Attorney's Fees - U.L. v. Carteret

7/1987

Brief and Appendix for Defendant Municipalities
(Action on appeal from 2/13/87 Order denying Plaintiffs costs and fees)

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Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-3416-86T1

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL.,

PLAINTIFFS-APPELLANTS

VS.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, ET AL.,

DEFENDANTS-RESPONDENTS

ACTION

ON APPEAL FROM

Order Dated February 13, 1987, Denying Plaintiffs Costs and Fees

SAT BELOW

Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Chancery Division

BRIEF AND APPENDIX
FOR
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PROCEDURAL HISTORY

During 1974, the plaintiff herein, then called "Urban League of Greater New Brunswick", sued 23 of the 25 municipalities constituting Middlesex County. Reciting grievances under a variety of constitutional and statutory provisions, its Complaint alleged that land use policies adopted by the defendant municipalities improperly limited the opportunities for housing affordable by lower income persons in the County.

Following trial commencing in February, 1976, Judge David D. Furman concluded [see Urban League of New Brunswick, et al. v. Mayor & Council of Carteret, et al., 142 N.J. Super. 11 (Ch. Div. 1976)] that the zoning ordinances of a number of defendant municipalities were unconstitutional. Judge Furman's opinion addressed two distinct areas:

a. First, it reiterated the holding of South Burlington County NAACP v. Mount Laurel Township, 67 N.J. 151 (1975) ("Mount Laurel I"), to the effect that every municipality had an affirmative obligation to provide for that municipality's "fair share" of affordable housing within its "region".

b. Second, it proposed a formula to compute the quantum of each municipality's Mount Laurel obligation. Finding that the appropriate region for the 23 defendant municipalities was the County of Middlesex, Judge Furman directed Old Bridge, Monroe, and South Brunswick to enact new

zoning ordinances to accommodate their respective specific fair share allocations of low and moderate income housing. Cranbury, East Brunswick, North Brunswick, Piscataway, Plainsboro and South Plainfield were ordered to rezone their respective net vacant acreage to permit a specific quota of affordable housing for each municipality.

Paragraph 20 of that Judgment recites as follows:

> All allegations as to alleged violations of the Federal Civil Rights Act, in such case made and provided, be and are hereby dismissed. (Da1 to 2)

Both plaintiffs and defendants appealed from various provisions of the Judgment. Per Judge Antell [170 N.J.Super. 461 (App. Div. 1979)], the Appellate Division reversed. The reversing opinion rejected Judge Furman's designation of Middlesex County as the appropriate "region", relying upon Oakwood at Madison, Inc. v. Madison Tp., 72 N.J. 481 (1977). In addition, the Court rejected the adoption of a formulaic allocation of affordable housing among the defendant municipalities without taking into account the "variety of circumstances and conditions" of each municipality, "and considering what effect the allocation would have upon the 'advisability and suitability' of each zoning plan thereby affected." Id. at 475, relying upon Pascack Ass'n, Ltd. v. Washington Tp., 74 N.J. 470, 482 (1977); Oakwood at Madison, Inc. v. Madison, Tp., supra, 72 N.J. at 539.

The Court also held that, insofar as Judge Furman had denied certain plaintiffs standing to argue that the

defendant municipalities had violated 42 U.S.C. §3601, et seq. (the federal Fair Housing Act), the trial court had interpreted New Jersey's standing requirements too strictly. In effect, Judge Antell permitted plaintiffs to speak to the question of violations of the Fair Housing Act, if they could, but did not decide whether their speech was persuasive.

Plaintiffs sought and were granted certification to the Supreme Court, which consolidated this case with other pending Mount Laurel I cases. More than three years later, in South Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983), ("Mount Laurel II"), the Supreme Court reaffirmed the principles underlying Mount Laurel I (exclusively on New Jersey State constitutional grounds). Chief Justice Wilentz, the author of the opinion, distinctly noted that plaintiffs did not appear to press any federal constitutional claims and rendered no ruling on any claim raised under 42 U.S.C. §3601, et seq, or any other federal legislation. Id. at 341.

Among other extraordinary aspects, Mount Laurel II determined that three trial judges would be designated to sit on all Mount Laurel litigation throughout the State. Each judge was directed to administer a specific geographical area. The judges were directed to develop a methodology to determine the quantum of each municipality's obligation to provide affordable housing; toward this end, judges were

given authority to "appoint such experts as are required to assist it in determining region and the fair share allocation plan[.]"; they did so. Id. at 351. Between January 1983, when Mount Laurel II was decided, and mid-1984, the Mount Laurel courts were occupied substantially, if not exclusively, with developing this formula.[1] Starting in June, 1984, Judge Eugene Serpentelli, the Mount Laurel judge to whom Middlesex County litigation (and this very lawsuit) was assigned, crafted the AMG, Inc. v. Township of Warren, opinion [207 N.J. Super. 388 (Law Div. 1984)], in which the court set forth in great detail the specifics of its "consensus methodology" (so-called because it was produced at meetings of planners representing all parties held at Judge Serpentelli's courtroom). But for minor modifications, AMG remained viable in all respects until July, 1985.

As to this matter, the trials on remand commenced in May, 1984, with Cranbury, East Brunswick, Piscataway, Plainsboro, Monroe, South Plainfield and South Brunswick

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[1] The Mount Laurel II decision clearly stated at 350-351:

> On remand there need be no trial concerning non-compliance with the Mount Laurel obligation (unless the municipality's land use ordinance has been substantially amended), see supra at 199 n.1, for that has already been amply demonstrated. All that is at issue is the determination of region, fair share and allocation and, thereafter, revision of the land use ordinances and adoption of affirmative measures to afford the realistic opportunity for the requisite lower income housing.

participating.[2] Judgments determining the fair share of each municipality were executed by the court at various times between May, 1984, and September, 1985. Supplemental hearings were required to address unique problems: for example, extensive hearings separately addressed both the historical status of a portion of Cranbury and the impact of limited vacant land in Piscataway. At all times between January, 1983, and September, 1985, the trial court clearly articulated, both formally and informally, that the question of the constitutionality and legal validity of the municipal ordinances in question had been resolved by Mount Laurel II, which, in effect, reinstated Judge Furman's 1976 ruling; Judge Serpentelli reflected that understanding in his various written opinions for each municipality.

In July, 1985, Governor Kean signed the New Jersey Fair Housing Act (herein "Act"), L. 1985, c.222. This Act created the New Jersey State Council on Affordable Housing

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[2] North Brunswick and Old Bridge were brought in later by separate motions of plaintiff. South Brunswick reached a settlement with the plaintiff during trial; a judgment incorporating the terms of the settlement was prepared but never entered by the Court. Subsequent to the Supreme Court's decision in Hills Development Co. v. Bernards Township, infra, South Brunswick moved to transfer its case to the Council on Affordable Housing; its motion was granted by Judge Serpentelli. South Brunswick did not participate in the appeal of Judge Serpentelli's Judgments against the defendant-municipalities here. Similarly, East Brunswick reached a settlement with the plaintiff at trial and did not, thereafter, move to transfer its case to the Council on Affordable Housing, or participate in the subsequent appeals.

(herein "Council"), which (in brief) was directed to prepare a new methodology to determine "fair share". The Council complied with this directive during the fall of 1985. With only limited exceptions, the effect of the new methodological approach was to reduce the numbers of housing units previously mandated. With respect to Cranbury, for example, the fair share number was reduced from 811 to 187. As to Piscataway, the fair share number, originally 4,192, thereafter reduced by Judge Serpentelli to 2,215 because of Piscataway's limited vacant land, was set at 911 by the Council. The defendants here[3] sought to transfer their respective cases from the Superior Court to the Council; those transfers were denied by Judge Serpentelli.

Defendants appealed to the Appellate Division in October and November, 1985; the Supreme Court took those appeals directly and consolidated them with other litigation addressing, among other things, the constitutionality of the Act. On February 20, 1986, the Supreme Court rendered an opinion sub nom Hills Development Co. v. Bernards Township, 103 N.J. 1 (1986), in which the Court sustained the constitutionality of the Act and ordered every appellant's case transferred to the Council.

At no time during the proceedings before Judge Furman (between 1973 and 1976) was any application for legal fees or

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[3] But for those which determined to settle their respective cases, see footnote, page 5.

costs filed with Judge Furman. At no time during the appeal from Judge Furman's decision (between 1976 and 1979) was any application for legal fees or costs filed either with the trial court or with the Appellate Division. At no time while the matter was before the Supreme Court (between 1980 and 1983) was any application for fees made. Therefore, from 1973 until 1986, when this application was filed, plaintiffs made no application for legal fees or costs as to any phase of this complex matter.

On August 14, 1986, plaintiffs filed an application for legal fees and costs (including expert's fees) before Judge Serpentelli. Plaintiffs submitted no affidavit or certification in support of that application, in patent contravention of the Rules of Court (see infra). Furthermore, plaintiffs failed to differentiate those fees and costs needed to prove the invalidity of the various ordinances, and those fees and costs incurred only to establish a theoretical formula (the "consensus methodology") later dramatically modified by the Fair Housing Act and the rules and regulations promulgated thereunder.

Following argument on November 14, 1986, the trial court denied plaintiffs' requests for costs and fees. The Court cogently pointed out that those facts essential to the Mount Laurel II decision are not the same facts which would justify a finding of discrimination based upon race, color, religion, sex, or national origin in connection with the sale

or rental of housing units under 42 U.S.C. {3601. Plaintiff argued that economic discrimination is tantamount to racial discrimination, without having presented any facts, circumstances or law from which any Court could fairly so conclude.

The defendants respectfully contend that plaintiffs have shown no entitlement to legal fees or costs in these proceedings, whether pursuant to statute, common law, or court rule, and seek affirmance of Judge Serpentelli's Order to that effect entered below.

COUNTERSTATEMENT OF FACTS

On August 14, 1986, plaintiff filed an application for an order directing the defendants:

a) to pay plaintiff's legal fees in an unspecified amount;[3]

b) to reimburse plaintiff $1,839.62 for its proportionate share of the fee sought by Carla Lerman, the court-appointed expert;

c) to pay its expert's fees of $36,995.00;

d) to pay $3,450.50 for deposition expenses;

e) to pay taxed costs pursuant to N.J.S.A. 2A:2-9; and

f) As to South Plainfield and Piscataway to pay $5,006.00 in fees to Rogers, Golden & Halpern for services rendered in connection with the analysis of land suitable for residential development.

Plaintiff submitted its attorney's certification, describing various bills received from experts and shorthand reporters. (Pa3 to Pa41) In addition, plaintiff submitted the certification of C. Roy Epps, its President, which described the organization's sources of funding. (Pa42 to 44)

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[3] Plaintiffs' counsel disclosed at the argument of the motion before Judge Serpentelli that plaintiffs would seek fees going back to the filing of their complaint in July, 1974. Although plaintiffs' motion requested attorneys fees, no affidavit (as required by R. 4:42-9) was provided, and plaintiffs produced no judgment or order recording their entitlement to fees as required by R. 4:42-9(d).

Although no evidence of racial discrimination had ever been presented by the plaintiff at trial or on appeal, plaintiff supplemented its memorandum for fees by presenting data including 1980 census tract maps, seeking to demonstrate evidence of {3601 discrimination (Pa45 to Pa107). At no time since filing its original complaint had plaintiff sought to present evidence of racial discrimination in housing. Plaintiff did concede that "a comprehensive analysis of this data is beyond the scope of this memorandum." (Pa47) Addressing plaintiff's {3601 claim at the November 14, 1986 argument of the motion, Judge Serpentelli observed:

> That issue cannot, now, be proven by affidavit, and a full trial on the issue is hardly fair or appropriate and in all likelihood would be barred under the single controversy doctrine in any event. (Da3-6 to 14)

Judge Serpentelli denied plaintiff's application for legal fees and costs; this appeal followed.

POINT I

THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION FOR ATTORNEYS FEES UNDER 42 U.S.C. {3612(c)

R. 4:42-9(a)(8) permits the discretionary award of attorneys' fees, where authorized by a specific statute. Plaintiff seeks fees and costs as authorized by 42 U.S.C. {3601 et seq. (the federal "Fair Housing Act" "{3601"); see, inter alia, Pb4.[4]

Section 3601 et seq. is part of the Civil Rights Act of 1968. It prohibits discrimination based on race, color, religion, sex, or national origin in the sale, rental, or financing of housing, or in the provision of brokerage services for the sale or rental of housing (42 U.S.C. {{3604-06). Although plaintiff introduced no direct evidence of racial discrimination at trial or in any Appellate Court, it claims entitlement to fees by analogy to another federal statute, the Civil Rights Attorneys Fees Awards Act of 1976,

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[4] 42 U.S.C. {3612(c) provides:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff. Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

42 U.S.C. §1988 ("§1988"),[5] and based upon the United States Supreme Court's decision in Maher v. Gagne, 448 U.S. 122 (1980). Reliance on both §1988 and Maher v. Gagne is misplaced.

§1988 encourages enforcement of the Civil Rights Act by the victims of unlawful discrimination. H.R. Rep. No. 15460 (1976). When Congress discussed this legislation, prior to its adoption, Congress did consider that a plaintiff might prevail on a non-fee claim, pendent to a claim for which fees may be awarded, while not prevailing on the fee claim itself. Under these circumstances, " ... plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees." H.R. Rep. No. 15460 (1976). Similarly, Congress recognized that

> [T]he claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v. Lavine, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the

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[5] Section 1988 provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

'substantiality' test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 (1966), attorneys fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' United Mine Workers v. Gibbs, supra, at 725" H.R. Rep. No. 94-1558, p.4 n 7 (1976).

Admitting, arguendo, that plaintiff "prevailed" in establishing that defendants' zoning ordinances were violative of the State constitution,[6] no court addressed the validity of the claim under §3601. Such a determination is absolutely necessary to sustain the award of attorneys fees. See Morales v. Haines, 486 F.2d 880, 882 (7th Cir. 1973) [(racial discrimination must be found to award attorneys fees under §3612(c)]; Dillon v. AFBIC Development Corp., 597 F.2d 556, 562 (5th Cir. 1979) [(attorneys fees under {3612(c) are appropriate only against defendants found guilty of racial discrimination]; Shannon v. Dept. of Housing & Urban Development, 409 F.Supp. 1189, 1192, affirmed 557 F.2d 854, cert. denied, 439 U.S. 1002 (1978) [attorneys fees may only be awarded under {{3604-06 upon a finding of racial discrimination].

Despite this fatal defect, plaintiff suggests that because, in its view, its {3601 claim was substantial, and

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[6] Clearly, Judge Furman found eleven municipal ordinances, including those of the defendants here, to be unconstitutional. Certainly no action after January, 1983 was needed to confirm that finding. Indeed, {1988 was not enacted until two years after this suit was filed; thereafter, plaintiffs never amended their complaint to allege their entitlement to fees under that statute.

the state constitutional claim on which plaintiff "prevailed" arose out of a "common nucleus of operative fact", plaintiff is entitled to fees as though the court had adjudicated the {3601 issue. Plaintiff argues that a §3601 adjudication is unnecessary because it obtained relief identical to that available under §3612(c) by virtue of the decision rendered in So. Burlington City N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) ("Mount Laurel II"): that is to say, plaintiff demonstrated in that case that the defendants' ordinances were unconstitutional.

Judge Serpentelli properly rejected these arguments. As to the "common nucleus of operative fact" contention, Judge Serpentelli stated:

> [M]ount Laurel does not ground its constitutional violation on discrimination of race, color, sex, or national origin. Its thrust is totally different, and its relief is unlike anything that the federal act [{3601] envisioned.
>
> * * * * *
>
> The Singer test [Singer v. State, 95 N.J. 487 1984)] does require a [factual] nexus between the cause of action and the relief obtained. A violation of the federal Fair Housing Act [{3601] ... would require a finding of discrimination based on race, color, sex, religion or creed, not low or moderate income. The Supreme Court finding was confined to the impact defendants' improper use of its power to zone was having on persons of lower and moderate income. While it may be that the impact was most greatly felt on nonwhites, minorities, no court has found low and moderate income to be equivalent to race. (citations omitted).
>
> * * * * *

> In the instant case I cannot say that the same facts which give rise to the New Jersey violation also violate the federal Act [{3601]. [Da4-1 to 6 to Da5-13 to Da6-1 to 8 and 24-25.][7]

Judge Serpentelli recognized that the basis of the Mount Laurel II decision was substantially different from the facts necessary to establish a violation of {3601, and that there is no "common nucleus of operative fact" needed to justify fees under Maher v. Gagne, supra, and {1988.

As to plaintiff's argument that it should receive fees because Mount Laurel II provided the same relief which it "should" have received under §3612(c), Judge Serpentelli was persuaded that that argument was wrong; in his judgment, relief available under §3612(c) is "much more limited" than that available under Mount Laurel II. (Da7-24 to Da8-2).[8] Clearly, Judge Serpentelli is correct; §3612(c) focuses on

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[7] Judge Serpentelli's unique status apropos of Mount Laurel is relevant here. He was one of three trial judges to address all Mount Laurel litigation after 1983. His assigned jurisdictional responsibility, Central New Jersey, produced the most cases. He established many of the procedural guidelines used to process Mount Laurel cases. For each of the three years as a Mount Laurel judge, he used one law clerk who was assigned only Mount Laurel litigation. Judge Serpentelli's designation of Carla Lerman as the court expert triggered the evolution of the consensus methodology. Judge Serpentelli maintained close and frequent communication with his colleagues, Judges Skillman and Gibson, and with the Supreme Court, which had appointed him. Clearly, Judge Serpentelli's views on the interpretation of the Mount Laurel doctrine are entitled to great weight.

[8] Counsel for respondents candidly acknowledged that "it's possible we would have gotten substantially less." (Da9-10 to 12).

discrimination based on race, color, religion, sex or national origin, whereas Mount Laurel II focuses on economic exclusion resulting from restrictive zoning practices.

Plaintiff has cited no case in which attorney's fees were awarded to a prevailing party under {3612(c) when that party prevailed on a non-fee pendent claim only. Instead, appellant relies upon cases where the prevailing party was awarded fees under {1988, a far broader statute, although, in such cases, counsel fees may not be routinely awarded. In Smith v. Robinson, 468 U.S. 992 (1984), for example, plaintiffs asserted claims for relief based on state law, as well as the (federal) Education of the Handicapped Act ("EHA"), a non-fee claim, the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, and on 42 U.S.C. {1983. They asserted that, as the EHA claim (on which they prevailed) arose out of a common nucleus of operative fact with their constitutional claims, they were entitled to attorneys fees under {1988 pursuant to Maher v. Gagne, supra. In denying attorneys fees under {1988, the Supreme Court stated at 1006-1007:

> [T]he authority to award fees in a case where the plaintiff prevails on substantial constitutional claims is not without qualification. Due regard must be paid, not only to the fact that a plaintiff "prevailed", but also to the relationship between the claims on which effort was expended and the ultimate relief obtained. Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886 (1984). Thus, for example, fees are not properly awarded for work done on a claim on which a plaintiff did not prevail and which

> involved distinctly different facts and legal theories from the claims on the basis of which relief was awarded. Hensley v. Eckerhart, 461 U.S. at 434-435.
>
> *   *   *   *   *
>
> In light of the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success, it is clear that plaintiffs may not rely simply on the fact that substantial fee-generating claims were made during the course of the litigation. Closer examination of the nature of the claims and the relationship between those claims and petitioner's ultimate success is required. (emphasis added)

Because petitioner's constitutional and statutory claims were not reasonably related to their ultimate success on the EHA claim, no fees were awarded. This ruling was consistent with the established view that "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against ... on the merits, §1988 does not authorize a fee award against that defendant." Kentucky v. Graham, ___ U.S. ____, 105 S.Ct. 3099 (1985). Cf. Pulliam v. Allen, 466 U.S. 522 (1984). See also Bergman v. United States, 648 F.Supp. 351, 357-358 (W.D. Mich. 1986), where fees were denied based on both Smith v. Robinson, supra, and Kentucky v. Graham, supra.

Here, plaintiff is not entitled to attorneys fees under §3612(c) because it did not prevail on its §3601 claim, a claim "which involved distinctly different facts and legal theories" from the rationale of Mount Laurel II.

Finally, plaintiff contends that the trial court

misunderstood the test for determining a litigant's entitlement to fees under Maher v. Gagne, supra, as discussed by the court in Bung's Bar & Grille v. Florence Tp., 206 N.J. Super. 414 (Law Div. 1984) ("Bungs"). Whether the test formulated in Bung's is inconsistent with Maher v. Gagne is irrelevant where, as here, there is a clear failure to show a {3601 violation and to demonstrate that a {3601 claim is reasonably related to claims determined by Mount Laurel II. Smith v. Robinson, supra; Hensley v. Eckerhart, supra.

POINT II

PLAINTIFF'S APPLICATION FOR LEGAL FEES AND COSTS FAILED TO COMPLY WITH R. 4:42.

R. 4:42-9, which governs court awards of counsel fees, requires that all applications for allowances of fees be supported by a detailed affidavit of services rendered. Without such an affidavit, the Court and opposing counsel have no way to evaluate the amounts sought. [9] Plaintiff's failure to have provided such an affidavit clearly rendered its motion deficient.

Furthermore, plaintiff's motion was untimely. R. 4:42-9(b) provides:

> An allowance of fees made on determination of a matter shall be included in the judgment or order stating the determination.

The judgments rendered by the trial court were entered at various times between May, 1984 and late 1985. Plaintiff did not file its motion for fees and costs until May, 1986, and argument was not scheduled until several months later. Therefore, there was substantial noncompliance with the Rule.

In any event, Judge Serpentelli properly concluded

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[9] Similarly, an application for fees rendered on appeal must be made by motion supported by affidavits served and filed within 10 days after the determination of the appeal. R. 2:11-4. And it is clear that applications for allowances of counsel fees and costs may only be made in the court in which the services were rendered or the costs accrued. U.S. Pipe, etc. v. United Steelworkers of America, 37 N.J. 343, 357 (1962); Tooker v. Hartford Accident and Indemnity Co., 136. N.J. Super. 572, 578 (App. Div. 1975). R. 4:42-8(c) also requires that a detailed affidavit pertaining to costs be filed. Plaintiffs failed to do this, as well.

that plaintiff had not shown an entitlement to fees in any regard. (See Point III).

POINT III

THE TRIAL COURT WAS CORRECT AS A MATTER OF LAW IN DENYING PLAINTIFF'S MOTION FOR EXPERT FEES AND DEPOSITION EXPENSES

Plaintiff's application sought "reimbursement" (although there is nothing before the Court certifying that the fees of its various experts have in fact been paid) of $36,995.00 charged by Alan Mallech. Mr. Mallech, who testified for plaintiff in the 1976 trial, produced a report during 1984 defining "region" and quantifying "fair share" as to each municipality. While his report was certainly considered by the Court in the development of the AMG methodology, both the Court's analysis and that conducted by the Council on Affordable Housing materially differed from Mr. Mallech's conclusions.

Plaintiff also sought an award for expert's fees charged by Rogers, Golden, and Halpern with respect to South Plainfield and Piscataway. That firm was retained to address the issue of limited vacant land within both municipalities. As to Piscataway, the ultimate conclusion reached by these experts was that every acre of "suitable" vacant land should be developed at an average density of 8-10 units per acre. Clearly, the efforts of Rogers, Golden and Halpern produced results rejected by the Council.

Generally, each party is required to bear the costs of fees charged by experts whom that party has retained. Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162 (1960). This

proposition was discussed and reinstated in Helton v. Prudential Property & Cas. Ins. Co., 205 N.J. Super. 196, 202 (App. Div. 1985), wherein the Appellate Division denied plaintiff's request for reimbursement of expert witness fees by stating:

> Absent ... a statutory provision, we perceive no authority to depart from the general policy that 'each litigant shall bear the expenses of prosecuting and defending his individual interests.' Sunset Beach Amusement Corp. v. Belk, [supra at 167] (1960); State v. Otis Elevator Co., 12 N.J. 1, 10 (1953); Janovsky v. American Motorists Ins. Co., 11 N.J. 1, 7 (1952). See also Housing Auth. of Long Branch v. Valentino, 47 N.J. 265, 268 (1966) where our Supreme Court held that a trial judge's order denying expert witness fees in a condemnation case was proper since there was no statutory authorization.

The Helton court considered the interrelationship between R. 4:42-8(a), which allows the prevailing party its costs, and N.J.S.A. 22A:2-8, which permits "legal fees of witnesses," concluding:

> We are convinced that the statutory reference to "legal fees" in N.J.S.A. 22A:2-8 demonstrates a legislative intention to confine witness fees included in the costs to stated fees and that the "disbursements taxable by law ... incurred for the attendance of witnesses" referred to in R. 4:42-8(c) relate to the fees and mileage rates set forth in N.J.S.A. 22A:1-4.
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> *　　*　　*　　*
>
> In the absence of a specific statute authorizing recovery of expert witness fees as taxed costs (over and above the statutory rates provided by N.J.S.A. 22A:1-4), we discern no sound basis to award such expenses. (Helton, supra, at 203-204; citations omitted, emphasis added.)

Although U.S. Pipe and Foundry Co. v. United Steelworkers of America, CIO-AFL, Local #2026, 37 N.J. 343, 355-356 (1962), relied upon by plaintiff, is fully consistent with Helton, plaintiff argues that it should be read to permit the trial court to exercise some discretion to award expert witness fees.

Plaintiff cites Barbieri v. Bochinsky, 43 N.J. Super. 186 (App. Div. 1956), as authority for such an award. Clearly, however, the primary reason for the award of fees there was because the defendant, who had been served prior to trial with a request for admission of a land survey which demonstrated that defendant's wall encroached on plaintiff's property, unnecessarily forced plaintiff to produce the surveyor at trial, even though defendant later stipulated that he knew of the accuracy of the land survey. In affirming the award of fees, the Appellate Division stated, "The action of the court was discretionary and under the circumstances we find no error." Id. at 192 (emphasis added). Significantly, however, the court refused plaintiff's request for the cost of the stenographic reporter's fee, concluding that the matter was controlled by N.J.S.A. 2A:18-15 which provides that the reporter acts "at the expense of the party making the application" -- in that case, the plaintiff. Id. 192.

Similarly, defendant's wrongful conduct (having fraudulently conveyed property) in Finch, Pruyn & Co., Inc.

v. Martinelli, 108 N.J. Super. 156 (Ch. Div. 1965), also relied upon by plaintiff here, led to the assessment of deposition costs against the defendant where the depositions were taken as part of enforcement proceedings. That court noted that Sunset Beach Amusement Corp. v. Belk, supra, "precludes the routine direction for taxation of the expenses of depositions in every case." Id at 158. Rather, the court held that such costs could only be assessed under N.J.S.A. 22A:2-8 in certain cases where "justice will require."[10] Both Barbieri v. Bochinsky, supra, and Finch, Pruyn & Co., Inc. v. Martinelli, supra, are cases where expert fees or deposition expenses were assessed because of defendants' wrongful conduct which resulted in the unnecessary expenditure of both judicial and private resources. Neither of those situations are applicable here. The experts employed by plaintiff were used to support plaintiff's methodology and fair share positions at trial. Unlike the defendant in Barbieri v. Bochinksy, defendants vigorously contested plaintiff's expert's conclusions, cross-examining those experts at length. The depositions taken of all experts were taken in the routine course of litigation, not

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[10] The cost of transcripts of proceedings before a municipal Board of Adjustment was allowed in Huber v. Zoning Bd. of Howell Tp., 124 N.J. Super. 26, 28 (Law Div. 1973), in an action in lieu of prerogative writs. There, the Court analogized the appeal process to appeals in the Supreme Court and Appellate Division where such costs are permitted by statute and court rule. The reimbursement sought here is for depositions costs incurred in preparing for trial, not on appeal.

as a supplement in aid of litigant's rights as in Finch, Pruyn & Co., Inc. v. Martinelli, supra.[11]

Plaintiff also argues that the trial court abused its discretion by declining to reimburse it for its one-ninth (1/9) share of the fee of Carla Lerman, the court-appointed planner. Plaintiff claims that defendants' resistance to plaintiff's fair share positions produced a greater expenditure of time "than should have been necessary." (Pb43) Plaintiff also contends that "because their primary objective ... has been the advancement of the public interest[.]"[12], defendants should have been compelled to pay plaintiff's share of Ms. Lerman's fee.

First, as to the contention that more time was expended than was anticipated, that contention may be correct. Obviously, the complexity of the issues and the insufficiency of plaintiffs' original proofs required close and detailed attention. Urban League of Greater New Brunswick, et al. v. The Mayor and Council of The Borough of Carteret, et al., supra at 476-477. Perhaps just as

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[11] Plaintiffs' reliance on Bung's, supra, is similarly misplaced. Here, unlike Bung's, a trial in the Superior Court was required to establish the consensus methodology and fair share numbers. And, unlike here, Bung's application for fees and costs was based on the much more liberal interpretation of §1988, which, as previously discussed, has no applicability here.

[12] The trial court was judicious in avoiding the merits of the argument that any party was the sole representative of the "public interest", stating many times throughout the litigation that no party had a monopoly on the public interest.

significant is the fact that plaintiffs' estimates of everything in this litigation (aggregate fair share numbers and trial time, for example) were woefully far from the mark all along.

Second, the municipalities here and in other Mount Laurel litigation defended primarily because of popular concern for the adverse effect on the general welfare resulting from court-mandated increments to population in large numbers. Because of the municipalities' aggressive defense, in part, the Legislature enacted the Fair Housing Act, which produced more realistic and achievable goals. The Act applies to all municipalities in the State, unlike the consensus methodology which excluded all municipalities not included within the State-defined growth area. The constitutionality of the Fair Housing Act was upheld in <u>The Hills Development Co. v. Township of Bernards</u>, <u>supra</u>. The municipalities were the representatives of, and advanced, the public interest, rather than those plaintiffs who argued against the legitimacy of the Act on several significant grounds (all rejected).

The trial court carefully weighed all arguments for and against reimbursement of Ms. Lerman's fees. It determined that all parties should contribute to the cost of the development of the consensus methodology, and because the "unique circumstances" of the case "justify leaving the parties where they are." (Da10-83)

The conclusion is clear; plaintiffs show no greater entitlement to a contribution towards their experts' fees than do defendants. Equity compels each party to this extended litigation to bear its own costs. There is no legal basis for imposing any "taxed costs" in these proceedings for expert witness fees or otherwise; plaintiff's appeal should be rejected.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be affirmed in all respects.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT, MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH PLAINFIELD

Plaintiff

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, ET AL,

vs.

Defendant

THE MAYOR AND COUNCIL OF
THE BOROUGH OF CARTERET,
ET AL,

SUPERIOR COURT OF
NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

Docket No. C 4122-73

CIVIL ACTION

JUDGMENT

THE ABOVE ENTITLED MATTER HAVING BEEN TRIED BEFORE THIS COURT COMMENCING FEBRUARY 3, 1976 AND THE COURT HAVING HEARD AND CONSIDERED THE TESTIMONY AND EVIDENCE ADDUCED DURING THE TRIAL AS RESULT OF WHICH THIS COURT HAS RENDERED ITS OPINION DATED MAY 4, 1976;

IT IS, THEREFORE, ON THIS 9th DAY OF July, 1976, O R D E R E D AND A D J U D G E D AS FOLLOWS:

1. JUDGMENT BE AND IS HEREBY ENTERED IN FAVOR OF THE DEFENDANT, BOROUGH OF DUNELLEN, AND AGAINST THE PLAINTIFF BASED UPON THE RELIEF DEMANDED IN THE COMPLAINT.

29

* * * *

dated May 4, 1976 at page 32 thereof, plus an additional fair share allocation of 1,333 units for each such municipality; or, shall rezone all of their remaining vacant land suitable for housing in order to permit or allow low and moderate income hous[illegible] on a ratio of 15% low and 19% moderate income housing units as specifically outlined in this Court's written opinion at pages 33 and 34.

16. All of the various defendants shall cause the enactment or adoption of their respective zoning ordinance amendments to be completed within ninety (90) days of the entry of this Judgment.

17. This Court retains jurisdiction over the pending litigation for the purpose of supervising the full compliance with the terms and conditions of this Judgment.

18. Applications for special relief from the terms and conditions of this Judgment may be entertained by this Court.

19. It is the Judgment of this Court that the plaintiffs have an interest in this litigation which entitles them to standing to represent a class of low and moderate income people.

20. All allegations as to alleged violations of the Federal Civil Rights Act, in such case made and provided, be and are hereby dismissed.

21. Each of the defendants, Township of Cranbury, Township of East Brunswick, Township of Edison, Township of Madison (Old Bridge), Township of Monroe, Township of North

1 are the same facts which support the claim upon
2 which the unproven federal claim would turn.
3 In short, it must be clear that the result in
4 Judge Haines' words, the result would have
5 been no different, page 462-63. I simply cannot
6 reach that conclusion here. It is by no means
7 clear that the Thirteenth and Fourteenth
8 Amendment claims or the Section 36:12 claims
9 would have been proven and, if so, what the
10 result would have been. That issue cannot, now,
11 be proven by affidavit, and a full trial on the
12 issue is hardly fair or appropriate and in all
13 likelihood would be barred under the single
14 controversy doctrine in any event.
15 It was based on these three key factors
16 that if one looks at the decision you'll find
17 that Judge Haines frames the issue after stating
18 these factors at page 462. He says, "The
19 question, therefore, as to whether the right to
20 fees and costs granted by the Act is to be denied,
21 because the court chose one path to decision when
22 it could have very easily chosen another. The
23 question provides its own answer. The important
24 right to recover the cost of successful
25 litigation involving genuine issues of civil

1 national origins. But Mount Laurel does not
2 ground its constitutional violation on
3 discrimination of race, color, sex, or
4 national origin. Its thrust is totally
5 different, and its relief is unlike anything
6 that the federal Act envisioned.

7 Mount Laurel II is meant to put teeth
8 into the Mount Laurel I document which, of
9 course, is the constitutional basis. At page
10 208 of Mount Laurel II the Supreme Court says,
11 and I quote, "Municipal land use regulations
12 that conflict with general welfare abuse the
13 police power and are unconstitutional. In
14 particular, those regulations that do not
15 provide the requisite opportunity for fair
16 share of the region's need for low and moderate
17 income housing conflict with the general welfare
18 and violate the state constitutional requirement
19 of substantive due process and equal protection."
20 That is the heart, soul and basis of the Mount
21 Laurel doctrine.

22 The plaintiffs state in its brief that
23 the Supreme Court noted in its opinion that the
24 plaintiffs did "not appear to be expressing
25 their Thirteenth and Fourteenth Amendment claims."

Thus the plaintiffs argue that the New Jersey
2 court did not feel called upon to address its
3 constitutional claims. The plaintiff notes
4 that its fair housing claim was not even
5 mentioned while most likely the Supreme Court
6 felt that was also not being expressed. The
7 plaintiff argues there was no need to reach
8 that issue, because the court had already
9 granted the plaintiff all relief that it was
10 entitled to under the federal Fair Housing
11 Act and then some, using the New Jersey
12 Constitution for its decision.
13 The Singer test does require a federal
14 nexus between the cause of action and the
15 relief obtained. I do not -- I think I said
16 "federal nexus." I mean a factual nexus. The
17 factual nexus is not present in this case. A
18 violation of the federal Fair Housing Act would
19 not require, I'm sorry, a violation of the
20 federal Fair Housing Act would require a finding
21 of discrimination based on race, color, sex,
22 religion or creed, not low or moderate income.
23 The Supreme Court finding was confined to the
24 impact defendants' improper use of its power to
25 zone was having on persons of lower and moderate

1 income. While it may be that the impact was
2 most greatly felt by nonwhites, minorities,
3 no court has found low or moderate income to be
4 equivalent to race. See Waldie versus
5 Schlesinger, 509 Fed. 2d 1110, Second Circuit,
6 1975, relying on James v. Valtierra,
7 V-a-l-t-i-e-r-r-a, Second Circuit -- I'm sorry,
8 402 U.S. 137, 1971.
9 While the plaintiff attempts to prove
10 disparte impact defendant's actions had on
11 minorities, as I've indicated, such evidence
12 should not be considered at this stage and
13 certainly was not relied upon by the Supreme Court.
14 Additionally, it is often the case, that is,
15 that a state court will rely on its own
16 constitution to provide its citizens with
17 even greater protection than is available
18 under the federal constitution. That is
19 clearly the fact in this case. There in all
20 likelihood cannot be a federal Mount Laurel,
21 say violation of our state constitution, which
22 may provide greater protection which in certain
23 areas does not necessarily result in a violation
24 of the federal constitution. In the instant
25 case I cannot say that the same facts which give

1 exist. Those are the factors that we've been
2 talking about, which you prefer to talk about
3 in terms of nexus and related legal theories,
4 and I prefer to talk about some other terms.
5 Let me go to the final thing in the
6 Bung's case. It's really quite amusing that we
7 talk about a Law Division case, which doesn't
8 bind me, anyhow, as the real heart of this
9 application. But nonetheless, it's such a
10 well-reasoned case, I think it really helps us.
11 Judge Haines phrases the ultimate issue at
12 page [illegible] He says, "The question, therefore,
13 is whether the right to fees and costs granted
14 by the Act is to be denied, because this state
15 court chose one path to a decision when it could
16 have easily chosen another." That's the issue.
17 That's what he meant by "unnecessary," I think.
18 [illegible], the same thing here?
19 Suppose the Supreme Court had chosen
20 30:01, the Fair Housing Act. I avoid using the
21 "Fair Housing Act," because we now have our
22 own --
23 MS. STARK: That's why we call it Title 8.
24 THE COURT: Yes. And if the Court had
25 gone that way, you would have gotten much, much

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1 more limited relief from the Supreme Court then
2 you got, wouldn't you?

3 MS. STARK: If we had only prevailed on
4 the Title 8 claims, we wouldn't have -- well,
5 an argument could have been made, your Honor,
6 under Tropicana that white lower income persons
7 were also entitled to relief under Title 8,
8 that they were being denied the benefit of
9 integrated housing, that whites would benefit
10 from that too. But I understand the Court's
11 argument, and it's possible we would have gotten
12 substantially less.

13 THE COURT: Which could not have happened
14 in the Bung case. In the Bung case either way
15 they went they would have gotten the same relief.
16 Do you know whether the original complaint
17 filed in this action -- I'm embarrassed to ask
18 you this, but I have to because I don't have it.
19 That's all right. I will accept your
20 representation.

21 Did it ask for a fair share methodology?

22 MS. STARK: That's easier than finding
23 the complaint. That was set forth in plaintiff's
24 main memoranda, the relief and footnote 2,
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1 rise to the New Jersey violation also violate
2 the federal Act.
3 Now, the plaintiff also seeks compensation
4 for its expert fees and deposition fees. Having
5 found no right to recover under 36:12, any claim
6 must be limited to state law. I find no support
7 in our state rules or the tax court statute for
8 the plaintiff's position. Some of the
9 defendants' briefs adequately address those
10 issues. Miss Lerman's, L-e-r-m-a-n-'-s, fees
11 fall into a different category. Since payment
12 of them is governed by what the Supreme Court
13 said in Mount Laurel II, they are not treated
14 as tax costs or other allowable fees under any
15 statutory or court rule, and I am mindful in
16 ordinary circumstances under Mount Laurel II
17 that the burden might fall fully on municipalities
18 to cover the court-appointed expert. Here
19 besides the relatively minute amount that the
20 plaintiff has been called upon to pay, [illegible]
21 unique circumstances justify leaving the parties
22 where they are with regard to the master's
23 [illegible], [illegible]s
24 [illegible]. It was a
25 unique benefit of the plaintiff, and the master's

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