

Brief of respondent - UL of Greater

New Brunswick

that appeal should be
dismissed

P 11

CA002635B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

URBAN LEAGUE OF GREATER]
NEW BRUNSWICK, et al.,]
Plaintiffs-Respondents]

Docket No. A-5394-84T1
(Monroe Township)

vs.]

THE MAYOR AND COUNCIL]
OF THE BOROUGH OF]
CARTERET, et al.,]
Defendants-Appellants]

BRIEF OF RESPONDENT
URBAN LEAGUE OF GREATER NEW BRUNSWICK

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PROCEDURAL HISTORY

Respondent Urban League accepts the appellant's procedural history, as supplemented by the September 26, 1985 letter-brief of respondent Hintz.

STATEMENT OF FACTS

Respondent Urban League accepts the appellant's statement of facts as supplemented by the September 26, 1985 letter-brief of respondent Hintz.

LEGAL ARGUMENT

- I. THE APPEAL SHOULD BE DISMISSED BECAUSE THE ORDER BELOW IS NOT APPEALABLE AS OF RIGHT, THE NOTICE OF APPEAL WAS UNTIMELY AND NO MOTION FOR LEAVE TO APPEAL WAS FILED

Respondent Urban League hereby incorporates the argument set forth in its Memorandum of Law in Support of its Motion to Dismiss, filed simultaneously with this brief.

- II. THE TRIAL COURT ORDER OF MAY 13, 1985 DIRECTING PAYMENT TO THE MASTER FOR ASSISTING THE TOWNSHIP IN SUBMITTING A PLAN TO COMPLY WITH ITS CONSTITUTIONAL OBLIGATION TO PROVIDE FOR LOWER INCOME HOUSING IS CLEARLY WITHIN THE COURT'S DISCRETION, WHATEVER BUDGETARY APPROPRIATIONS MAY OR MAY NOT HAVE BEEN MADE BEFORE ITS ENTRY

This brief will be short because the appeal is clearly frivolous. The trial court clearly had the authority to appoint the Master and to require the Township to pay for her services.¹

In So. Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 281-285, 456 A.2d 390 (1983) (hereinafter Mount Laurel II), the State Supreme Court unequivocally approved the use of a Court-appointed special master to assist municipal officials in developing constitutional zoning and land use regulations, once the court has determined that the municipality's existing

¹ Respondent Urban League only addresses the propriety of the Order insofar as it directs payment by the Township for the Msster's services. Respondent Urban League has no direct interest in payments to the township's attorney and planning consultant and thus takes no poosition on those aspects of the Order.

ordinance does not satisfy its Mount Laurel obligation to provide a realistic opportunity for its fair share of the regional lower income housing need. The Court specifically recognized the potential values of a master's advice and assistance in determining remedies for the noncompliance of a municipality's zoning ordinance with the constitutional requirements set forth in that opinion. Id. at 286.

Although a court may use its discretion in deciding whether to make the appointment, such an appointment is usually desirable (and thus the court's discretion should be exercised in favor of an appointment) where the revision of land use regulations is required, especially if the revision is substantial. Id. at 282. "[W]e intend that the appointment of masters be viewed by the court as a readily available device, one to be liberally used." Id. at 283.

It is undisputed that the zoning practices of the Township of Monroe have been found to be in violation of Mount Laurel. Id. at 346, referring to Urban League of Greater New Brunswick v. Borough of Carteret, 142 N.J. Super. 11 (Ch. Div. 1976). The Township, in fact, is one of the very defendants before the Court to which the court's ruling were addressed. Moreover, after remand and an 18-day trial on region and fair share, Judge Serpentelli, by letter-opinion dated July 27, 1984, found that Monroe Township had a fair share obligation of 774 lower income units and that its then existing zoning ordinance was unconstitutional in that it failed to provide a realistic

opportunity for production of those units. This ruling was incorporated in a Judgment dated August 13, 1984 directing the Township to revise its ordinances appropriately within 90 days and appointing Carla Lerman as Master.

Thus, looking simply to the Supreme Court's pronouncements in Mount Laurel II, it cannot be questioned that the court possessed the authority in this case to appoint a master. This conclusion is further supported by the provision of N.J. Court Rule 4:4-41 for reference to a master upon approval by the Chief Justice. The fact that the Mount Laurel II opinion was itself written by the Chief Justice dispels any possible doubt as to the validity of the Order of appointment in this case.

Indeed, the Township of Monroe does not question the authority of the trial court to appoint a master in this matter. It simply questions the court's authority to order the municipality to pay for the required services of the master. The court's authority in this regard, however, is likewise without question.

New Jersey Court Rule 4:41-2 states: "The master's compensation shall be fixed by the court and charged upon such of the parties or paid out of any fund or property as the court directs." (Emphasis added). In applying this rule to Mount Laurel cases, including this case, the Supreme Court specifically directed that such payments are to be made by the municipalities involved. "The master's compensation shall be paid in its entirety by the municipality, and is due upon entry of final

judgment. Partial payments may be directed to be made in the court's discretion as the master's work progresses." 92 N.J. at 281, n.38 (emphasis added).

This language could not be more forthright and unambiguous. In fact, the statement is phrased in terms not simply suggesting that the municipality pay the master's compensation, but in fact requiring such payment by the municipality. It was the court's deliberate determination here that the municipality should bear this expense, and as the court directed, the municipality should make the payments forthwith. If not, the court has authority to issue a writ of execution against the Township, as provided in N.J. Court Rule 4:41-2.

Appellant Monroe Township claims that the Court cannot require it to pay the fees for the Court-appointed master despite Rule 4:41-2 because N.J.S.A. 40A:4-57 provides that no municipality can expend any money that had not been properly appropriated by the council or board within its annual budget. Essex County Board of Taxation v. City of Newark, 73 N.J. 69, 372 A.2d 607 (1977) disposes of this groundless contention.

That case involved a court-authorized re-evaluation of the city's property assessments. The City refused to appropriate the necessary funds and said that it could not pay the fees because doing so would violate the statute requiring such an appropriation. The Court noted that the purpose of the statutes "requiring appropriations in advance of expenditures is to foster sound municipal management of finances by prohibiting undisclosed

or irresponsible expenditures." Id. at 610. The Court further stated that by its actions it was insuring that the purpose of the statute was, in fact, adhered to, because the Court was supervising the expenditure, thereby insuring that public funds were not being misused. The Court stated:

That policy is not subverted by the action here proposed. This is not a case of a municipality undertaking an expenditure not undergirded by an appropriation but rather a municipality refusing to make an expenditure which the law renders mandatory. Moreover, our judicial review of this matter, resulting in the steps we now take to compel compliance with a legislative mandate, affords at least that amount of protection customarily supplied by adherence to the appropriation procedures. Id.

In Warren v. Hudson County, 23 N.J. Misc. 252 (1945), the Court rejected the argument that the town could not pay attorney's fees because no appropriation was made, on the grounds that the town must then make an emergency appropriation, which the statute allows for. The Court said:

If plaintiff's claim was not foreseen at the time of the adoption of the budget or if adequate provision was not made in the budget for this purpose, an emergency appropriation might be made after judgment is entered, N.J.S.A. 40:2-31. Whether an emergency appropriation is made or not, the amount will have to be provided in next year's budget (citations omitted). In either event, the lack of an appropriation will not defeat the plaintiff's right of recovery in this suit. Therefore, this separate defense is frivolous and will be stricken. Id. at 257.

The same result was arrived at in the case of In re Salaries Probation Officers Bergen County, 58 N.J. 422 (1971), in which the Court held that the county must pay the salaries of the

Court-appointed probation officers. To avoid violating the statute which says that no payments without a prior appropriation can be made, the Court said that the County could simply make an emergency appropriation that would serve to comply with the statutes.

Based on the intent of the budget statutes to insure sound spending of public tax revenues and the cases cited, the Township of Monroe is required to make an emergency appropriation according to Court order to pay the fees of the Master. In doing so, the Town will not be violating the budget statutes. The Court, by its ruling, has insured that public monies are being properly spent, and the town, by making an emergency appropriation, would be following the correct procedure as required by statute.

It should be noted that in another decision, Essex County Board of Taxation v. City of Newark, 139 N.J. Super. 264, 353 A.2d 535 (1976), the Appellate Division held that if the town did not make the emergency appropriation as required by the Court, then the Court could jail or fine for contempt the recalcitrant public officials. Additionally, as noted earlier, Rule 4:41-2 authorizes a writ of execution to insure payment.

We respectfully request that this Court promptly and forcefully clarify to Monroe Township and its elected officials that they, too, like all other litigants, are subject to the Constitution and the laws of this State.

CONCLUSION

For the reasons stated herein and in the Memorandum of Law in Support of Motion to Dismiss, the respondent Urban League of Greater New Brunswick respectfully requests this Court either to dismiss the appeal or to affirm the Order appealed from.

Dated: October 21, 1985

Respectfully submitted,



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Counsel wish to note the invaluable assistance in the preparation of this Brief of Fran Farber-Walter, Eileen Gavin McKenna, Kathy Hecht, and Steven Hallett, Rutgers Law School, Class of 1987.