Memorandum in support of ULTIs' application for attorney's fees and costs

AF 00011632

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JOHN M. PAYNE, ESQ.
ERIC NEISSER, ESQ.
BARBARA STARK, ESQ.
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
201-648-5687
ATTORNEYS FOR URBAN LEAGUE PLAINTIFFS
On Behalf of the American Civil Liberties Union
of New Jersey

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	Civil No. C 4122-73 (Mount Laurel)

MEMORANDUM IN SUPPORT OF THE URBAN LEAGUE PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND COSTS

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Introduction

This Memorandum is respectfully submitted in support of the Urban League plaintiffs' application for attorneys' fees and costs in connection with this matter since their retention of the American Civil Liberties Union ("ACLU"). The New Jersey Court Rules allow an award of counsel fees when "permitted by Statute" and the Fair Housing Act, 42 U.S.C. §3612, expressly provides that attorneys' fees may be awarded to plaintiffs prevailing under that statute where they are unable to bear their own legal expenses.

As plaintiffs will demonstrate, it is not necessary in New Jersey for a Court to hold that plaintiffs have formally prevailed under the federal civil rights statute or even to address plaintiffs' federal claims in order to award counsel fees. Where, like here, plaintiffs' federal civil rights claims were substantial, and arose from the same nucleus of operative facts as the claims upon which their success was predicated, the Court may award attorneys' fees under 42 U.S.C. § 3612(c).

It is respectfully submitted that in view of the unprecedented results achieved, the significant public interest vindicated and the tremendous amount of time and effort expended, the Urban League plaintiffs are entitled to such an award. The Appellate Division has recently expressed strong support for the award of attorneys' fees in connection with the vindication of civil rights:

> Although the Awards Act gives the court discretion in awarding attorney's fees, fees should be liberally granted. Moreover, courts are not free to deny fees to prevailing plaintiffs unless

> special circumstances would make the award just. Thus the prevailing party should normally recover attorney fees. (Citations omitted.) Frank's Chicken House, Inc. v. Manville, A-982-84T7, slip op. at 3 (App. Div., March 7, 1986.)

The Urban League plaintiffs are also entitled to costs. R. 4:42-8(a) provides in pertinent part that, "... costs shall be allowed as of course to the prevailing party." Since So. Burlington County N.A.A.C.P. v. Mt. Laurel Township, 92 N.J. 158 (1983) ("Mount Laurel II") unequivocally established the Urban League plaintiffs as the prevailing party in this matter, the only questions to be resolved by this Court are the particular items includable in costs and the allocation of same among the defendants. A chart setting forth the costs attributable to each town since 1983 is annexed to the Certification of Barbara Stark as Exhibit G.[1]

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1 A supplemental statement of costs incurred prior to 1983 shall be submitted following the Court's determination, if appropriate.

ARGUMENT

I. THE URBAN LEAGUE PLAINTIFFS ARE ENTITLED TO COUNSEL FEES PURSUANT TO 42 U.S.C. 3612(c).

The New Jersey courts have consistently held that R. 4:42-9(a)(8), which allows an award of counsel fees, "In all cases where counsel fees are permitted by statute," is applicable to claims made under the federal civil rights statutes. Ramirez v. Hudson County, 169 N.J. Super. 455 (Ch. Div. 1979). It is similarly well established that representation by non-profit public interest attorneys does not preclude an award of such fees. Schlott v. Morton, 107 N.J. Super. 16 (Ch. Div. 1969).

Here, while granting essentially all of the relief sought by plaintiffs under their federal Fair Housing Act claims, the New Jerey Supreme Court chose to base its decision on state constitutional grounds rather than the federal statute. In Bung's Bar and Grille, Inc. v. Florence Tp., 206 N.J. Super. 432 (Law Div. 1985), cited with approval by the Appellate Division in the Frank's Chicken House case, supra, the court succinctly explained why such a decision should not operate to deprive plaintiffs of attorneys' fees:

> The question, therefore, is whether the right to fees and costs, otherwise granted by the act, is to be denied because this court chose one path to decision when it could as easily have chosen another. The question provides its own answer. The important right to recover the cost of successful litigation involving genuine issues of civil rights cannot be lost as a result of an unnecessary judicial election. (Emphasis added.) Id. at 462-463.

It is respectfully submitted that the circumstances here merit the same conclusion. The Urban League plaintiffs are prevailing parties within the meaning of §3612 since they were successful in obtaining the relief sought under the cited section, their §3601 et seq. claims were never expressly denied, and they are unable to bear their own costs.

A. Plaintiffs' §3601 et seq. Claims

The original complaint in this matter was filed in the Superior Court of New Jersey in July, 1974, eight months before the issuance of the landmark decision in South Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975) ("Mount Laurel I"). In its complaint, the Urban League averred that its members' civil rights under the Fair Housing Act, Title VIII of the Civil Rights Act, 42 U.S.C. §§1981, 1982 and 3601 et seq. were being violated:

> 1. Low and moderate income persons, both white and nonwhite, bring this action against 23 municipal defendants in Middlesex County seeking to enjoin economic and racial discrimination in housing...
>
> 3. Plaintiffs' claims for relief are based upon N.J.S.A. 40:55-32; Article One,paragraphs 1,5, and 18, of the New Jersey Constitution; 42 U.S.C. 1981, 1982 and 3601 et seq.; and the Thirteenth and Fourteenth Amendments to the United States Constitution.(page 1,2)

On May 4, 1976, the Honorable David D. Furman held that the zoning ordinances of 11 of the defendant municipalities were constitutionally invalid under Mount Laurel I. Urban League of New Brunswick v. Carteret, 142 N.J. Super. 11 (Ch. Div. 1976), rev'd on other grounds,

170 N.J. Super. 461 (App. Div. 1979).

Defendants appealed and plaintiffs cross-appealed. The Appellate Division held in pertinent part that the trial court had erred in denying the Urban League plaintiffs standing to argue violations of §3601 et seq. and in dismissing their claim of racial discrimination under that statute. This claim, upon which the instant application is predicated, was expressly reinstated by Judge Antell:

> On the cross-appeal the individual plaintiffs assert that the trial judge erred in denying them standing to argue violations of the 13th and 14th Amendments of the United States Constitution and violations of the Civil Rights Act of 1968, also known as the Fair Housing Act, 42 U.S.C.A. § 3601 et seq. In ruling as he did the trial judge applied principles formulated in Warth v. Seldin, 422 U.S. 490 (1075). For reasons which we explained in Urban League of Essex Cty. v. Tp. of Mahwah, supra, at 33-34, this was error. New Jersey courts are not bound by federal rules of standing. The rights asserted by the individual plaintiff could only have arisen under 42 U.S.C.A. § 3612(a) and, by the language of that statute, are enforceable in appropriate State or local courts of general jurisdiction.'
> * * *
> Plaintiffs further claim that the trial judge erred in dismissing the corporate plaintiff's complaint for racial discrimination under the foregoing federal statute. The reason given was that no credible evidence of deliberate or systematic exclusion of minorities was before the court. Without deciding whether the evidence presented actually suffices to prove a violation, we conclude that the trial judge erred in requiring proof of a discriminatory intent since this ruling is in conflict with controlling authorities. (Citations omitted, emphasis added.) Id. at 468-469.

The Supreme Court granted certification and decided the Urban League matter along with five other cases in Mount Laurel II. Unambiguously reaffirming its commitment to the principles of Mount Laurel I, the Court found "widespread non-compliance with the

constitutional mandate of our original opinion in this case." Id. at 199. The Court granted substantially all of the relief sought by the Urban League on state constitutional grounds:

> When the exercise of [the constitutional power to zone] by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare - in this case the housing needs- of those residing outside of the municipality but within the region that contributes to the housing demand within that municpality. Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional. In particular, those regulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection. (Citations omitted.) Id. at 209.

While noting that plaintiffs did "not appear to be press[ing] their Thirteenth and Fourteenth Amendment claims," at no point does the Mount Laurel II Court even mention plaintiffs' Fair Housing Act claims. There was no need to reach these claims, since the relief sought had already been granted.[2] Indeed, the remedy fashioned by the

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2 The Urban League plaintiffs requested judgment as follows:

> "(1) Permanently enjoining the defendants, their officers agents, and employees, and all other persons acting in active concert or in participation with any of them, from engaging in any zoning and other land use policies and practices which have the effect of excluding low-and moderate-income persons, both white and non-white.
>
> (2) Requiring defendants, individually and collectively, to take reasonable steps to correct past discriminatory conduct by preparing and implementing a joint plan to facilitate racially and economically integrated housing within the means of plaintiffs and the class they represent. In developing and implementing such

Supreme Court encompassed all of the relief which could have been obtained under Title VIII. In ruling in favor of the Urban League, the Supreme Court considered the "same nucleus of operative fact" as that underlying the Urban League's Fair Housing Act claims. Significantly, those claims were never abandoned nor was there ever any adverse decision with regard to same.[3]

Under the New Jersey cases, accordingly, plaintiffs must be considered prevailing parties within the meaning of the civil rights statute and as such are entitled to counsel fees.

B. Plaintiffs Are Entitled to Counsel Fees Under the Test Set Forth by the New Jersey Supreme Court in Singer v. State, 95 N.J. 487 (1984)

1. The Singer Test

In Right to Choose v. Byrne, 91 N.J. 287 (N.J. 1982), the New

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plan, defendants, should be required to solicit and utilize the advice and assistance of appropriate county, state, and federal agencies and programs. Such plan should include a precise program and timetable outlining the steps defendants will take to assure successful and expeditious implementation.

(3) Granting the named plaintiffs the recovery of all costs, including attorney fees, incurred in maintaining this action, and such further relief as the interest of justice may require and this Court deems appropriate."

3 The non-discriminatory affirmative marketing clauses contained in the Final Orders and Judgments of Repose subsequently entered by this Court further demonstrate plaintiffs', as well as the Court's, continuing concern with their Title VIII claims.

Jersey Supreme Court rejected an argument that plaintiffs who prevailed on a pendent state claim were entitled to attorneys' fees under §1988 for the sole reason that there, unlike here, there had been an adverse decision with respect to the federal claim. In Singer v. State, supra, the Supreme Court clarified the test to be applied in determining attorney fee awards under 42 U.S.C. §1988.[4] It is respectfully submitted that the Singer standard is controlling here.

The Singer Court noted that the test it was adopting had first been articulated in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), where plaintiffs sought counsel fees in connection with a successfully settled, rather than adjudicated, prison conditions suit. Nadeau prescribed a two part test, paraphrased by the New Jersey Supreme Court as follows:

> The test, as noted, first calls for a factual causal nexus between plaintiff's litigation and the relief ultimately achieved. * * * Second, under Nadeau, it must be shown that the relief ultimately secured by plaintiffs had a basis in law. Singer, supra at 495.

The causal nexus between the Urban League litigation and the

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4 §1988, unlike §3612, does not require a showing, easily met here, that plaintiffs are unable to pay their own fees. Fees under §1988, however, may only be awarded where plaintiff has prevailed in an action or proceeding to enforce a provision of §§1981, 1982, 1983, 1985, and 1986 of this Title XIII, XXIV and LXX, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964. Plaintiffs do not proceed under §1988 because their claims under the cited sections, unlike their claims under §3601, were not before the Mount Laurel II Court.

commitment of the defendant municipalities to provide a realistic opportunity for lower income housing is beyond dispute. The relief secured by plaintiffs was broader than that sought under their Fair Housing Act claims alone, which did not include housing for lower income whites, but unquestionably included the relief sought pursuant to that statute. Plaintiffs' entitlement to attorneys' fees under Singer is buttressed by the Court's emphasis in that case on the actual result achieved:

> As the Supreme Court earlier stated, a party can be considered prevailing' for the purposes of the Awards Act even though the disposition of the case does not include a final judgment entered in plaintiff's favor, provided plaintiff has won substantially the relief originally sought in her (or his) complaint.' (Citation omitted.) Id. at 495.

The Singer Court proceeded to reinstate plaintiffs' §1983 claim, noting that they had obtained virtually all of the relief sought below despite the rejection of that particular claim by the lower court. In the case at bar, of course, the statutory predicate for the award of fees, §3612, has already been reinstated by Judge Antell.

Plaintiffs have frequently been granted attorneys' fees in housing discrimination cases in New Jersey, usually under 42 U.S.C. §1988. Jones v. Orange Housing Authority, 559 F. Supp. 1379 (D.N.J. 1983). While there are no reported New Jersey cases regarding attorney fee awards made solely under 42 U.S.C. §3612, courts in other jurisdictions have applied the same test to determine the prevailing party to actions brought under the Fair Housing Act as to those

brought under §1988. In Williams v. Fairburn, 640 F.2d 635 (5th Cir. 1981), aff'd, rev'd and remanded on other grounds, at 702 F.2d 973 (11th Cir. 1983), for example, the court held that the plaintiff had prevailed under the Fair Housing Act even though the case was settled and did not proceed to trial. Here, defendants' persistent refusal to comply with the mandate of Mount Laurel I left plaintiffs no alternative to years of expensive and time consuming litigation. There is no authority, and certainly no logic, for depriving them of attorneys' fees which they would have been entitled to under Williams had their adversaries been less recalcitrant.

2. Application of the Singer test where plaintiffs prevail on nonfederal grounds

In Bung's Bar & Grille, supra, the Singer holding was applied in a case indistinguishable, for purposes of this application, from the case at bar. There, property owners who successfully challenged local improvement assessments were held entitled to recover costs and attorneys' fees under §1988, even though they received no favorable ruling on their §1983 claims. There, as in the instant case, plaintiffs' federal claims were not even addressed by the Court. Citing Singer, the Bung's Bar & Grille court held that:

> Thus, the legislative and decisional history of §1988 indicate that plaintiffs claiming bona fide civil rights violations, prevailing on alternative grounds, may recover fees and costs under section 1988, through a later determination of the constitutional claim for that purpose, if the constitutional claim arises from the same nucleus of operative facts' or is "based upon related legal theories"

and meets the substantiality test.' Id. at 465. Although the tests are proposed alternatively, the Urban League plaintiffs' §3601 et seq. claims, like the Bung's Bar & Brille plaintiffs' §1983 claims, clearly satisfy both. It is respectfully submitted, therefore, that plaintiffs here are similarly entitled to attorneys' fees. The Urban League's §3601 et seq. claims arise from the same nucleus of operative fact as the state constitutional claims upon which they prevailed.

The material facts in this case, set forth in the original Complaint, were essentially adopted by the Supreme Court in Mount Laurel II.

> [The Urban League] case provides a fitting conclusion to our opinion in these matters. The action was started in 1974. Plaintiffs proved beyond any question that there was a present actual need for low and moderate income housing in the 23 Middlesex County municipalities initially joined as defendants and that this need would become overwhelming in the future. They proved a pattern of exclusionary zoning that was clear. They portrayed a county exploding with growth, providing jobs for all, and promising even more in the future, including employment for low and moderate income families, a county where the opportunity for lower income housing shrank faster than its need grew.
>
> Armed with substantial documentation of the need, the exclusionary practices, and the obvious ability of the municipalities to absorb any reasonably calculated fair share of the region's need for lower income housing, the trial court conscientiously attempted to determine the precise regional need and its allocation among the municipalities. Id. at 339, 340.

These facts, which also supported plaintiffs' original §3601 claims, comprise the "nucleus of operative facts" upon which the portion of the Mount Laurel II decision regarding the Urban League

plaintiffs was predicated. It is respectfully submitted that the finding of facts made by the Court in Mount Laurel II is more than sufficient to support plaintiffs' §3601 et seq. claims. This is confirmed by the broad relief granted by the Court; i.e., the relief that could have been granted on the basis of plaintiffs' §3601 claims alone is included in the relief actually granted because the facts upon which plaintiffs' federal claims are based are included in the facts actually found.

As Judge Antell noted, citing Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978), discriminatory intent is not necessary under §3601. In Arlington Heights the United States Supreme Court carefully analyzed the factors to be considered in determining whether a party is entitled to relief under §3601 where, like here, there is no finding of discriminatory intent:

> We turn now to determining under what circumstances conduct that produces a discriminatory impact but which was taken without discriminatory intent will violate §3604(a). Four critical factors are discernible from previous cases. They are: (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of Washington v. Davis; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. Id. at 1290.

Application of these factors to the findings of the New Jersey Supreme Court in the Urban League matter shows that the Urban League

plaintiffs plainly prevail under the Arlington Heights test.

In evaluating the strength of plaintiffs' showing of discriminatory impact, the Arlington Heights Court distinguished between two kinds of discriminatory effect:

> There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups. Id. at 1290.

As set forth in the chart annexed hereto as Exhibit A, census data for the defendant municipalities indicate that in the instant case, as in the Arlington Heights, exclusionary zoning had an adverse impact on a greater percentage of nonwhites than whites. Here, too, the disadvantaged class was not predominantly nonwhite. The Arlington Heights Court held, however, that this was not a bar to relief:

> The fact that the conduct complained of adversely affected white as well as nonwhite people, however, is not by itself an obstacle to relief under the Fair Housing Act. Id. at 1291.

In Arlington Heights, moreover, it was unclear whether the Village's refusal to rezone would "necessarily perpetuate segregated housing" because of the alleged availability of alternative sites for low-cost housing within the municipalities. The case was remanded on this issue. Here, the New Jersey Supreme Court has already found that the defendant municipalities in Mount Laurel II provided no such alternatives. Indeed, the Court explicitly found that the defendant

municipalities had failed to provide even a "realistic opportunity" for such housing. Under this factor, accordingly, the Urban League plaintiffs would prevail, although the Arlington Heights plaintiffs did not.

The second factor considered by the Arlington Heights Court, which it characterized as "least important", was intent. As in Mount Laurel II, there was no specific finding of intent to discriminate on the basis of race in Arlington Heights. It is pertinent that the Court, while concluding that such a finding was unnecessary under the Fair Housing Act, explained its significance as a factor:

> But it is evidence that the equitable argument for relief is stronger when there is some direct evidence that the defendant purposefully discriminated against members of minority groups because that evidence supports the inference that the defendant is a wrongdoer. Id. at 1292.

Here, plaintiffs' equitable argument needs no such "inference" of wrongdoing because the New Jersey Supreme Court has already made express findings of persistent wrongdoing by the defendant municipalities. Again, this factor is favorable to the Urban League, although it was not favorable to the Arlington Heights plaintiffs.

The third factor under Arlington Heights is the defendant's interest "in taking the action which produces a discriminatory impact." Id. at 1293. There, this weakened plaintiffs' claim since the Village was found to be acting legitimately within its zoning authority. The Supreme Court could have been describing the defendant municipalities in the case at bar in the example it offered by way of

contrast:

> Similarly, if the defendant is a governmental body acting outside the scope of its authority or abusing its power, it is not entitled to the deference which courts must pay to legitimate governmental action. (Citations omitted.) Id. at 1293.

Here, again, there has already been a finding by the New Jersey Supreme Court that defendant municipalities were not only "abus[ing their] power," but that such abuse was of constitutional magnitude.

The fourth factor identified by the Supreme Court is the nature of the relief sought. A plaintiff seeking to compel a defendant to actually construct or ensure construction is distinguished from a plaintiff who "merely seeks to enjoin the defendant from interfering with that construction." Id. at 1293.[5] In the case at bar, as set forth in footnote 3, plaintiffs here sought both forms of relief. The state Supreme Court has already held, however, that they were entitled to both. The exercise of discretion discussed in Arlington Heights has already been resolved here in plaintiffs' favor.

In Arlington Heights, analysis of the above described factors resulted in what the Court characterized as a "close case." The Court nevertheless ruled in favor of plaintiffs, remanding for a determination of alternative sites. The decision concludes with an

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5 This is not an issue in New Jersey because, as a matter of state law, municipalities can be required to take affirmative steps. Mount Laurel II. See also the New Jersey Fair Housing Act of 1985.

unequivocal confirmation of the Court's commitment to the Fair Housing Act:

> Moreover, if we are to liberally construe the Fair Housing Act, we must decide close cases in favor of integrated housing. Id. at 1294.

Under the New Jersey Supreme Court's finding of facts regarding the Urban League plaintiffs in Mount Laurel II, analysis of each of the Arlington Heights factors favors plaintiffs. It is respectfully submitted, accordingly, that plaintiffs could have easily prevailed on their Fair Housing Act claims, a conclusion consistent with the relief granted by the New Jersey Supreme Court.

Nor can there be any dispute that the Urban League plaintiffs Fair Housing Act claim meets the "substantiality test" as set forth by the court in Bung's Bar & Grille. Citing Southeast Legal Defense Group v. Adams, 436 F.Supp. at 894, the Bung's Bar & Grille court held: "The substantiality test merely requires ... that the constitutional (fee-claim) issue which is raised be not wholly insubstantial', obviously frivolous', plainly insubstantial' or obviously without merit.'" Id. at 466. It is respectfully submitted that the substantiality of the Urban League plaintiffs' Fair Housing Act fee-claim has been amply demonstrated by its ability to meet the standards set forth in Arlington Heights.

Finally, it is respectfully submitted that the Urban League plaintiffs' federal and state legal theories were related in that the former was essentially included in the latter. Under the Fair Housing Act, plaintiffs sought affordable housing for lower income minorities.

Under their state constitutional theory, they sought relief for lower income whites as well. In United States v. Parma, 661 F.2d 562 (6th Cir. 1981), aff'g in part 494 F. Supp. 1049, 504 F. Supp. 913 (N.D. Ohio 1980), the United States Court of Appeals for the Sixth Circuit found Title VIII violations where, as in the instant case, plaintiffs' allegations essentially addressed economic exclusion.

> Indeed, only one of the five principal allegations in the U.S.' "pattern and practice" suit against Parma -- the failure by the city to adopt a proposed ordinance "welcoming" all people of "goodwill" -- can be characterized as primarily concerned with racial bias. The remaining four allegations centered on economic concerns.
> * * *
> While there are undoubtedly situations in which the linkage between race and poverty would be sufficiently weak that the Fair Housing Act would not provide an adequate charter for an attack on economic exclusivity alone, it also seems clear that Parma's conduct was roughly typical of the general pattern of exclusion in urban areas, and the allegations of the Parma complaint fit readily into the well-known format of such economic exclusion cases as Mount Laurel. (Footnote omitted.) Payne, "From the Courts", Real Estate Law Journal, Vol. 11, No. 1, Summer 1982, at 72.

C. The Urban League Plaintiffs Are Unable to Bear Their Own Costs.

The applicable statute, 42 U.S.C. §3612(c), expressly provides for an award of counsel fees where, like here, the prevailing plaintiffs are unable to bear their own costs. The cited section provides:

> (c) 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 $1000 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.

As set forth in the Certification of C. Roy Epps, Urban League President, submitted herewith, since the Urban League's funds are all "program designated", none of those funds may properly be used for attorneys' fees in this matter. The Urban League is therefore entitled to "reasonable attorney fees" pursuant to the cited provision.

The fact that the Urban League has been represented without cost is no bar to such an award. In Hairston v. R&R Apartments et al. 510 F.2d 1090 (7th Cir. 1975) the plaintiff filed an uncontested affidavit that he was unable to afford the costs of litigating his Fair Housing Act claim. Since plaintiff had been represented without cost by a legal services organization, however, the district court denied his request. The Seventh Circuit cited the line of Supreme Court cases, including Trafficante v. Metropolitan Life Insurance Co. 409 U.S. 205, 34 L.Ed.2d 415(1972), Newman v. Piggie Park Enterprises,Inc. 390 U.S. 400, 19 L. Ed.2d 1263 (1968) and Northcross v. Memphis Board of Education 412 U.S. 427, 37 L. Ed. 2d 48(1978); in which the Supreme Court stressed the importance of equal opportunity in housing, and concluded that:

> ... Congress has enacted provisions for attorneys fees to encourage individuals injured by racial discrimination to act as private attorneys general' by seeking judicial relief on their own initiative , thereby providing a method to forcefully vindicate a policy of equal opportunity considered to be of the highest priority. Hairston, supra at 1092.

The Hairston Court reasoned that it was at least as crucial to encourage organizations providing services to such individuals:

> When free legal services are provided there may be no direct barrier to the courtroom door, but if no fees are awarded, the burden of the costs is placed on the organization providing the services, and it correspondingly may decide to concentrate its limited resources elsewhere, thus curtailing the forceful application of the Act that Congress sought. Thus, the denial of fees in this situation indirectly cripples the enforcement scheme designed by Congress. Id. at 1092.

It is respectfully submitted that plaintiffs here, like the plaintiff in Hairston, should be awarded attorneys' fees since denial of same would "curtail the forceful application of the [Fair Housing] Act".

II. AS THE PREVAILING PARTY THE URBAN LEAGUE IS ENTITLED TO COSTS, INCLUDING EXPERTS' FEES.

R. 4:42-8(a) provides in pertinent part that, "... costs shall be allowed as of course to the prevailing party." The Supreme Court in Mount Laurel II expressly held that the claims of the Urban League plaintiffs had been vindicated , "...noncompliance with the Mount Laurel obligation ... has already been amply demonstrated." 92 N.J. at 350. The question on remand was not whether the municipalities had violated Mount Laurel I, for that had already been established. It is a matter of record that each of the municipal defendants has been compelled to amend its zoning ordinance or shall be compelled to do so. The Urban League plaintiffs, therefore, are indisputably the prevailing party to whom costs should be awarded "as of course."

A. Reasonable and Necessary Costs Include the Urban League's

Share of the Court-Appointed Expert's Fee.

The statutory costs expressly allowable pursuant to N.J.S.A. 22A:2-8 are set forth in detail in the certification of Barbara Stark, submitted herewith. In addition to these expressly specified costs, the cited statute provides that the prevailing party is also entitled to:

> Such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law, or rule of court.

Here such "reasonable and necessary expenses" include the Urban League's share of all fees paid or owing to the court-appointed expert, Carla Lerman, in connection with the pretrial and trial proceedings as well as the fees of the Urban League's expert, Alan Mallach. As set forth in Ms. Stark's certification, $1839.62 of Ms. Lerman's fees has been billed to the Urban League. Mr. Mallach's fee totalled $36,995.00.

The Urban League should have no responsibility for Ms. Lerman's fee, which the Mount Laurel II Court contemplated would be determined by this Court at the conclusion of the litigation:

> The trial court should use any aids that may sensibly dispose of this litigation fairly, practically, promptly and effectively. There are experts in this field who are prepared to testify, who have studied this subject matter for many years, and who will not be in the pay of any of the parties although their general bias may be well known. They should be used liberally by the trial court.* * * As for the compensation of court-appointed experts - and compensation will not always be required - the trial court should determine that matter at the time the expert is retained. One or more of the parties will have to pay; on occasion the ultimate liability may await the outcome of the litigation. (Emphasis added.) Id. at 293.

By letter dated September 8, 1983, a copy of which is attached as Exhibit B, for the Court's convenience, this Court reserved decision with regard to such liability:

> The ultimate issue of responsibility for the fees of the experts has not been decided. My direction to Ms. Lerman to bill all eight parties equally if a retainer was requested is without prejudice.I will review the situation at the appropriate time.

It is respectfully submitted that that time has come. Equity, as well as case law, mandates that the towns rather than the plaintiffs bear the full cost of Ms. Lerman's fees. It was the towns' unconstitutional ordinances which compelled this litigation in the first instance. Their continuing resistance resulted in a far greater expenditure of time and effort on Ms. Lerman's part than should have been necessary.

Plaintiffs should be relieved of these costs, moreover, because their primary objective in this litigation has been the advancement of the public interest. None of the Urban League plaintiffs has sought personal pecuniary gain, nor indeed any form of personal as opposed to public relief.

It is respectfully submitted that Huber v. Zoning Board of Adjustment, 124 N.J. Super. 26 (Law Div. 1973), is controlling here. There, the court required the party opposing the public interest plaintiff to bear costs, even though, unlike here, the court "was unable to find a reported case" supporting its award of the particular costs; i.e., "costs of a transcript of hearings before a municipal body for use in an action in perogative writs." The court held that

it nevertheless had the authority to tax such costs because the plaintiff, like the plaintiffs here, represented the public interest. In Huber the defendant Board had granted a variance and the Township committee had granted a special permit for the enlargement of a gas station. The Huber Court, striking the variance, noted that such plaintiffs should not be "discouraged" from bringing such suits by the "possibility of large costs":

> Plaintiff in this case is an interested citizen whose property was close enough to the property in question to give him standing to challenge the decisions of the board and governing body. His challenge had the effect of insuring the correct enforcement of the Township Zoning Ordinance. In this sense, his suit is one brought on behalf of all the citizens of the Township, who will benefit from the correct application of local zoning regulations.* * * It is important that citizens should feel able to bring such actions where they believe that their representatives are not carrying out their duties correctly or effectively and should not be discouraged from doing so by the possibility of large costs. (Citations omitted; emphasis added.) Id. at 29.

It is respectfully submitted that here, even more than in Huber, the "[citizen's] representatives [were] not carrying out their duties correctly." Indeed, their malfeasance reached constitutional dimensions. In view of the importance of the right vindicated, the Urban League plaintiffs should not be penalized for bringing such actions by being forced to pay the substantial costs incurred herein. Furthermore, requiring the prevailing low and moderate income plaintiffs here to bear the full cost of their expert would impose an unsupportable burden on the very limited resources of these plaintiffs and the public interest groups that assist them.

The extent to which the public interest has been advanced has

consistently been taken into account by courts in this and related litigation and the towns have been held responsible for the masters' fees. Urban League of Essex County v. Mahwah, 207 N.J. Super. 169 (Law Div. 1984). It is respectfully submitted that there is no reason to change that policy at this point.

B. Defendants Should Pay Plaintiffs' Experts' Fees

In the instant application, plaintiffs are also requesting reimbursement for the expenses and fees of their experts, Alan Mallach, AICP and Rogers, Golden and Halpern. It is well established in New Jersey that the allowance of such expert witness fees as costs is within the discretion of the trial court. U.S. Pipe and Foundry Co. v. United Steelworkers of America, AFL-CIO, Local No. 2026, 37 N.J. 343 (1962).

As the Supreme Court noted in Mount Laurel II, the testimony and assistance of experts was essential here. In cases where such expert opinion was similarly necessary, such fees have been awarded as costs to the prevailing party. Barberi v. Bochinsky, 43 N.J. Super. 186 (App. Div.1956), for example, involved an action for damages for the cost of removing an encroaching retaining wall. Since the testimony of the prevailing plaintiff's surveyor was crucial to plaintiff's case,the trial court's award of that fee as a cost item was affirmed by the Appellate Division.

In Bung's Bar & Grille, discussed above, the Court addressed plaintiffs' motion for summary judgment allowing counsel fees and

costs, including expert witness fees. Granting the request for experts' fees, the Bung's Bar and Grille Court held:

> The plaintiffs seek an award of costs, including the cost of three expert witnesses. These witnesses testified at municipal hearings prior to the institution of this litigation. Their testimony was not accepted at the municipal level. When this court rejected the original assessments and established new ones, however, it relied primarily on their opinions. Those opinions were contained in the record of the municipal proceedings; that record provided the basis for the decision here - no trial was required....Substantial costs were saved. This result would not have been possible without the expert testimony produced by the plaintiffs. It is also clear that such testimony was a necessity; its absence would have denied plaintiffs any chance of success. Id. at 478.

Here, as in Bung's Bar and Grille, the Court placed great reliance on the opinion of plaintiffs' experts, particularly Mr. Malalach. All of those involved in this litigation are aware of the central role played by Mr. Mallach in the development of the consensus methodology utilized in other cases as well as the case at bar.[6] Nor can there be any question of the essential role Mr. Mallach's complete mastery and insightful analysis of the facts played in the development of plaintiffs' case. His ability to generate creative approaches to this complex and difficult matter, moreover, inured to the benefit of all parties. The absence of Mr. Mallach's testimony would undoubtedly have "denied plaintiffs any chance of success." It is respectfully submitted that here, as in Barberi and Bung's Bar & Grille, defendants

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6 Indeed, the importance of Mr. Mallach's role in this litigation was expressly noted by the New Jersey Supreme Court in Hills Development Co. v. Township of Bernards, slip op., at 27.

should accordingly be required to pay plaintiffs' expert's fees.

C. Defendants Should be Required to Reimburse the Urban League Plaintiffs for the Costs of Depositions

N.J.S.A. 22A:2-8 provides in pertinent part that a party:

> ... is entitled to include in his bill of costs his necessary disbursements, as follows:
> * * *
> The costs of taking depositions when taxable, by order of the court.

While observing the dearth of reported cases in which costs of depositions have been awarded, the Court in Finch, Pruyn & Co., Inc. v. Martinelli, 108 N.J. Super. 157 (Ch. Div. 1969) notes that:

> The clerk of the court has advised that orders directing the taxation of the expenses of depositions are not uncommon in [the Chancery] Division. Id. at 159.

The Finch Court proceeded to grant plaintiff's application for the cost of those depositions which plaintiff was constrained to take by reason of defendant's "fraud or other reprehensible conduct," where such depositions were "necessary" and "actually used at the trial." Id. at 176. It is respectfully submitted that under this standard, plaintiffs here should be reimbursed for the depositions set forth in Exhibit G of the Certification of Barbara Stark, Esq., totalling $3450.50. Indeed, the Urban League plaintiffs' claim for reimbursement is much more compelling than that of the plaintiff in Finch in view of the strong public policy reasons for awarding costs to prevailing plaintiffs in public interest matters. See Huber and

Bung's Bar & Grille, supra.

Here, the persistent and deliberate exclusion of lower income households was the "reprehensible" conduct of the defendant municipalities necessitating depositions. Defendants' "determination to exclude the poor," deplored by the New Jersey Supreme Court in Mount Laurel II, surely merits censure as much as the Finch defendant's effort to avoid paying his debts by transferring his interest in real estate to his wife.

Nor can there by any question of the need for these depositions. The information obtained thereby was of critical importance in trial preparation and all of the depositions were carefully reviewed and analyzed for that purpose. Portions of the depositions were actually used at trial on cross-examination.

In Huber, the court frankly stated that it had found no reported cases where the prevailing party was awarded costs for transcripts of hearings before a municipal body. In contrast to the "not uncommon" award of deposition costs noted by the Finch Court, moreover, the clerk reported "no established pattern within the Law Division" for taxing such transcript costs. The court nevertheless awarded the costs of these transcripts to Mr. Huber "....so that plaintiff is not in effect penalized for taking the initiative in acting for his community." Id. at 29. The initiative taken by the Urban League plaintiffs has had far-reaching and beneficial effects in defendant municipalities. It is respectfully submitted that here, as in Huber, plaintiffs should not be penalized for "acting for [their] community."

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Urban League plaintiffs should be awarded attorneys' fees, experts' fees and costs incurred since their retention of the ACLU.

Respectfully submitted,

JOHN PAYNE, ESQ.
ERIC NEISSER, ESQ.
BARBARA STARK, ESQ.
ATTORNEYS FOR URBAN LEAGUE
On Behalf of the
American Civil Liberties Union
of New Jersey

Dated: August 14, 1986

EXHIBIT A

1980 CENSUS DATA DEMONSTRATING ADVERSE IMPACT
OF EXCLUSIONARY ZONING IN DEFENDANT MUNICIPALITIES

TOWN	POPULATION	BLACK	WHITE
Cranbury	1927	168	1743
East Brunswick	37711	437	35865
Monroe	15858	592	14930
North Brunswick	22220	1003	20533
Old Bridge	51515	1086	48807
Piscataway	42223	6162	33135
Plainsboro	5605	330	5095
South Brunswick	17127	680	15398
South Plainfield	20521	979	19167
NEW JERSEY	7,364,823	925,066	6,127,467

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Source: Population statistics from New Jersey 1980 Census of Population and Housing, Municipal Profiles, Volume II: Characteristics of Households and Families, New Jersey State Department of Labor, January 1982.

Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D. SERPENTELLI

OCEAN COUNTY COURT HOUSE
C. N. 2191
TOMS RIVER, N. J. 08753

September 8, 1983

Bruce S. Gelber, Esq.
National Conference Against
Discrimination in Housing, Inc.
1425 H Street N. W.
Washington, D. C. 20005

Re: Urban League of Greater New Brunswick
v. Carteret - Middlesex Co. No. C-4122-73

Dear Mr. Gelber:

I have your letter of August 24, 1983 concerning the payment of the fees of Ms. Carla Lerman. I also have the response of Bertram Busch, Esquire of August 29, 1983 and of Phillip Lewis Paley, Esquire of September 1, 1983 all of which arrived while I was on vacation.

My recollection of our case management conference comports with the statements made by Mr. Paley in his letter of September 1, 1983. The ultimate issue of responsibility for the fees of the experts has not been decided. My direction to Ms. Lerman to bill all eight parties equally if a retainer was requested is without prejudice. I will review the situation at the appropriate time.

I also wish to acknowledge your letter of August 22, 1983 in which you submit your position with respect to the appropriate region to be considered by the Court. I would ask all defendant's counsel to whom a copy of this letter is being directed, with the exception of Mr. Busch and Mr. Paley, to do likewise. I have received Mr. Busch's letter of August 26, 1983 enclosing the report of Carl Hintz relating to his position as to the appropriate region and Mr. Paley's of September 1, 1983.

EXHIBIT B

Bruce S. Gelber, Esq. September 8, 1983

Re: Urban League v. Carteret

You may feel free to send a copy of your letter of August 22, 1983 to Ms. Lerman as may any other counsel who wishes to make the position of their client known to her.

For the edification of all counsel, I enclose a copy of a letter dated August 15, 1983 in which Ms.Lerman accepts her appointment and establishes her rate of compensation.

Very truly yours,

Eugene D. Serpentelli, J.S.C.

EDS:RDH
enclosure
cc: to all counsel w/encl.

CARLA L. LERMAN
413 W. ENGLEWOOD AVENUE
TEANECK, NEW JERSEY 07666

August 15, 1983

Honorable Eugene D. Serpentelli
Ocean County Court House
CN 2191
Toms River, N.J. 08753

Dear Judge Serpentelli:

This letter will confirm my acceptance of the appointment as the Court' expert in the case of Urban League v. Carteret-Middlesex C-4122-73.

I understand that the first task, in the form of a report to you, will relate to the definition of region, regional need and fair share.

My fee will be based on an hourly rate of $70., which will include routine expenses. I will not require any retainer. As I have discussed with you, I estimate that this study will require approximately three to four weeks.

I am looking forward to working with you on this case.

Sincerely,

Carla L. Lerman

Carla L. Lerman