Attorney's fees

1986

draft memo: award of costs is integral to success of mt. laurel doctrine & an incentive to ~~the~~ institutional litigation

Pg 13
P.i. #4044

AF000027D

EN

Award of Costs is Integral to the Success of the Mount Laurel Doctrine As an Incentive to Institutional Litigation

Beyond those statutory costs to which it is without doubt entitled, the Urban league plaintiffs seek reimbursement for out-of-pocket litigation expenses, including witness and deposition costs, and also for appropriate attorneys fees. These costs are allowable, we submit, as "customary" expenses within the special context of Mount Laurel litigation.

Before turning to the applicable caselaw on customary costs, the reasons for recognizing a special Mount Laurel context should be carefully explored. This is a new and still evolving area of law, and it is important to see how a generous cost-shifting rule will effectuate the Supreme Court's concern that the public interest be furthered by furnishing appropriate incentives to Mount Laurel litigation.

Costs in a builder's remedy case. The principal incentive to on-going litigation created by Mount Laurel II is, of course, the builder's remedy, and by the experience of the Urban League case alone, this device has vindicated the court's intentions spectacularly well. In addition to the four builder-plaintiffs who participateed fully in the Cranbury portion of the trial, additional builder-plaintiffs have been partially consolidated for remedial purposes (with

the status of their builder's-remedy claims left for later resolution), in the portions of the case involving Monroe, Piscataway , North Brunswick and Old Bridge Townships.

The engine which drives the builder's remedy incentive is, as it was intended to be, the prospect of increased profitability which can be achieved by joining higher densities and efficient construction techniques with a set aside of below-market units for poorer families. Measured against this profit incentive, the ability to recover costs of the type sought here by the Urban League may not be terribly important to the builder-plaintiff's ledger sheet. The Supreme Court has noted, however, the serious burden of expense on Mount Laurel litigation, [**cite**] and passing on the builder's litigation expenses to the municipality, if conditioned on an equivalent reduction in the price of the low and moderate income Mount Laurel units, could easily be justified as a modest form of municipal contribution, one of the cost-reducing techniques encouraged by the Supreme Court. [**cite**]

In addition, in those instances where a municipality's obligation under Mount Laurel II is clear, as it was in the case of the municipalities before the court in the Urban League case, the award of discretionary costs, including attorneys fees, is an appropriate recognition of the unnecessary expense to which the plaintiffs were put. Needless to say, the discretionary nature of any costs award

allows the court ample room to adjust these rationales where equity demands.

If a conventional builder-plaintiff is entitled to a generous measure of costs, as just suggested, it would be inequitable to deny these to an "institutional," or public interest plaintiff such as the Urban League, unless the Supreme Court's strong encouragement of the builder plaintiff is taken to include a negative inference that suits by public interest plaintiffs should be discouraged. This is hardly a plausible reading of Mount Laurel II. The Supreme Court gave institutional plaintiffs a very liberal right to standing in Mount Laurel cases, [**cite**] presumably in order to assure that the public interest would be independently repersented in at least some of the Mount Laurel cases, but this would be a hollow right without some realistic method of financing the litigation in the absence of a profit return.

Thus, a return of out-of-pocket costs to public interest plaintiffs will encourage the useful participation of such institutions in Mount Laurel cases in the same was that the builder's remedy encourages the useful participation of builders. The full return of costs would have other advantages as well, just as a return to builder plaintiffs has the added advantage of a possible pass-through to consumers in the form of a lower housing price. While the institutional plaintiff lacks a pricing mechanism to pass costs

through, it is in a singularly appropriate position to monitor Mount Laurel settlements and orders as they are entered. The six settlements thus far entered into between the Urban League and municipal defendants each provides for extensive reporting to the Urban League as the settlement is implemented and affordable housing actually produced. This reporting will be fruitless without an ability to monitor progress or lack thereof, and monitoring will in turn require some new funding support. Awards to public interest plaintiffs will also discourage unnecessary defensive tactics, as well as will such awards to a builder. Thus, the Court can plausibly view builder and institutional plaintiffs as similarly situated for purposes of an award of costs.

Costs in an institutional plaintiff's case. The Urban League's claims for discretionary costs does not depend upon parity with builder plaintiffs, however, and it exists independently of whether builders are granted or denied them. The claim rests fundamentally on the premise that steps must be taken by the Court -- and by rule change in the Supreme Court if necessary -- to preserve a viable, independent role for non-builder plaintiffs in Mount Laurel litigation. A realistic rule on costs, a rule which recognizes the perennial funding problems of public interest organizations, is one way to do so.

The very sucess of the builder's remedy has threatened the atrophy of the public interest suit. As this Court has

noted, virtually all of its new filings in exclusionary zoning actions are by builders, compared to a dominance of institutional suits prior to 1980. Indeed, the Department of the Public Advocate recently announced the likelihood that it would not be bringing any new Mount Laurel actions. The Court should be concerned about this atrophy of the institutional law suit for a number of reasons.

Most importantly, institutional litigation is not inextricably tied, as the builder's case is, to the mandatory setaside technique which, using the 20% rule of thumb, requires production of four conventional housing units for each Mount Laurel unit achieved. As one of the fair share expert in this litigation, George Raymond, has pointed out, use of the 4:1 ratio to achieve the entire 1990 regional fair share of approximately 35,000 low and moderate income units would require construction and sale of 140,000 market rate units during that same period in the 11-county North Jersey region, an unlikely figure given reasonable projections of the economy and of industry capabilities. [**Cite Raymond report and check data for accuracy**] Mr. Raymond's critique was not persuasive as a specific defense to the Urban League's claims in this case, because the initial market throughout the region, and the longer-term market in highly competive areas (such as Cranbury, for whom he testified) can undoubtedly absorb all of the housing contemplated by the litigation presently before the court. As

a general proposition however, the inexorable statistics of overbuilding will seriously undermine the viability of Mount Laurel II if this process is not counterbalanced in some way.

For this reason, the Urban League has pursued solutions that do not require the 4:1 set aside wherever possible, most notably in the Plainsboro settlement where only 40 units out of a 575-unit plan involve new construction on a set aside basis. Needless to say, a settlement of this type would have been utterly impossible in a builder's suit, and a court judgment embodying this result would be wholly incompatible with the obligation to provide a builder's remedy, since the logic of the builder's remedy depends heavily on the profit contribution of the market-priced units.

There are a number of techniques that can achieve affordable housing without incurring the over-production risks of the 20% set aside, but all are more likely to be persued by an institutional plaintiff than a profitmotivated builder. Two basic strategies underlie these techniques -- first, whenever possible, the existing housing stock should be adapted to Mount Laurel purposes, and second, where new construction is necessary, it should take advantage of what ever subsidy programs still exist. Implementation of these strategies can involve imposition of rent and occupancy controls, condominium conversion and refinancing, rehabili-

tation of existing substandard units, creative packaging of tax-sheltered financing, and vigorous pursuit of such remaining subsidy funds as are available through the senior citizen and farm home loan programs. None of these techniques is foolproof; all require hard work and cooperation between plaintiffs and defendant municipalities and the institutional plaintiff's role is sometimes that of a broker bringing municipalities into contact with viable sources of public or private funds. The intricacies of this process need not be explored here -- the point is that this vital element of the long range Mount Laurel remedy is likely to be slighted if the litigation is left wholly in the hands of developer plaintiffs, who will understandably (and legitimately) pursue those strategies most favorable to their interests.

Reliance on builder remedy suits poses further problems. The Mount Laurel need is region-wide, yet the builder suits will inevitably cluster in those relatively few communities that the market finds "best" at any given time. In the Urban League case, for instance, Cranbury was the defendant against four consolidated builder suits, and Monroe was the defendant against one. No builders intervened against Plainsboro, South Plainfield, South Brunswick or East Bruswick at any point in the litigation, and one brought suit against Piscataway only after trial had commenced. To date, all four of the townships sued only by the Urban

League have settled, committing themselves to a cumulative fair share obligation in excess of 5000 housing low and moderate income units. As a part of this process, the four towns have had to take the initiative in seeking out development possibilities, rather than waiting for a developer to strike. (Not insignificantly they have also retained greater local control of their land use policies by not having to defer to the preemptive rights that the builder plaintiff gains by the builder's remedy.) Left to builder-initiated litigation, it is questionable whether any of these towns would have been sued, with an immediate 5000 unit loss.

This is not to suggest that settlement is impossible in cases where builders are present. Builder-plaintiffs were involved in the separately scheduled phase of the Urban League case involving North Brunswick and Old Bridge, and preliminary settlements have been reached with both municipalities. As to Old Bridge, however, the Urban League settled independently of the builder-plaintiff, and as to North Brunswick the settlement involved identification of builders other than the builder-plaintiff who were presently willing to propose set aside projects. Whether by settlement or judgment of the court, the result is different when builders are litigants, and this may sometimes cause problems that an institutional plaintiffs can ameliorate.

Piscataway offers another variation on this theme. There, the thrust of recent development has been mostly in office and research parks, with proposals for additional building in that category pending. The function of the Urban League in this setting has been to fight hard for suitable residential development on the remaining appropriate land, in the process setting itself against established land development interests as well as the township itself. Again, it is immaterial who ultimately prevails on each substantive issue; in Piscataway, as in each of the other townships named, the Urban League has played a role as an institutional litigant that could not have been played by a builder plaintiff, thus contributing to a broad and hopefully effective resolution of the cases before the Court.

A third aspect of the institutional plaintiff's role in Mount Laurel litigation focuses on the remedial phase of a standard builder's remedy suit. In some situations, such as Cranbury's, the builder's claims exceed any plausible fair share that could be ordered, and the resolution of their self-interested claims will effectively resolve the remedial issues in the case and allow the Court to grant repose. A much more likely situation, however, will be the one in which only one or a few builder plaintiffs are before the court and claim only a part of the municipality's fair share, leaving the rest to be satisfied by other means.

The Supreme Court in Mount Laurel II did not have to consider this situation, but it is obvious that a builder plaintiff will not be the most effective advocate of the public interest in this setting. As to rehabilitation, "retrofitting" or subsidy strategies, for instance, the builder will probably be indifferent, and as to additional rezoning, the builder may have competitive reasons to prefer a solution that is less than optimal from the public interest point of view. The trial judge, of course, and the master if one is appointed, will have an independent responsibility to consider the public interest but Mount Laurel litigation still depends upon a vigorous adversary process to aid the decision-makers, assistance which is weakened or lost once the builder plaintiff achieves its narrower objective.

In the present litigation, the continued participation of the Urban League moots this problem, but such suits will be a rarity in the future unless institutional litigation is encouraged to a degree at least somewhat commensurate with that of the builder plaintiff. Indeed, the Urban League plaintiffs have previously suggested that the Court consider appointing an institutional plaintiff as a representative of the public interest at the remedial stage where on builder plaintiffs are involved [**cite priorities brief**]; if this suggestion were accepted litigation expenses for the designated "guardian ad litem" would surely be reimbursable.

Thus, in three significant respects, the institutional or "public interest" plaintiff can contribute to the development of the Mount Laurel doctrine -- by pursuing existing housing and subsidy alternatives to overbuilding, by focussing on less competitive (or profitable) communites, and by following up on remedies. Beyond these practicalities, however, the institutional plaintiff brings a different perspective that it is useful to keep before the court. A builder-plaintiff is properly concerned with "the deal" -- whether a given combination of economic factors can produce both lower-income housing and private profit. An institutional plaintiff, while necessarily concerned also about "the deal," in the sense of having a solution that will actually work and produce housing, is much more likely to be equally concerned about non-economic aspects of the case.

In the nature of things, for instance, the builder-plaintiff will normally prefer a profit-maximizing mix of housing units weighted towards moderate, rather than low income households, since these units can be sold or rented at a price closer to market price; an institutional plaintiff will ordinarily be skeptical of such weightings, asking that they be closely scrutinized and justified. In the present litigation, the Urban League has occasionally found itself at odds with some builder-plaintiff positions on such matters as the limits of sound planning considerations. The

substantive correctness is not in issue here; what matters is that a doctrine fraught with as broad social and political implications as the Mount Laurel doctrine can benefit in it's development from the fullest diversity of perspectives possible, since this litigation has unfortunately become a surrogate for the ordinary political process.

Thus, the Urban League submits that over the long haul the institutional plaintiff should be given a tangible form of encouragement to participate in future cases, one that parallels the profit incentive given by Mount Laurel II to builders. Given the realities of institutional public interest litigation, which normally operates (as the Urban League team has in this case) on the margin of solvency, discretionary award of litigation support costs, including expert witness expenses, discovery costs, and appropriate attorneys fees, is the equitable solution.

In this case, for instance, four attorneys and their retained expert have had responsibility for litigation encompassing nine municipalities, the development of a novel fair share methodology, and several substantive briefs on legal issues left unresolved by Mount Laurel II. Because of the exigencies of funding, one attorney was forced to withdraw from the litigation during trial, others have in effect volunteered large numbers of hours without compensation, and the grant for direct litigation expenses was exhausted in the month trial began, leaving current expenses

unpaid. Under these circumstances, it is not difficult to see how institutional litigation can atrophy, and how a modest boost in terms of recoverable costs can change that situation.

The Urban League plaintiffs thus submit that there is a strong case on general principles to be made for awarding costs to institutional plaintiffs beyond those relatively narrow categories explicity provided for by law. Specifically, it is our contention that these expenses should be regarded as "customary" within the meaning of the law as applied to the unique context of the Mount Laurel cases. With our statement of these general principles in hand, we now turn to an evaluation of the specific caselaw guidance on these matter.