action. This means 13 or more experts testifying as to the appropriate highly technical methodology to calculate a municipality's fair share of low and moderate income housing. Without a focus point, such as the "consensus" report, the trial of just the fair share aspect of this case would have lasted months. Indeed, the defendants likely would have spent the first months of the trial violently attacking each other, because a methodology which provides a low fair share number for Cranbury may well provide a very high fair share number for Piscataway.*

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* For example, the "consensus" report fair share number for South Plainfield in less than the number generated for that municipality by Ms. Lerman's report of November, 1983. Presumably, South Plainfield would rather have this Court adopt the "consensus" methodology than Ms. Lerman's November, 1983 methodology. Similarly, the "consensus" report provides for Monroe Township a fair share number less than one-half that urged by the Urban League expert, Alan Mallack, in his December, 1983 report. The "consensus" report provides for Piscataway a fair share number which is more than 2,000 units less than the number derived by applying the Warren Township methodology. See February 3, 1984 memorandum of Carla L. Lerman. The "consensus" report number is also better for Plainsboro than the number which would be generated for that municipality by the Warren Township methodology, and the South Brunswick "consensus" report number is significantly lower than the number recommended by Alan Mallack.

The trial would have been so lengthy that there is some question as to whether a plaintiff developer could have afforded to participate. This, of course, is one way to defend against a builder's remedy. Make the litigation so burdensome that no builder dare participate. Moreover, upon completion of such a lengthy proceeding, it would probably have been months before the Court was able to analyze each of the different highly technical positions presented by the experts and come up with a fair share methodology.

The creation of a "consensus" report as a focus point, however, significantly expedites these proceedings. First, virtually all of the plaintiffs have agreed to accept the numbers generated by that report. Second, a focus point now exist against which to measure and compare the presentations of those experts who disagree with the methodology set out in that report. The "consensus" report does not co-opt the experts in this case, it merely focuses them and enables them better to present their own reports by contrasting them with the "consensus" report. Creation of the "consensus" report is just the type of positive judicial action mandated by the Supreme Court in Mount Laurel II.

Counsel for Cranbury does not really object to the method by which the "consensus" report was created or to the participation of his expert in this discussion process which gave rise to the report. He never objected to the procedure. He never requested that his expert not take part in the process.* Indeed, he admits that he was "elated" at the fair share number found in the February 3, 1984 memorandum of Carla L. Lerman, which applied a fair share methodology submitted by three experts in the Warren Township case to the defendants in the instant case.** Not until less than a week before the April 9, 1984 scheduled trial date and long after the originally scheduled March 19, 1984 trial date did counsel for Cranbury object to any of the practices or procedures which led up to the "consensus" report.

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* Similarly, he now complains that he was not permitted to attend the experts' meetings. But, he never requested permission to do so. The one attorney who requested such permission, and was refused, is opposing this motion.

** Counsel for Cranbury mistakenly identifies this methodology as the creation of his expert, George Raymond. Also, he mistakenly identifies this memorandum as a report by Carla L. Lerman, implying that she approved of the methodology by this the figures were calculated. In fact, Ms. Lerman made quite clear that she was only running numbers.

Counsel for Cranbury argues that the will of his expert was somehow overborne by procedures used to create a "consensus" report. However, no affidavit or certification to that effect has been provided. Perhaps the reason for this failure is the obvious fact that Mr. Raymond's will was not overborne. For example, Mr. Raymond had no difficulty producing a report attacking the methodology of the consensus report and suggesting that Cranbury's fair share number should be 599 rather than 822. Nor was Mr. Raymond shy about attempting to defend his conclusions at a deposition.

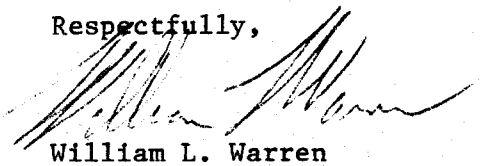
Counsel for Cranbury nevertheless suggests that had Mr. Raymond's will not been overborne, he would have put forth a fair share methodology which would have allocated to Cranbury even fewer then 599 low and moderate income units. Such claims are hardly credible to anyone who knows Mr. Raymond. And, once again, no certification supports this allegation. The fact is that had Cranbury conformed to the time schedule set out by this Court, it could never have made these unsupportable allegations. Pursuant to this Court's Scheduling Order of January 30, 1984, all expert reports on the fair share issue were to be submitted by February 7, 1984, long before any consensus was reached by the experts in this case. Mr Raymond's report was not submitted until March. Thus, it was only Cranbury's failure to meet this Court's Scheduling Order which now permits it to make an argument for which it has presented no factual support.

Finally, counsel for Cranbury complains about the supposed interaction of this Court and the experts in this case. This is a strange complaint coming from an attorney whose expert had been appointed a master by this very Court in another Mount Laurel case and presumably had many occasions to discuss Mount Laurel issues generally with this Court. Indeed, it may have been for just this reason that Mr. Raymond was chosen by Cranbury to be its expert. The fact is that because the Supreme Court has assigned to your Honor one-third or more of the Mount Laurel cases which have been brought in this State, you have, of necessity, come into contact previously with most of the experts in the instant case and have had occasion to hear or read their presentations on fair share. This is exactly what the Supreme Court anticipated would happen when it stated its hope that "the constant growth of expertise in the part of the judges handling these matters ... will result in an example of trial efficiency that needs copying, not explaining." 92 N.J. at 293.

That this motion by Cranbury, having no testimonial support, was brought so close to the trial of this case is the best evidence that the real purpose behind this motion is delay. Cranbury and certain other municipalities hope to delay this trial until January 1, 1985. If the State Development Guide Plan is not revised by that date, it is no longer a valid remedial standard. 92 N.J. at 292. Under those circumstances, discovery in this case would have to began all over again, and the trial would probably not take place until 1986, if it took place at all. The cost of beginning all over again at square one might well preclude any plaintiff from prosecuting this action.

In summary, no basis for recusal exists in this case. The actions of this Court are and were in keeping with the mandate provided by the Supreme Court in Mount Laurel II. Firm judicial management in these unique cases calls for approbation rather than criticism.

Respectfully,



William L. Warren

WLW/st