CA - Cranbury 4/2/85

letter-brief on behalf of T - Toll Bros., Inc.
in opposition to petition of Cranbury
Twp for a stay and other relief,
the application of 22 municipalites
to appear as amici curiae, and
the motion of Thomas W. Evans for
pro hac vice admission

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FILE NO.

April 2, 1985

New Jersey Supreme Court
c/o Stephen W. Townsend, Clerk
Hughes Justice Complex
CN-970
Trenton, New Jersey 08625

Re: Township of Cranbury v. Urban League of Greater New Brunswick, et al.
Supreme Court Docket No: 23830

Dear Honorable Justices of the Supreme Court:

Please accept the following letter-brief filed on behalf of Plaintiff-Toll Brothers, Inc. in opposition to the petition of Cranbury Township for a stay and other relief, the application of the twenty-two (22) municipalities to appear as amici curiae and the motion of Thomas W. Evans for pro hac vice admission.

COUNTERSTATEMENT OF FACTS

The consolidated exclusionary zoning cases against Cranbury Township[1] were instituted pursuant to this Court's decisions in Southern Burlington County

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[1] The following cases have been filed requesting a builder's remedy: Zirinsky v. Township Committee, et al., Dkt. No. L-079309-83 P.W.; Cranbury Land Co. v. Cranbury Tp., Dkt. No. L-070841-83; Garfield & Co. v. Mayor & Tp. Comm., Dkt. No. L-055956-83 P.W.; and Toll Brothers, Inc. v. Cranbury, Dkt. No. L-005652-84.

N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975) (Mt. Laurel I) and 92 N.J. 158 (1983) (Mt. Laurel II). The original action against Cranbury Township[2] (and other municipalities in Middlesex County) was filed on July 23, 1974 and resulted in a judgment declaring the zoning of Cranbury Township to be exclusionary with respect to its prohibition of multi-family housing and mobile homes, unnecessary development restrictions and over-zoning for industry and large lot single family uses. 142 N.J. Super. 11,28-29. On appeal, this Court ordered a remand to the special Mt. Laurel court for the central region of New Jersey to consider the issues of region, fair share and compliance. 92 N.J. 350-351.

The trial on remand occurred during the month of May, 1984. Expert testimony was presented by the parties, including Cranbury Township, on the issues of the Township's region and fair share allocation. On July 27, 1984 Judge Serpentelli issued a Letter Opinion declaring Cranbury Township's fair share to be 816 units. Cranbury Township stipulated that its ordinances were non-compliant with that obligation.

By Order of July 27, 1984, Cranbury Township was given 90 days to revise its land use ordinances. Cranbury Township did not comply with this order until December 28, 1984, when it submitted a plan which essentially preserved its current zoning scheme and recommended the rezoning of one builder-plaintiff's site. The Court-appointed master's report on this compliance plan is expected to be submitted by early April, 1985.

The issues raised in petitioner's Statement of Facts concerning the impacts of "massive development" to result from builders remedies to be granted in

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[2] Urban League of Greater New Brunswick v. Carteret, Docket No. C-4122-73

Cranbury, as well as the impact of this growth on the municipal water system, sewer system, school system, traffic pattern and agricultural environment of the Township will be addressed in the compliance hearing to be scheduled after submission of the master's report.

Plaintiff-Toll Brothers respectfully requests this Court to deny Cranbury Township's petition and the remainder of the relief requested in order to allow a full record to be made in the trial court. We also request this Court to recognize this petition for what it really is: an attack on the jurisdiction and power of the special courts:

> "Moreover, unless the special courts are curbed immediately, the areas which entail predominant legislative action (e.g., revision of the SDGP) or demand state legislative action (e.g., provision for governmental subsidies) will be needlessly skewed by courts which have demonstrated in the past two years that they are not the proper vehicle to redress these problems of towering public import." (Pb 21-7-10).

## LEGAL ARGUMENT

### POINT I - THIS COURT SHOULD NOT EXERCISE ITS EQUITABLE JURISDICTION TO HEAR THIS APPLICATION

Plaintiff-Toll Brothers, Inc. respectfully suggests that this Court should not exercise original jurisdiction to consider the issues raised by the petition of Cranbury Township. Petitioner is partially correct in arguing that appellate courts may exercise original jurisdiction when exigent circumstances necessitate immediate review, the public interest is implicated and delay and unnecessary expense can be avoided. All cases cited by petitioner, however, involved original appellate jurisdiction over collateral matters related to causes already properly before the court. In re LiVolsi, 85 N.J. 576, 583 (1981); Marlboro Tp. v. Freehold Regional High School District, 195 N.J. Super. 245, 251 (App.Div. 1984). In the absence of either imperative necessity or a clear

record for review, original jurisdiction is not warranted. City of Newark v. West Milford Tp., 9 N.J. 295 (1952).

Petitioners have alleged no reason other then the pendency of Mt. Laurel legislation to justify this Court's usurpation of the special Mt. Laurel courts' trial responsibilities. The legislation, if and when it is signed by Govenor Kean, may or may not have an impact on the remaining issues in the Cranbury Township case. If the legislation is signed into law, an appropriate motion should be made before the trial court and the avenue of appeals afforded by the Rules of Civil Practice should be followed. The Supreme Court of New Jersey should not be turned into a trial court, to sit and take evidence on environmental and planning factors which influence the award of builder's remedies.[3]

POINT II - A STAY SHOULD NOT ISSUE IN THE CRANBURY TOWNSHIP LITIGATION OR ANY OTHER Mt. Laurel II LITIGATION AT THIS TIME

R. 4:52-2 and R. 4:52-1 set forth procedures for the application and entry of any temporary restraint or interlocutory injunction. The within petition is an attempt to side-step all of the requirements of these rules, including the requirement that application first be made by motion or order to show cause in the trial court, (R.2:9-5(b)), and that all parties against whom relief is sought be given notice where possible.[4]

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[3] We urge this Court to deny this petition on procedural grounds and not reach the merits of the controversies. The facts stated in the self-serving affidavits in petitioners appendix are in some cases contrary to the record already made in the trial court (e.g., Cranbury Township) and in most cases, a poor substitute for trial testimony which has not yet been elicited or tested on cross examination.

[4] The listing compiled by the Administrative Office of the Courts indicates that fifty-two (52) suits are pending against movant-amici. We suggest that amici's request not be considered until formal notice and opportunity to reply is given to these parties.

This petition does not meet any of the criteria for issuance of a preliminary injunction as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). Petitioner's allegations of immediate and irreparable harm are very speculative since no unconditional builder's remedies have been entered in either the Cranbury cases or other Mt. Laurel II actions pending against twenty-one (21) of the amici municipalities. Additionally, the legal right underlying Cranbury Township's claim is currently unsettled and many of the material facts are controverted. No hearing has yet been held on any of Cranbury Township's defenses including municipal goals of historic preservation, farmland preservation, compliance with the Middlesex County Land Use Plan and adjacent land use patterns, sewer, water, traffic and community facility constraints as well as the environmental suitability of the various plaintiffs' sites. Cranbury also can not and does not attempt to show that the legislatively adopted "moratorium" in Senate Committee substitute for S.2046 and S.2334 would prevent a compliance hearing from being held and a final judgment from being entered.

Consideration of the relative hardship of the parties also requires that a stay not be entered. The only "hardship" which Defendant-Cranbury Township will suffer if the stay is not issued is that it may be required to defend its compliance plan in a hearing before the trial court. Defendant-Cranbury Township has in effect brought this hardship upon itself by delaying the adoption of a compliance plan until December 28, 1984, over 10 years after the initial exclusionary zoning litigation was commenced against it.

POINT III - THIS COURT SHOULD NOT RECONSIDER THE USE OF THE S.D.G.P., THE BUILDER'S REMEDY AND THE EFFECT ON URBAN AREAS IN THE ABSENCE OF A FULL RECORD

Petitioner suggests that the use of the State Development Guide Plan in both the Cranbury Township cases and the cases pending against the Township of

Colts Neck is producing "chaotic results", that the builder's remedy is "fundamentally unfair" and that urban areas throughout this State are losing private investment as a result of this Court's decision in Mt. Laurel II. With respect to the State Development Guide Plan, petitioner misunderstands this Court's admonition that the S.D.G.P. must be kept up to date. This Court did not suggest that the S.D.G.P. would have no effect if not revised by January 1, 1985; it simply reduced the weight to be given to the S.D.G.P. if not revised by that date. Petitioner states no facts to support its claim that this ruling has produced "chaotic results".

With respect to the unfairness of the builder's remedy and its impact on urban areas, this Court should have a full record to evaluate petitioner's claims. Until builder's remedies are awarded in Cranbury and perhaps in the other amici municipalities, this Court cannot evaluate the "fairness" of the result. A record is similarily necessary on petitioner's contentions regarding urban impacts.

CONCLUSION

Plaintiff-Toll Brothers respectfully requests this Court to deny Cranbury Township's petition and dismiss as moot the motions to appear as amici curiae and for admission pro hac vice.

Respectfully submitted,

Guliet D. Hirsch

GDH/sr
cc: All counsel on attached service list

Service List for TOLL BROTHERS, INC. v. TOWNSHIP OF CRANBURY, et al.
Docket No: L-005652-84

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