CA - Cranbury 12/4/85

letter brief in lieu of formal Brief in support of motion for leave to take interlocutory appeal

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December 4, 1985

Supreme Court of New Jersey
Hughes Justice Complex
CN-970
Trenton, New Jersey 08625

Attention; Stephen W. Townsend/ Clerk

Re: A^124 Urban League of Greater New Brunswick
vs. Carteret and Consolidated' Ca's'e's'

Dear Mr. Townsend:

I am writing this Letter Brief pursuant to R. 2:6-2(b) in lieu of a formal Brief because of the time constraints placed by the Court for the filing of Briefs. A Statement of Facts and a Procedural History have already been submitted by the Township of Cranbury in the Brief in Support of Motion for Leave to Take an Interlocutory Appeal, copies of which have been filed for this Court. The Procedural History need be supplemented only by a statement that this Court has certified the Motion for Leave to Take an Interlocutory Appeal on its own Motion, and has granted that Motion. The Township of Cranbury relies on Points III and IV, as set forth in said Brief and also relies on its Brief in Support of the Motion for Transfer to the Affordable Housing Council submitted to the Trial Court as set forth at page 18a of the Appendix in Support of Motion for Leave to Take an Interlocutory Appeal.

POINT I

ANY DEFINITION OF THE TEEM "MANIFEST INJUSTrCE" MUST MAKE REFERENCE TO THE CASE LAW ON RETROACTIVE' APPLICATION OF NEW' LEGISLATION.

By now, this Court is well aware that on July 2, 1985 Chapter 222, the Public Laws of 1985, now known as "The Fair Housing Act" went into effect. That Act has now been codified as N.J.S.A. 52:27D-301, et *seq*. The issues currently before this Court on the Interlocutory Appeals from denial of Motions to Transfer to the Affordable Housing Council pursuant to Section 16 of the Act N.J.S.A. 52:27D-316, revolve around the criteria to be used in determining whether, or not to grant a Motion to Transfer made pursuant to that statutory section, and the effect to be given to the legislative declarations set forth in N.J.S.A. 52:27D-303, that the "State's preference for a resolution of existing and future disputes involving exclusionary zoning, is the mediation and review process set forth in this act, and not litigation..."

It is of note that the emphasis given *hy* the two Trial Courts which have rendered opinions thus far in the matter, is on the question of whether or not the continued litigation or the transfer to the Affordable Housing Council would be most likely to result in the most expeditious construction of housing for persons of low and moderate income. In giving conclusive weight to this standard or criteria, these Courts have ignored- the legislative history surrounding the adoption of this crucial legislation. A predecessor to

Senate Bill 2046 which eventually became "The Fair Housing Act" contained five separate factors to be considered by a Court in determining whether or not to transfer such litigation to the Council on Affordable Housing. Before its final enactment, four of those factors were eliminated, and only one remained. That version, which was not enacted, read as follows:

> For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, no exhaustion of the review and mediation procedures described in Sections 14 and 15 of this act shall be required unless the court determines that a transfer of the case is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing.

That language which was, in effect, followed by both Judge Serpentelli and Judge Skillman, was specifically rejected by the Legislature. Instead, the Legislature substituted the language which became part of the final enactment which says, "In determining whether or not to transfer, the Court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation." N.J.S.A. 52:27D-316. The use of the term "manifest injustice", is clearly not an accident. Section 3 of the Statute as already indicated, clearly sets forth an intention on the part of the Legislature to apply the statute retroactively; in other words to apply it to those cases which were pending 60 days prior to the enactment of the Legislation. This Court has previously indicated the standard to be applied in situations where the Legislature clearly indicated an intent to apply

new Legislation, retroactively. That standard was most recently set forth in the case of State, Dept. of Environ. Protect, v. Ventron, 94 N.J. 473, 468 A.2d 150 (1983) where this Court stated:

> "When considering whether a statute should be applied prospectively or retroactively, our quest is to ascertain the intention of the Legislature. In the absence of an express declaration to the contrary, that search may lead to the conclusion that a statute should be given only prospective effect. Rothman v. Rothman, 65 N.J. 219, 224, 320 A.2d 496 (1974). Conversely, when the Legislature has clearly indicated that a statute should be given retroactive effect, the courts will give it that effect unless it will violate the constitution or result in a manifest injustice".

In other words, where the Legislature has indicated that it intends retroactive application, this Court stated that it will do unless that application is either unconstitutional or will result in a "manifest injustice". The Ventron case made reference to the case of Gibbotos v. Gibbons, 86 N.J.515, 522-23 432 A2d 80 (1981) which defined "manifest injustice", in the context of retroactive application by using the following language:

> "The essence of this inquiry is whether the affected party relied, to his or her prejudice, on the law that is now changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively".

It seems clear then from the decisions of this Court that three things are true; a) that manifest injustice must

be determined on a case by case basis, based on individual facts of a specification situation, b) that the burden of proving manifest injustice must be on the party asserting the unique facts which create the manifest injustice as to it, and c) that the Legislature could not have intended that "Manifest injustice" should be determined by a reference to a "quicker construction" criteria.

If this last standard were to be the standard applied in determining manifest injustice, it would mean that the delays inherent in setting up the Affordable Housing Council and the development by that Council of rules and regulations, criteria for establishing region and fair share allocation methodology, and all of the other work involved in getting started would make it impossible for a Transfer Motion to succeed in most cases despite the stated legislative intent that existing litigation be transferred. Could the Legislature have intended such a paradox? It is submitted that this is highly unlikely.

In certain cases it is also problematical as to whether or not a transfer would indeed delay the implementation of low and moderate income housing. This Court, in its opinion, in So. Burlington Cty. NAACP v. Tp. of MtV Laurel 92 N.J. 158, 456 A 2d 390 (1983) reassured municipalities that "they should remember that they are not being required to provide more than their fair share", 456 A 2d at 420. What value does that promise have, when the consensus methodology used by the Trial Court in Cranbury's case in establishing Cranbury's "fair share" of

the regional need for low and moderate income housing does not take into account specific criteria required by the act to be used by the Affordable Housing Council in establishing municipal fair share numbers, such as the preservation of historically or important architecture in sites, adequate land for agricultural and farmland preservation purposes and giving credit for current units of low and moderate income housing of adequate standard. N.J.S.A. 52:27D-307C (1)(2). Can a municipality think that it is being required to do nothing more than its fair share, when what it is being required to do was determined by a different method than the method being used to determine what its neighbor is required to do? In this light, Cranbury Township has made an alternative Motion to Judge Serpentelli to recalculate Cranbury[1]s fair share number using the criteria set forth in this statute. It would appear that if Cranbury is not going to be required to do more than its fair share, that Motion should be granted, since the calculation of the first fair share number took almost one year of Court proceedings and three weeks of trial. It is submitted that the time differential between further Court proceedings and a transfer to the Affordable Housing Council would be greatly minimized.

POINT II

THE MORATORIUM ON BUILDER'S REMEDY IS INDEPENDENT OF ANY TRANSFER PROVISIONS IN THE FAIR HOUSTNG ACT.

The Township of Cranbury has already briefed the question

of the independence of the provisions of the Fair Housing Act on Moratorium on Builder's Remedy (N.J.S.A. 52:27D-328) in its brief submitted to the Trial Court and set forth in its Appendix at page 33a. The Township of Cranbury relies on the material set forth therein. It is clear from a reading of the Statute that the moratorium provisions were intended to stand alone. This is clear, not only from a reading of the text of the statute, but also from the statement of Leglislative intent to provide various alternatives to the use of Builder's Remedy as a method of achieving Fair Share Housing, which is set forth in N.J.S.A. 52:27D-303.

The language which is set forth in the act concerning the moratorium^ was adopted at the specific recommendation of Governor I^ane in his message to the Senate conditionally vetoing Senate Bills 2046 and 2334. In that message he said:

> "Accordingly, I am recommending an amendment to make this moratorium perspective, only by directing the Courts not to impose a builder's remedy during the moratorium period in any case in which a final judgment providing for a builder's remedy has not been entered".

Since it was the Governor's statement that the moratorium would be directed to the Courts, and not the Council on Affordable Housing, it appears clear that the moratorium was intended to apply in the final version of the bill, whether or not a particular case had been transferred to the Council on Affordable Housing.

The builder's remedy itself, is not a constitutional right. Prior to Mfr. Laurel II, a builder's remedy was granted only in the most extraordinary circumstances, See Oakwood at

Madison v. Tp. of Madison, 371 A 2d 1192 n. 50. The use of the builder[1]s remedy was expanded in Mt. Laurel II, but only "where appropriate" and only on a "case by case" basis. 456 A 2d 420. It is clear that the builder's remedy is only a device or a means "to achieve compliance with Mt. Laurel", 456 A 2d 452. No where, in any of the cases is there even a hint that a builder's remedy has risen to the level of a constitutional right. Rather, it is a device devised by the Courts to assist in providing relief for the violation of a constitutional right. The Legislature has now provided what it now considers to be viable alternatives to a builder's remedy to right the wrongs cited in Mt. Laurel. If those alternate means are viable, and for our purposes here we must assume that they are viable, then how can the substitution of one device for another device be said to be unconstitutional. Mf. Laurel II recognizes that this new Legislation is entitled to a presumption of validity.

> "IT]he presumption goes deep, and indirectly includes the assumption of any conceivable state of facts, rationally conceivable on the record, that will support the validity of the action in question". Mt. Laurel II, 456 A 2d at 466.

POINT III

SETTING REQUIREMENTS FOR CREDITS AGAINST FAIR SHARfi DEFINING REGION AND DETERMINING PROSPECTIVE NEED IS NOT VIOLATIVE OF ANY~OF THE PROVISIONS SET FORTH TO MT. LAUREL II.

The Fair Housing Act defines region in a manner different from the suggested definition of region set forth in Mt. Laurel II. See N.J.S.A. 52:727D-304(b), 456 A 2d at 440. Xf this Court in its prior decisions, acknowledged on more than one occasion that problems of definition of region in determination of fair

share are "better addressed by others". The Court also acknowledged the disadvantages of having a Court adjudicating individual disputes as opposed to administrative planning agencies. 456 A 2d at 437. In that context, however, this Court generally approved the concept of a region as "the housing market area of which the subject municipality is a part, and from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning. 456 A 2nd at 440. The Court then indicated that "we will not attempt here to provide any further guidance for the determination of regional need, but leave that to the experts, including the experts appointed by the Trial Courts pursuant to our opinion". 456 A 2nd at 440. The whole point of the Fair Housing Act is to provide expertise at the highest level in making determinations of region^ -tfiat the Legislature has done is to set forth relatively small regions,!, e. two to four counties, on which fair share allocations must be based. To the greatest extent practicable, they are to be primary metropolitan statistical areas as last defined by the United States Census Bureau. N.J.S.A. 52:27D-304. The Urban League Plaintiffs in the Cranbury case, at an early stage, recommended to the Court the use of such statistical areas for the purpose of determining region. How can it possibly be said that the use of such areas on two to four county basis is somehow an impermissible region for determining fair share.

Similarly, the act requires that credits be given against fair share or that adjustments be made in fair share to accommodate certain factors set forth in the act. On its face, any such adjustments or credits can be accommodated on a regional basis in a manner similar to the basis that the Trial Courts have already accommodated credits for a lack of available land in the consensus methodology which was set forth in the unrecorded Trial Court opinion of A.M.G. Realty v. Warren, decided by Judge Serpentelli on July 16, 1984. In that case, once the regional need was determined, it was increased by a factor of twenty per cent to accommodate those municipalities which would be receiving a credit for lack of available vacant land. Why cannot a similar increase be made to the regional need determination to accommodate credits or adjustments to be given to those municipalities who already have substantial amounts of low and moderate income housing, or which are sensitive because of the need for historic preservation or agricultural preservation?

In Mt. Laurel II this Court has already stated that "in the absence of adequate Legislative and executive help, we must give meaning to the Constitutional Doctrine in the cases before us through our own devices, even if they are relatively less suitable". 92 N.J. at 213-214. Now the Legislature has acted and is providing that help. Is it now necessary that the Court continue to pursue its own devices even if they are relatively less suitable than the Legislature's

devices? As Judge Skillman indicated in his Trial Court opinion in Morris Cty.Fair Hous. Council v. Boonton Tp. et als. decided October 28, 1985, "consequently certain of the ruling set forth in Mt. Laurel II may be viewed not as constitutional imperatives in themselves, but rather as "devices" to promote more effective judicial enforcement of the Mt. Laurel Doctrine until such time as the Legislature might address the problem in another manner". Surely, the definition of region or the development of the fair share methodology is nothing more than a device, and not a constitutional imperative. A similar situation was before this Court in Robinson v. Cahill, 69 N.J. 449 (1976). As Judge Skillman pointed out in his opinion at page 14, a majority of that Court concluded that faithfulness to the presumption of validity of legislative enactments required it to sustain the validity of the law on its face, and to afford the Commissioner an opportunity to administer its provisions in a manner which would fulfill the constitutional guarantee of a "thorough and efficient" system of public schools. In Robinson v. Cahill, the constitutional guarantee was a thorough and efficient education. Here the constitutional guarantee is the right to adequate housing. In both cases the Courts threw out long established systems of local government as violative of the New Jersey Constitution. In both cases, after considerable litigation, legislation was finally enacted. In Robinson v. Cahill, the Court deferred to that legislation, despite the considerable opposition of the plaintiffs.

In Mt. Laurel II, this Court also indicated the necessity

for judicial deference to legislation absent of clear showing of facial unconstitutionality. It should now follow the course that it charted for itself, almost three years ago.

POINT IV

DELAY IS AN ESSENTIAL PART IN THE ESTABLISHMENT OF AN ADMINISTRATIVE PROCEDURE AND DOES NOT RENDER! THE ACT UNCONSTITUTIONAL.

The analogies between this case and the case of Robinson v. Cahill supra, are numerous. There the Court imposed extraordinary sanctions for failure to comply with its constitutional mandate. In light of those sanctions the Legislature took action to set up a comprehensive administrative process to guarantee compliance with the constitutional requirement. It was inevitable there, as here, that the establishment of a new and comprehensive administrative framework would take time and necessarily delay to a certain extent, the constitutional relief called for by this Court's decision. The language used by Chief Justice Hughes there, is equally appropriate here.

> In the area of judicial restraint in moderation there is room for accommodation to the exigencies of government, as pointed out by Judge Conford, in the consideration of practical possibilities of accomplishment...This Court has exercised this restraint in the timing of required accomplishment of a constitutional goal, without abandoning its eyentual enforcement. (69 N.J. at 474-475). Citations omitted.

This Court is urged to follow the precedent it has set and allow a reasonable period of time for the administrative procedures created by the Legislature to become effective.

CONCLUSION

Mt. Laurel II is replete with statements that this is properly a legislative function and that were the legislature to act, the courts should defer. "...[P]owerful reasons suggest, and we agree, that the matter is better left to the legislature." Legislation "might completely remove this court from those controversies". "...[W]e have always preferred legislative to judicial action in the field..." "Our deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions." 456 A 2d. at 417. ",..[T]he complexity and political sensitivity of the tissue now before us make it especially appropriate for legislative resolution..." 456 A 2d. at 417 n. 7* "As we said at the outset, 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 Mt. Laurel doctrine." 456 A2d at 490.

The Legislature has acted. The Executive has acted. A comprehensive system now exists at an administrative level to approve municipal plans for low and moderate income housing.

The language set forth in the Mt. Laurel II becomes meaningless to the municipalities as it appears that the assurances of deference to legislative action were mere lip service, and not seriously intended. Obviously, there are pitfalls in implementing the legislation. As Judge Skillman said at page 41 of his opinion in Morris Cty. Fair Housing Council v. Boonton Tp.

> "It is fair to say that the Council will find itself walking through a constitutional mine-field when it undertakes, in conformity with the Act, to establish housing regions, to determine regional needs for lower income housing, to adopt "criteria and guidelines" for determining municipal fair share allocations and to review municipal petitions for substantive certification of housing elements. However, appropriate respect for the legislative branch of government, and the Council, precludes the court from assuming that the Council, will be unsuccessful in traversing the difficult course which lies before it. Rather, the proper allocation of responsibility among the coordinate branches of government requires the courts to defer to the Council until it has been afforded an adequate opportunity to perform its responsibilities under the Act in a manner which conforms with the constitutional mandate of Mount Laurel.

The only conclusion that can be drawn from the prior cases is that this Court has permitted deference to legislative action and in similar circumstances in the past, it has so deferred. It should continue to do so, now.

Respectfully submitted,

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