COAH - Cranbury 12/18/85

letter in lieu of reply brief rejecting Atty. General's position favoring transfer in Morris + Middlesex cases

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December 18, 1985

Supreme Court of New Jersey
c/o Stephen W. Townsend, Clerk
Richard J. Hughes Justice Complex
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Trenton, New Jersey 08625

Re: Urban League of Greater New Brunswick v. Carteret (Cranbury) A-124,(24,782)

Dear Honorable Justices of the Supreme Court:

Lawrence Zirinsky, plaintiff in the Cranbury litigation, herewith submits his response to the Briefs previously filed by the Department of the Public Advocate and the Attorney General of New Jersey.

With respect to the Public Advocate's Brief, plaintiff Zirinsky adopts the positions taken therein as adequately protecting the rights of the public and litigants in the lengthy Mount Laurel litigation that has occurred in Morris and Middlesex Counties. As the Public Advocate recognizes, cases as old as these represent special situations in which the transfer should not be granted without compelling justification. See Brief of the Public Advocate on behalf of Plaintiffs-Respondents in Morris County Fair Housing Council, et al. v. Boonton Township, et al., at 73-74. Plaintiff Zirinsky would only add that developers such as he, who have the residential construction capacity to achieve the aims of these long-standing county wide public interest law suits, stand in the shoes of the public interest litigants. It must be remembered that in neither the Morris nor the Middlesex cases was there realistic prospect of immediate housing construction, notwithstanding successes in Court,

until Mount Laurel II. That decision's promise of relief on the developer's land provided for the first time a reasonable incentive for litigation to implement the public interest claims. Thus, plaintiff Zirinsky joins the Public Advocate in opposing transfer precisely because his interest furthers, in the Mount Laurel II context, the interests of low and moderate income persons and public interest organizations.

In contrast, the Attorney General's Brief, while prettily describing a grand, over-arching legislative scheme, never comes down to earth to grapple with the real problems faced by Mount Laurel II litigants, be they low income persons or builders. First, in its Brief at page 8, the Attorney General appears to lay claim to greater "objectivity" than the Public Advocate. This claim is scarcely credible. After all the Attorney General in this case represents an administration, the head of which, Governor Kean, was quoted as declaring Mount Laurel "communistic". In constrast, the Public Advocate is perhaps the only state agency which has consistently and objectively attempted to implement the law as declared by this Court in Mount Laurel II. Greater objectivity would thus, appear to lie with the Public Advocate since it has sought to respond to, rather than challenge, the actions of this Court.

Second, the Attorney General makes repeated reference to the funding that will supposedly facilitate Mount Laurel compliance by providing an incentive for communities to utilize the offices of the Council on Affordable Housing. See footnote on page 17. However, the actual subsidy money involved, 25 million dollars, will only fund about 3600 units, given the (probably optimistic) 7,000.00 per unit subsidy amount which the NJHMFA is apparently contemplating. This is barely more than 1% of the total need for the State over the next 20 years as estimated in the Rutgers report, Mount Laurel II: Challenge and Delivery of Low Cost Housing, at 309. Putting the matter in a different perspective, the fair share requirements of two typical municipalities before this Court, Cranbury and Warren, as determined by Judge Serpentelli, exhaust roughly 50% of the appropriation. Thus, the funding to which the Attorney General points in its Brief is in reality nothing more than a makeweight since it will satisfy so little of the actual need.

Third, the Attorney General never in its Brief actually deals with the facts of specific cases. He refers to arguments of various unnamed plaintiffs made with respect to unnamed towns. Thus, in the State's Brief, there is little attempt to confront the reality of the Morris County case which is nearly 8 years old and the Urban League case, which is just about to become a teenager. The application of the phrase "manifest injustice" to the resources and time allocated to these specific, unique, public interest-developer suits is completely ignored.

Such disregard for the facts or circumstances of particular cases, in addition, seems to encourage the Attorney General to belittle the committment of time, energy, and resources which developers have expended in pursuing litigation, the institution of which, after all, was specifically invited by the Supreme Court. See, e.g. Attorney General's Brief at 28. This disregard of the very real costs and efforts of litigation starkly contrasts with the Attorney General's firm position when its own resources are involved. This Court will recall that the Attorney General insisted on compensation for the sum of $7,000.00 to $8,000.00 he would have to spend in preparing the legislative history of the Fair Housing Act. Yet he cares nothing for the far larger expenses incurred by developers in reliance on this Court's specific encouragement of private litigation. Based on consistency, the Attorney General should be willing to assume the 5 and 6 figure fees which have been incurred by litigants in pursuit of a remedy that would be frustrated if the Attorney General's position is upheld. If the public interest now requires that this remedy be withdrawn, surely those developers, who furthered the public interest by taking advantage of Mount Laurel II and thereby, in large measure spurred the passage of the statute, should be compensated for their efforts. And who should pay but the state authorities that would rule that those statute-forcing efforts, made in good faith, are no longer needed.

Fourth, the Attorney General ignores the fact that the Fair Housing Act, rather than being a well-intentioned legislative response to Mount Laurel, is conceived by many as simply a way-station to a constitutional amendment. Senator John Dorsey, a member of the Republican Senate Minority, stated as much recently in appearing before the Land Use Law Section

of the New Jersey State Bar Association, and added that the constitutional amendment will again come to the fore-front now that political control of the Assembly has shifted. The result will be turmoil. The optimistic portrait painted by the Attorney General, which depicts an executive branch and legislative branch working in harmony to achieve, through the Fair Housing Act, the goals of the constitutional mandate in Mount Laurel II does not reflect reality. The actual political context is much different and much more troubling. One need only to read the purply rhetorical Assembly minority statement on the Fair Housing Act, calling the Fair Housing Act, "the mess" created by the Democratic Majority, to realize that this former minority and now majority in the Assembly has very little interest in objective implementation of the Fair Housing Act as currently written.

Finally, plaintiff Zirinsky would once more reiterate why he brought his law suit in the first place. He, like others, specifically responded to the Supreme Court's invitation to enforce Mount Laurel II by builder's remedy litigation. Any withdrawal of that remedy would thus be a breach of faith with him and with similar litigants particularly where such suits were joined to pending lengthy public interest litigation. The Attorney General, who has never been a litigant in any of these proceedings, and is only now becoming involved, totally glosses over the manifest lack of simple fairness in any withdrawal of the builder's remedy.

Accordingly, for the reasons given here, the position of the Attorney General favoring transfer in the Morris and Middlesex cases should be rejected. Rather, the position of the Public Advocate, who is a litigant and who understands the difficulty and expense involved, should be adopted.

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