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Brief in opposition to motion for attorney's fees and costs

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

Civil No. C 4122-73
(Mount Laurel)

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

vs.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,

Defendants.

BRIEF IN OPPOSITION TO MOTION FOR ATTORNEY'S FEES AND COSTS

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LEGAL ARGUMENT

POINT ONE

THIS COURT LACKS JURISDICTION TO TAKE ANY FURTHER ACTION OTHER THAN TO PROTECT SCARCE RESOURCES.

This motion for fees and costs comes almost six months after the Supreme Court decision in Hills Development Co. v. Tp. of Bernards, _____N.J._____(1986). It also comes about four months after the last Order of this Court pursuant to the limited jurisdiction retained after Hills. (see Slip Opinion at p. 88)

It is that limited jurisdiction which is critical to this motion. The language of the Supreme Court in transferring these cases to the Council on Affordable Housing could not be clearer. "As to any transferred matter, any party to the action may apply to the trial court (which shall retain jurisdiction for this limited purpose) for the imposition of conditions on transfer.." Slip opinion at p. 88 (emphasis supplied)

In other words all jurisdiction on these matters is now in the Affordable Housing Council. This motion is beyond the limited jurisdiction retained.

POINT TWO

PLAINTIFFS' MOTION FAILS TO COMPLY WITH THE RULE ON SUCH MOTIONS IN THREE RESPECTS.

R.4:42-9 has very specific language on the allowance of fees. It lists the eight types of actions in which fees may be awarded. This motion appears to be brought under category 8 "In all cases where fees are permitted by statute." See plaintiffs' brief p. 3.

However the rule continues with three requirements which are applicable to all eight categories. The first of these is:

> Affidavit of Service. "Except in tax and mortgage foreclosure actions, all applications for the allowance of fees shall be supported by an affidavit stating in detail the nature of the services rendered, the amount of time actually expended and a good faith estimate of time to be expended, the amount of the estate or fund, if any, the responsibility assumed, the results obtained, the amount of time spent by the attorney, any particular novelty or difficulty, the time spent and services rendered by paraprofessionals, other factors pertinent in the evaluation of the services rendered, and the amount of the allowance applied for and an itemization of disbursements for which reimbursement is sought."

The language of the rule is mandatory, yet no such supporting affidavit has been submitted. The court is being asked to rule on the motion for fees without knowing how much is being requested or what allocation among the parties is proposed. If the request is modest it may not be practically

worthwhile for Cranbury to oppose it. On the other hand if the request is exorbitant the court should know this before ruling on the merits.

The second requirement of the rule is as follows:

> Statement of Fees Received. "All applications for the allowance of fees shall state how much had been paid to the attorney (including, in a matrimonial action, the amount, if any, received by him from pendente lite allowances) and what provision, if any, has been made for the payment of fees to him in the future." (emphasis supplied)

Again the language of the rule is mandatory. The court should know who is actually going to be reimbursed. It may well be that no monies have been paid. If so--say so!!!

The third requirement of the rule is the one that is most crucial to this motion:

> Prohibiting Separate Orders for Allowances of Fees. "An allowance of fees made on the determination of a matter shall be included in the judgment or order stating the determination."

Again the language is mandatory. No final determination is sought here. Indeed a final determination can only be made now by the Council on Affordable Housing or on appeal from that body. The "Affordable Housing Act" makes no provision for attorney's fees; nor does the "Administrative Procedures Act" which is incorporated into the "Affordable Housing Act" on contested matters. N.J.S.A. 52:27D-301 et. seq.; N.J.S.A. 52:14B-1, et. seq. When the Supreme court transferred these matters to the Council on Affordable Housing with the severe

limitations on retained jurisdiction discussed in POINT ONE supra surely it realized that no award of fees would be possible since no determination would thereafter be possible in which an award of fees could be included as required by the rule.

While counsel could not examine all such cases no exclusionary zoning case could be found from the scores that have been filed; nor has plaintiff cited any in which such an award of fees was made.

POINT THREE

NO DETERMINATION HAS EVER BEEN MADE THAT PLAINTIFF WAS ENTITLED TO RELIEF UNDER THE FAIR HOUSING ACT.

The only decision ever made on the merits of plaintiffs' claims under either the "Fair Housing Act" or the Federal "Civil Rights Act" was made by Judge Furman in 1976. There he dismissed the charges of wilful racial discrimination saying "But no credible evidence of deliberate or systematic exlusion of minorities was before the Court. That dismissal must result in the dismissal also of the specific count for violation of Federal Civil Rights Acts. 42 U.S.C.A.§1981, 1982 & 3601 et. seq." (Urban League of Greater New Brunswick v. Mayor and Council of Borough of Carteret, et al. 142 N.J. Super 11, 352 A.2d 526 at 530. (Ch. Div. 1976).)

The Appellate Division subsequently overruled that portion of the opinion but did so without deciding whether the evidence presented actually sufficed to prove a violation. Urban League of Greater New Brunswick v. Mayor and Council of Borough of Carteret, et al. 170 N.J. Super. 461 at 469 (App. Div. 1979). The weight to be given this must be questioned since the court later reversed without a remand thereby effectively dismissing plaintiffs' case.

The fact remains however that no evidence of any racial discrimination was presented to this court, nor was there any decision on the merits of such claims in prior proceedings.

A reading of the Fair Housing Act indicates that its target was not exclusionary zoning, but to stop insidious practices by landlords and real estate brokers. In fact, plaintiff has pointed to no case in which a municipality's zoning practices were held to violate that Act. It has been argued in some quarters that the State Courts have specifically avoided reliance on Federal Statutes or the U.S. Constitution to avoid involvement of the Federal Courts. See Southern Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel 423 U.S. 808 (1976).

Since relief under the Fair Housing Act has not been granted and since no evidence has been presented of violations of the Act, then the request for fees under that Act should be denied.

POINT FOUR

PLAINTIFF IS NOT A PREVAILING PARTY AS TO CRANBURY.

From the very beginning the major issue in the case relating to Cranbury was one of numbers. What is Cranbury's fair share allocation? Throughout the litigation before this Court, Cranbury has stipulated the inability of its ordinance to produce a fair share number sought by plaintiff or fixed by the Court.

A look at the history of the fair share numbers proposed for Cranbury over the history of the litigation is revealing,

Urban League proposed in 1st litigation.....500 +

Judge Furman's allocation.....1351

Urban League proposal in 2nd litigation..... 600 ±

Judge Serpentelli's allocation.. 816

Throughout, Cranbury has claimed that all of these numbers are too high. Now the Council on Affordable Housing has tentatively fixed Cranbury's fair share at 187 units, and Cranbury is well on its way to implementing that number both through a 4 to 1 set aside and a 100% low and moderate income project.

Since Cranbury has always argued for a lower number and now appears to have obtained it, how can it be said that Urban League is the prevailing party.

CONCLUSION

For all of the above reasons plaintiffs' motion for fees and costs should be denied.

Respectfully submitted.

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