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Letter opposing π's motion ~~of~~ for fees and costs

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs,	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX/OCEAN COUNTY
vs.	Civil No. C 4122-73 (Mount Laurel)
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	LETTER OPPOSING PLAINTIFF'S MOTION FOR FEES AND COSTS

TO: The Honorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Courthouse
CN-2191
Toms River, NJ 08754

Dear Judge Serpentelli:

Please accept the original and copy of this letter as Monroe Township's opposition to the Urban League's motion for fees and costs returnable before Your Honor on October 3, 1986. Kindly return the copy filed in the stamped, self-addressed envelope.

MONROE TOWNSHIP SHOULD NOT HAVE TO PAY THE URBAN LEAGUE'S ATTORNEY'S FEES

New Jersey Court Rules allow an award of counsel fees when "permitted by statute." R.4:42-9(a)(8). The Fair Housing Act, 42 U.S.C. 3612 expressly provides that attorney's fees may be awarded to plaintiffs prevailing under that statute when they are unable to bear their own legal expense. As plaintiff correctly states, there should be a showing of a factual causal nexus between the plaintiff's litigation and the relief ultimately achieved. (Plaintiff's Memorandum of Law at page 8). The fallacy in plaintiff's argument is that we should simply look at the final conclusion in the litigation and not worry about all the various procedural steps involved to get to that conclusion. If during a certain phase of the case plaintiffs are not successful in a particular proceeding, why should they be awarded

attorney's fees for an unsuccessful effort simply because they later claim they won the case as a whole? The plaintiff was not the prevailing party in all proceedings in this litigation. For example, defendant Monroe Township and other towns filed motions to be transferred from the court's jurisdiction to the Council on Affordable Housing. The Urban League strenuously opposed and fought the towns right up to the Supreme Court. Monroe Township and other towns "prevailed" on this aspect of the case. Why should Monroe Township now have to pay plaintiff's attorney's fees for the attorney work in this aspect of the case? Monroe Township, in making its motion, exercised a right created by statute and "won" in that regard. Plaintiff should be compelled to demonstrate that the attorney's fees it is asking for are only for services connected to proceedings which it actually won.

There is also no statutory basis for the plaintiff's request for fees and costs. The Urban League plaintiffs have not prevailed under 42 U.S.C. § 3612. The New Jersey Supreme Court chose to ground its decision on state constitutional grounds rather than federal statute. It is mere speculation to say that the Supreme Court could have just as easily based its decision on federal statute. It did not do so and it would be judicially improper for the Law Division to decide what legal conclusions the Supreme Court could have made when those conclusions were in fact not made.

The case of Bung's Bar and Grille, Inc. v. Florence Tp., 206 N.J. Super. 432 (Law Div. 1985) does not apply here because in that case it was the Law Division analyzing its own decision and not that of a higher court. Also, how do we know that the Supreme Court's choosing state constitutional grounds over federal statute was an "unnecessary judicial election." Id. at 462-463. To allow such judicial speculation is to allow cases to be litigated twice, once by the higher court and again by the lower court. Such a result is fundamentally unfair to defendants and lower courts which would be asked by plaintiffs to undertake such speculative legal analysis. Such legal proceedings would require the courts and all parties to further expend time and limited resources in trying to determine what a higher court could have done under the facts it found.

As we can see from plaintiff's argument (Plaintiff's Memorandum of Law at pages 12-17), the court is now asked to determine whether the plaintiffs have made out a § 3601 claim under the four-factor test of Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978). The plaintiffs are thus asking the trial court to rule on an issue on which the Supreme Court refused to rule. The plaintiffs are in essence asking this court to re-litigate their § 3601 claim. This court should be bound by what the Supreme Court has already done in these cases. It should not attempt to second guess the Supreme

Court. This court should rule that the issue of plaintiff's § 3601 claim was rendered final by the Supreme Court and cannot now be re-opened for purposes of awarding attorney's fees. Finally, this court is not being asked to re-analyze its own previous decision but rather that of the Supreme Court. The trial court will interfer with the Supreme Court's jurisdiction over Mt. Laurel II if it now attempts to rule on the §3601 claim. If the trial court does decide the §3601 issue, what impact, if any, will its decision have on the Mt. Laurel II decision? Who will decide? The trial court should stay out of such judicial interference.

A court's findings of fact is one thing and its findings of applicable law is another. If the New Jersey Supreme Court did not make a finding on the applicability of a certain law, then it would be judicially improper for a lower court to conclude that under the facts found by the Supreme Court that Court could have found that the certain law did apply. Only the Supreme Court knows if given the facts it found whether a certain federal law applied to furnish plaintiff any relief thereunder. Additionally, it seems fundamentally just that a party should be bound by what a court chooses to actually do or not do and not by what it could have done.

In addition, this court lacks jurisdiction to decide the question of whether plaintiff has established a claim under 42 U.S.C. § 3601. The jurisdiction over Monroe Township's exclusionary zoning cases has been transferred to the Council on Affordable Housing, with limited exceptions pursuant to P.L. 1985, c. 222, §16. The question of whether plaintiff has established a §3601 claim is not one of the exceptions. In Hills Development Co. v. Bernards, _____ N.J. _____, slip op. at 87, the Supreme Court held that the judiciary still "has the power, upon transfer, to impose those same conditions designed to conserve scarce resources that the Council might have imposed were it fully in operation." The question of the applicability of § 3601 has nothing to do with imposing conditions to preserve "scarce resources" needed to produce affordable housing. Also, the definition of "scarce resoures" does not apply to money needed for attorneys fees. No other power other than that defined by P.L. 1985, c.222 and the Supreme Court is allowed to the courts after transfer of the exclusionary zoning cases to the Council, unless jurisdiction over a case reverts back to the courts as prescribed under c. 222's conditions. Hence, this court lacks the authority to decide whether plaintiffs have made out a §3601 claim.

Finally, it is not proper for plaintiff to ask for a court order for attoney's fees when they have not informed the court or the defendant what those fees are. We have no idea what the amount of those fees is. Why could not the plaintiff provide a statement of the amount at this time? It is a waste of time and

money to ask the courts to do things in a piecemeal fashion. It is also unfair to the court and defendant to ask the court to commit itself on something in which it does not have full information.

MONROE TOWNSHIP SHOULD NOT HAVE TO PAY FOR THE URBAN LEAGUE'S SHARE OF THE FEE OF CARLA LERMAN, THE COURT-APPOINTED EXPERT AND THEIR OWN EXPERT

Plaintiff argues that equity, as well as case law, mandates that towns, rather than the plaintiffs bear the full cost of Ms. Lerman's fees (Plaintiff's Memorandum of Law at page 21). The plaintiff also argues that because it represents the "public interest" and that it has advanced that public interest, that it should be reimbursed for its expenses incurred for the services of the court-appointed master (Plaintiff's Memorandum of Law at pages 21-22). It is not correct for plaintiff to argue that they represent the "public interest" and to suggest that Monroe Township does not. The Township of Monroe's legal battle is one brought on behalf of all the citizens of the Township, who will benefit from the correct resolution of the affordable housing issue. How can it be reasonably argued that Monroe Township's and the other municipal defendants' efforts in this litigation in getting the affordable housing issue out of the courts and before the Council on Affordable Housing have not served the public interest? The legal issue which Monroe Township has been litigating is not whether or not it should provide affordable housing but rather how best to achieve it. The proper answer to this question surely serves the public interest. Plaintiff should also be compelled to show what portion of their expert's fees were for proceedings which produced favorable results for plaintiff.

MONROE TOWNSHIP SHOULD NOT PAY ANY PART OF THE COSTS FOR DEPOSITIONS

Plaintiff should be compelled to show that defendant, Monroe Township, has intentionally and deliberately committed a wrong before the court makes Monroe Township pay for the plaintiff's depositions. See Finch, Pruyn & Co., Inc. v. Martinelli, 108 N.J. Super. 157 (Ch.Div. 1969). What evidence has plaintiff produced that Monroe Township has intentionally excluded low and moderate income families from its borders or intentionally committed any other civil rights violation? The fact that a certain condition exists does not alone support the conclusion that that condition was intentionally brought about by the person in control.

For all of the foregoing reasons, Monroe Township

respectfully requests that the Urban League Motion for fees and costs be denied.

Respectfully Submitted,

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Director of Law

MA:rl

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