Reply Memorandum of the Urban League Plaintiffs

Re: ~~AG~~ Attorney's Fees

pg. 52

AF0001162

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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)

REPLY MEMORANDUM OF THE URBAN LEAGUE PLAINTIFFS

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

I. THIS COURT HAS JURISDICTION TO DETERMINE THE URBAN LEAGUE'S REQUEST FOR COSTS AND FEES

A. This Is Not Only the Proper Forum, But the Only Forum Where This Application May Be Brought

There can be no serious doubt that this Court has jurisdiction to hear this application. As Piscataway notes, citing U.S. Pipe, etc. v. U.S. Steelworkers of America, 37 N.J. 343 (1962), this is not only the proper forum, but the only forum where this application may be determined. "And it is clear that applications for allowances of counsel fees may only be made in the court in which the services were rendered or the costs accrued." (Piscataway's Brief, p. 2, fn. 1) In the words of the New Jersey Supreme Court: "It is elementary in our practice that applications relative to costs and allowance of counsel fees are to be made in the court in which the costs accrued or the services claimed were rendered." Id. at 357, n.1.

Hills Development Co. v. Township of Bernards, ____ N.J. ___ (1986) ("Hills") did not deprive this Court of this "elementary" jurisdiction. There is no support in the law for defendants' astonishing contention that such jurisdiction simply evaporates in the absence of express reservation. On the contrary, courts have been loathe to find an implicit denial of jurisdiction. As the Supreme Court of Florida noted in Finkelstein v. North Broward Hosp. Dist., 484 So.2d 1241 (Fla. 1986):

> We refuse to deprive plaintiffs of their substantive right to attorney's fees merely because the final judgment did not contain the magic words "jurisdiction is reserved." Id. at 1243.

Defendants' arguments further deteriorate upon a close reading

of Hills. The Hills Court expressly reserved jurisdiction and further provided that "Some cases may require further fact finding to make these determinations." Slip. op. at 88. It is clear that the New Jersey Supreme Court contemplated this Court's continuing, albeit limited, supervision of these matters until the Council on Affordable Housing (the "Council") commenced operation, a task which this Court has not shirked. Indeed, Piscataway conceded the ongoing role of this Court by demanding clarification of that role in its September 2, 1986 Order.

In transferring these matters to the Council, the Hills Court plainly sought to relieve this court of further responsibility for substantive determinations regarding fair share numbers, credits and other matters expressly within the jurisdiction of the Council. The continuing grant of jurisdiction for the purpose of imposing conditions on transfer was an exception to this principle. In the context of Hills, the language relied upon by defendants, "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) is no more -- and no less -- than the unambiguous articulation of a narrow exception to the principle previously set forth.

There was no intention of stripping this Court of its customary jurisdiction with respect to matters, such as determination of counsel fees, beyond the purview of Council. Nor is there any reason whatsoever to do so.

B. The Urban League's Application is Timely

In complex matters involving important civil rights, such as the case at bar, fee applications often arise in a complicated procedural context. In Gaines v. Dougherty, 775 F. 2d 1565 (11th Cir. 1985), for example, plaintiffs brought suit in 1963 to challenge the de jure segregation of the Dougherty school system. The case reached the Court of Appeals twice, in 1971 and 1972, and each time plaintiffs appealed the district court's denial of attorney fees in addition to raising other issues. The matter was remanded but on neither occasion did the Court address the denial of plaintiffs' fee claim.

Finally, in 1979, after the Court of Appeals noted that its mandate had not been carried out for seven years despite plaintiffs efforts, a comprehensive desegregation plan was implemented.[1] Following the entry of that plan, plaintiffs moved for attorneys' fees for "all of the work their lawyers had done in the case up to that time, an eighteen year period extending from the commencement

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1 This is another striking parallel to the instant case, in which the New Jersey Supreme Court tersely remarked:

> This is the return, eight years later of Mount Laurel I. After all this time, ten years after the trial court 's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Mount Laurel II at 198.

of the suit in 1963 to the entry of the final desegregation plan." Id. at 1567. Although the District Court granted plaintiffs' request, it held that plaintiffs were not entitled to fees for the period prior to 1971 because the Court of Appeals had not addressed the denial of such fees in its 1971 and 1972 remands. The Eleventh Circuit vacated that Order, holding in pertinent part that: "Our 1971 and 1972 decisions did not affirm the district court's denial of attorneys' fees", and remanded with instructions to the lower Court to "fashion a new award." Id. at 1568, 1572.

This is also a complicated matter procedurally and there seems to be little consensus among defendants as to the appropriate time for filing the instant application.[2] South Plainfield, for example, argues that: "The Judgment entered in this litigation against the Borough of South Plainfield on May 22, 1984 in the nature of a Summary Judgment was not a Final Judgment and the Borough of South Plainfield has never had a Final Judgment, as such Final Judgment is defined in the Rules governing the Courts of the State of New Jersey, particularly Rule 2:2-3." (Santoro Certification, p. 8).

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2 Defendants are not alone. As the Supreme Court noted in White v. New Hampshire Dept. of Empl. Sec., 455 U.S. 445 (1981):

> In civil rights actions, especially in those involving "relief of an injunctive nature that may prove its efficacy only over a period of time," this Court has recognized that "many final orders may issue in the course of the litigation." Bradley v. Richmond School Bd., 416 U.S. 696, 722-723 (1974). Yet sometimes it may be unclear even to counsel which orders are and which are not "final judgments." Id. at 453.

Piscataway, by way of contrast, insists that it obtained a Final Judgment on September 17, 1985.

Under Hills, however, South Plainfield, Cranbury, Piscataway, South Brunswick and Monroe would not have been transferred to the Council on Affordable Housing (the "Council") had there in fact been a prior entry of final judgment. The Supreme Court held:

> "Where no final judgment has been entered, we believe the Council is not bound by any order entered in the matter, all of them being provisional and subject to change, nor is it bound by any stipulations, including a municipality's stipulation that its zoning ordinances do not comply with the Mount Laurel obligation." Id. at 82.

South Plainfield, Piscataway, Cranbury, South Brunswick and Monroe are barred by the doctrine of res judicata from now asserting that judgments which they persuaded the New Jersey Supreme Court were provisional should be considered final for purposes of this application.

It is respectfully submitted that the Final Judgment here was Hills itself. There, the Supreme Court set forth the standards for transfer, setting once and for all which defendants were subject to the Council's jurisdiction (Cranbury, Piscataway, South Plainfield, Monroe and as interpreted by this Court, South Brunswick) and which were not (East Brunswick, Old Bridge, North Brunswick and Plainsboro, all of which had voluntarily entered into Final Judgments). This Judgment did not, and could not have, become final until the Council adopted its substantive regulations in August, 1986. Since the Urban League's application was served and filed on

August 14, 1986, there can be no real dispute as to its timeliness.

II. REQUESTS FOR STATUTORY FEES AND COSTS MAY PROPERLY BE CONSIDERED FOLLOWING THE ENTRY OF FINAL JUDGMENT AND THE FORM OF SUCH APPLICATIONS SHOULD BE APPROPRIATE TO THE CIRCUMSTANCES OF THE CASE

A. The Urban League's Request for Counsel Fees and Costs Could Not Have Been Properly Decided Prior to the Conclusion of Litigation

It is well established that attorneys' fees allowable pursuant to the fee shifting civil rights statutes, like those sought here, cannot be determined until the conclusion of the litigation. Elucidation has been provided by the United States Supreme Court:

> Section 1988 provides for awards of attorney's fees only to a "prevailing party." Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits--an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from other elements. Unlike other judicial relief, the attorney's fees allowed under §1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial White v. New Hampshire Dept. of Empl. Sec., supra, at 451-52.

The applicability of the holding in White to requests for fees under Title VIII, like the one at bar, has been noted by the United States Court of Appeals for the District of Columbia Circuit:

> The rationale for White and its progeny is quite sensible--inasmuch as statutes providing for attorneys' fees typically if not always require the party seeking to recover such fees to have prevailed on the merits, the action for attorneys' fees necessarily must be brought as a separate, later action. In such instances, the attorneys' fees claim is derived from and spawned

> by the antecedent claim on the merits.... n.18, see, e.g., * * * Fair Housing Act of 1968, 42 U.S.C. §3612(c) (1982). * * * U.S. Industries, Inc. v. Blake Const. Co., Inc., 765 F.2d 195, 203 (1985).

Here as in White and U.S. Industries, Inc., plaintiffs' attorneys' fee claim requires "an inquiry separate from the decision on the merits -- an inquiry that cannot even commence until one party has 'prevailed'."[3] Although the Urban League plaintiffs plainly "prevailed" in 1983 when Mount Laurel II was decided, it was not until Hills that this matter could be considered concluded.

Moreover, of course, the fees for services on remand could not be ascertained until the conclusion of those proceedings. Similarly, fees incurred in connection with the imposition of conditions on transfer, in accordance with Hills, could not be ascertained until the termination of this Court's supervision of those conditions. Under the facts of this case, in short, it is respectfully submitted that the within application would have been premature had it been filed prior to the Council's adoption of substantive regulations.

This Court is well aware of the demands of this complicated and far reaching lawsuit, which has been in litigation since 1976. Defendants' insistence that the instant application be handled like

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3 The fee award in Bung's Bar and Grille, it should be noted, was made on motion before the trial court following decision of the merits by the trial court, affirmation on appeal, and denial of certification by the Supreme Court.

a fee request in a routine case wilfully ignores this context. As the Ninth Circuit held in Metcalf v. Borba, 681 F.2d 1183 (1982), noting that local rules did not "indicate a departure from the general rule that fee awards under § 1988 are within the court's sound discretion", concluded that:

> A request for attorneys' fees raises issues collateral to the main cause of action and the courts in determining whether to award attorney's fees must conduct a separate inquiry from the decision on the merits. Id. at 1185.

B. A Separate Proceeding, Or, If the Court Prefers, Separate Proceedings, Is Necessary Here To Determine the Appropriate Counsel Fees and Costs

Contrary to Cranbury's suggestion (Cranbury Brief, p. 3), the question of whether plaintiffs are entitled to counsel fees and costs should not be determined by the amount sought. These are separate and distinct issues, and only the former is before this Court. As set forth quite clearly in the Urban League 's Memorandum and at paragraph 1 of the Stark Certification dated August 13, 1986, following this Court's determination of this issue, supplemental certifications shall be submitted pursuant to R.4:42. Contrary to defendants' contentions, the Urban League is not seeking a "blank check". Naturally, defendants will have every opportunity to respond to these affidavits.

It is respectfully submitted that considerations of judicial economy as well as the scope of this litigation, the numerous collateral issues raised and the particular circumstances of each

defendant municipality, compel bifurcated determination of the questions (1) whether fees are to be awarded; and (2) the amounts of such fees, on a town by town basis. The first question, i.e., the merit of the Urban League's request, is basically the same for all parties, and can be addressed in a single proceeding. Resolution of the amounts owed by each party, on the other hand, will require nine separate determinations. There is ample judicial precedent for following such a procedure here. As Justice Blackmun noted in a similarly complex and protracted school desegregation case, "Further, the resolution of the fee issue may be a matter of some complexity and require, as here, the taking of evidence and briefing." Bradley v. Richmond School Board, 416 U.S. 696, 723 (1974).

Moreover, in their answering papers, defendant municipalities themselves raise issues more appropriately addressed in collateral proceedings. Piscataway and South Plainfield, for example, urge that nonparty municipalities be required to bear their fair share of any assigned costs. (Piscataway Brief, p. 3; South Plainfield Brief, p. 6) The Urban League plaintiffs take no position with regard to this argument. From a procedural point of view and, again, in the interest of judicial economy, however, there is certainly no reason to address this issue prior to a determination of the merits.

Finally, the Urban League plaintiffs also request fees incurred in connection with the instant fee application. In Bagby v. Beal,

606 F.2d 411 (1979), the Third Circuit expressly approved such awards:

> Thus because the policies behind statutory fee awards apply equally to time spent preparing the fee petition and time devoted to litigating the amount of the award at the fee hearing, we hold that awards made under the Awards Act may include hours devoted to determining the appropriate amount of the fee at the fee hearing. Id. at 416.

The time expended on this application, of course, cannot be ascertained until the matter is decided. If any fees are awarded, such an application will be justified and the appropriate supplemental affidavits will have to be filed. Again, in the interest of judicial economy, it seems more reasonable to ask this Court to review all affidavits of services at the same time, rather than in a piecemeal fashion.

III. DEFENDANTS CONSPICUOUSLY FAIL TO DISTINGUISH SINGER OR BUNG'S BAR & GRILLE FROM THE CASE AT BAR

The straightforward test set forth in Singer v. State, 95 N.J. 487 (1984), cert. denied, 105 S. Ct. 121 (1984) is easily met by plaintiffs here. Singer requires only, first, "a factual causal nexus between plaintiffs' litigation and the result ultimately achieved"; and, second, a showing that "the relief ultimately secured by plaintiffs had a basis in law." Surprisingly, most defendant municipalities do not even address Singer.[4] Those defendants which appreciate the significance of Singer strain to distinguish it from the case at bar by arguing that there was no "causal nexus between plaintiffs' litigation and the result achieved. This argument simply cannot stand in the face of the New Jersey Supreme Court's express recognition of the critical role played by the Mount Laurel II plaintiffs in obtaining affordable housing for lower income residents of the State.

Instead of addressing Singer, defendants expend a great deal of effort proving that plaintiffs Title VIII claims were not actively litigated below.[5] This is not disputed. The Bung's Bar & Grille

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4 North Brunswick, Cranbury, South Plainfield, Monroe, East Brunswick and Old Bridge do not even mention this crucial case in their memorandum. While Piscataway cites Singer, it does not attempt to distinguish it from the instant case.

5 Piscataway, for example, accuses plaintiffs of "intellectual[] dishonest[y] ... to suggest that it [sic] spent weeks trying a case based on racial discrimination when not one iota of evidence was presented to justify that position."

test, Bung's Bar & Grille, Inc. v. Florence Tp., 206 N.J. Super. 157 (Ch. Div. 1969), however, does not require that plaintiffs' fee claim prevail on the record below. Such a test would require plaintiffs to redundantly litigate every statutory fee claim, even where, as here, the court clearly indicated at an early stage of the litigation that it would take a different judicial route to the desired remedy.[6] Such a test would not only encourage but necessitate a tremendous waste of valuable court time as well as generating unconscionable legal fees for all parties.

Perhaps most significantly, however, it would undermine "the basic policy against deciding constitutional claims unnecessarily." Maher v. Gagne 448 U.S. 122, 127 (1980). Civil rights plaintiffs,

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(Piscataway Brief at p. 10) Defendant has unfortunately missed the point. Plaintiffs never "suggested" that a racial discrimination case was tried. As explained in plaintiffs' main brief, a far broader case of discrimination was presented, and won, in the New Jersey Supreme Court.

6 It should be recalled that Mount Laurel I was decided in 1975, shortly after plaintiffs filed their complaint. In Mount Laurel I the Supreme Court unambiguously expressed its preference for deciding these issues on state constitutional grounds:

> In Mount Laurel I, this court held that a zoning ordinance that contravened he general welfare was unconstitutional. We pointed out that a developing municipality violated that constitutional mandate by excluding housing for lower income people; that it would satisfy that constitutional obligation by affirmatively affording a realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing. Mount Laurel II at 204-205.

like the Urban League here, should not be deprived of fees because of this longstanding judicial policy.

This is the point of Seaway Drive-In, Inc. v. Township of Clay, 54 U.S.L.W. 2613, cert. denied, 55 U.S.L.W. 3248. There, plaintiff movie theatre claimed that a local ordinance violated the United States Constitution and a state zoning statute. The court enjoined enforcement of portions of the ordinance on state law grounds. In overturning the district court's denial of plaintiff's request for attorney's fees, the 6th Circuit noted:

> The theater alleged two types of claims: constitutional and state law. If it had asserted only §1983 claims and prevailed, it would have been entitled to attorneys' fees under §1988. Had it not asserted a §1983 claim, but asserted only state law claims or federal law claims not listed in § 1988, and prevailed, it would not have been entitled to attorneys' fees.
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> Instead, the theater asserted both fee and non-fee claims. The district court only addressed the non-fee claim because the theater succeeded on that claim and the court, following well settled doctrine, refused to comment unnecessarily on the constitutional issues. The theater thus has prevailed in an action to enforce a fee claim but, for reasons unrelated to the merits of that claim, the fee claim has not been addressed. Id. at 2613.

The reasoning of the Seaway Drive-In is equally applicable here. It is respectfully submitted that that holding is controlling here in view of the lack of any authority to the contrary in the Third Circuit and the recent denial of certiorari by the United States Supreme Court as reported October 14, 1986, 55 U.S.L.W. 3248. The Seaway Drive-In court, like the court in Bung's Bar & Grille,

properly refused to deprive a prevailing plaintiff of attorney's fees because of a judicial preference for an alternate route. Any other result would penalize plaintiffs for the "well settled" policy of avoiding unnecessarily decision of constitutional claims. This is a point, incidentally, which none of the defendant municipalities even attempts to refute. It is respectfully submitted that because of the scope of this litigation as well as the magnitude of the constitutional issues involved, a fee award is even more merited here than it was in Bung's.

A. Defendants Fail to Distinguish This Case From the Plethora of Upper Court Cases, Including Singer, in Which Plaintiffs Prevailing on a Nonfee Claim Have Been Held Entitled to Counsel Fees Where They Asserted a Nonfrivolous Fee Claim Which Was Not Ruled On

It is well established that plaintiffs prevailing on a nonfee state claim may be awarded counsel fees where they asserted a nonfrivolous federal claim which is not addressed by the Court.[7] None of the defendants disputes this. Instead, they cite cases in which, unlike here, the federal claim was denied, declared moot, found frivolous, or otherwise rejected by the deciding court.

Defendant South Brunswick, for example, argues that the instant case "is not substantially different from those cases where a

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7 This principle is as applicable to proceedings brought in state court as to those brought in federal court. Maine v. Thiboutot, 100 S. Ct. 2502, 2507 (1980).

plaintiff's federal claim has not been prosecuted or has been determined to be moot." (South Brunswick Brief, p. 3) Plaintiffs agree that the instant case is substantially the same as the former class of cases if by "not prosecuted" South Brunswick means that the federal claim has not been addressed by the Court. Counsel fee awards have frequently been predicated on such federal claims.

The instant case is clearly distinguishable from the latter class of cases, of course, since plaintiffs' Title VIII claim has neither been declared moot nor abandoned.[8] On the contrary, it was expressly reinstated by Judge Antell.

South Brunswick's reliance on Mesolella v. City of Providence, 578 F. Supp. 387 (D.C. R.I. 1984), accordingly, is clearly misplaced.[9] There, the federal claim, filed as a separate action in

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8 It should be noted, however, that plaintiffs have been awarded counsel fees under the Act even in connection with moot claims where plaintiff has "indicated his right," that is, where plaintiff's lawsuit was a "catalyst" leading to the relief sought. Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985). Fees may also be awarded where the claim is voluntarily dismissed. Fields v. Tarpon Springs, 721 F.2d 315 (11th Cir. 1983).

9 North Brunswick similarly errs in its reliance on Latino Project, Inc. v. City of Camden, 701 F.2d 262 (3d Cir. 1983) where, as defendant concedes, there was no Title VII claim before the Court on which to predicate a fee award. It is respectfully submitted that defendant's attempt to analogize Latino to the case at bar, i.e., "... it is as if no fair Housing Act claim had been raised" is mere wishful thinking. (North Brunswick Brief, P. 6) It is a matter of record that the Urban League plaintiffs' Title VIII claim was made, was reinstated, and was not addressed by the Mount Laurel II court, although the relief requested pursuant to that claim, and more, was granted.

federal court, was permitted to "lay fallow" while the state claim was vigorously litigated in state court. The Mesolella court found that the separate federal suit was brought as an "afterthought," unlike the federal claim here, which was an integral part of plaintiffs' original complaint. Here, moreover, plaintiffs energetically and successfully sought the reinstatement of their federal claim following its improper dismissal by the trial court. The Mesolella plaintiffs, in vivid contrast, voluntarily stipulated to the dismissal of their federal claim.

While denying fees to the Mesolella plaintiffs, the court there explicitly noted that under circumstances like those here, an award would be appropriate:

> ... attorneys' fees may be recovered pursuant to 42 U.S.C. § 1988 when claims are made under U.S.C. § 1983 [but] the judgment is founded on a claim other than the constitutional claim. Such a phenomenon occurs where the constitutional issue is substantial' and the dispositive non-constitutional claim grows out of a common nucleus of operative fact.' And, it is equally clear that, in appropriate circumstances, state court proceedings can be entwined with federal claims in such a way that the two become one

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Nor is Byrne v. Right to Choose, also cited by North Brunswick, apt here. In Right to Choose, unlike the case at bar, there had been an adverse decision with respect to plaintiff's fee claim as pointed out at page 8 of the Urban League's main brief. Here, of course, there has been no such adverse decision. Plainsboro proceeds to ignore this distinction, urging this Court to find an "implied" adverse decision by the Mount Laurel II court with respect to plaintiffs' Title VIII claim. (Plainsboro Brief, p. 7)

for Section 1988 purposes. (Emphasis added.)
Id. at 389.

It is respectfully submitted that under Mesolella the Urban League plaintiffs should be awarded attorneys' fees.

Indeed, denial of attorneys' fees for no other reason than that plaintiffs have prevailed on an alternative theory would contravene the express intent of the legislature in enacting the Attorneys' Fees Act of 1976. That Act was a response to Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240 (1975) which according to the legislative history "... ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the private attorney general' theory." The Fees Act addressed the post Alyeska anomaly that: "Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights."[10] Congress vehemently rejected a double standard pursuant to which plaintiffs protecting the "same rights" might or might not be entitled to fees. It is precisely such a double standard that defendant municipalities demand of this Court.

At page 2 of its Brief, South Brunswick speculates: "It is

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10 These explicit references to Title VIII in the Congressional discussion of the intent and purpose of the Fees Act unambiguously demonstrate the applicability of that discussion to Title VIII.

difficult to believe that Congress intended to award attorneys' fees to a plaintiff on the basis of a federal claim when that claim has played no part in obtaining the relief sought." Assuming, arguendo, that the plaintiffs' subsumed federal claim "played no part" here, it is respectfully submitted that it is far more difficult to believe that Congress intended to deny attorneys' fees to an otherwise entitled plaintiff merely because of a judicial election to award relief on the basis of an alternative cause of action. This would be particularly inequitable here, where the successful state constitutional claim affords plaintiffs greater relief than they could have obtained from the lesser included Title VIII claim alone. Moreover, the extensive and explicit legislative history of the Act precludes such a construction. As Justice Stevens noted in Maher v. Gagne, 448 U.S. 122 (1980):

> The legislative history [of the Fees Act] makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:
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> > To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that 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. In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the

> non-constitutional claim is dispositive. In such cases, if the claim for which fees may be awarded meets the substantiality' test, attorney's 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.' (Citations omitted; emphasis added.) Id. at 132, n.15.

The courts have been responsive to the liberal approach favored by Congress with respect to fee applications by civil rights plaintiffs who prevail on pendent non-fee claims. In Maher, for example, the United States Supreme Court upheld the award of attorney's fees under the Fees Act where, like here, there was no ruling on plaintiff's federal fee claim. Unequivocally upholding the rights of such plaintiffs to fees, Justice Stevens explained the rationale underlying such awards:

> We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fee in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication. As the Court of appeals pointed out, such a fee award furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.'" (Citations omitted.) Id. at 133.[11]

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11 It is respectfully submitted that Justice Stevens conclusively anticipated Monroe's argument: "If the New Jersey

It is noteworthy that since the matter was settled in Maher, the Court never ruled in plaintiff's favor on any of her claims. A fee award was nevertheless determined to be appropriate, the Court holding that:

> Nothing in the language of §1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. (Citations omitted.) Id at 129.

Similarly, plaintiffs have been held entitled to fees under the Act where they have merely acted as "catalysts" in obtaining the desired result, even where "... the litigation successfully terminates by a consent decree, an out of court settlement, a voluntary cessation of the unlawful practice by the defendant, or other mooting of the case where the plaintiff has vindicated his right." (Citations omitted.) Martin v. Heckler, supra at 1149. Indeed, as the 11th Circuit held in Fields v. Tarpon Springs, supra: "The catalyst test only

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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. 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." (Monroe Brief, page 3) Monroe ignores the "longstanding judicial policy of avoiding the unnecessary decision of important constitutional issues," a policy crucial to the analysis here.

demands that practical relief has been obtained that is factually a causal result of the lawsuit." Id. at 321. Here, of course, there is no need for this Court to determine whether plaintiffs have vindicated their rights since the New Jersey Supreme Court has unequivocally held that they have done so.[12] It is respectfully submitted that plaintiffs here, like plaintiffs in Singer, Thiboutot, Maher, Martin, Tarpon Springs, Seaside Drive-In, and Bung's Bar & Grille are entitled to attorney's fees.

B. Defendants Fail to Refute Plaintiffs' Title VIII Claim

In keeping with the intent of Congress in enacting the Fees Act, for purposes of fee applications plaintiffs need not satisfy the same burden of proof which would have been necessary to prevail upon their fee claim at trial. Such a requirement would place an impossible burden on plaintiffs, since it would be very rare that the retroactive reconstruction of the record below would support such a claim. In certain cases, like the one at bar, the early judicial election of an "alternate route" would have effectively precluded the development of a record upon which to predicate the fee claim. The courts have similarly rejected the imposition of

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12 The Supreme Court did not mince words: "[Plaintiffs] proved a pattern of exclusionary zoning that was clear." Mount Laurel II at 339.

such a burden of proof in the many cases cited above in which fee awards have been made where there has been no record supporting the fee claim because of settlement or other mooting of the claim.

Defendant municipalities misstate the analysis here by suggesting that its corollary is that plaintiffs have no burden with respect to the fee claim. North Brunswick, for example, contends that: "Taken to its extreme, plaintiffs' reasoning suggests that any time a federal statute authorizing attorneys' fees is in some fashion appended to a non-fee-qualifying claim, an award of fees may still be allowed if the plaintiff prevails only on the non-fee-qualifying claim." (North Brunswick Brief, p. 5) It is respectfully submitted that neither Congress, nor the case law suggest anything of the sort. As set forth in Bung's Bar & Grille, and addressed at length in plaintiffs' main brief, the fee claim must be "substantial" and "arise from the same nucleus of operative facts" or be "based upon related legal theories." Bung's Bar & Grille, supra at 465. Here, notwithstanding defendants' imaginative convolutions of these simple tests, plaintiffs' Title VIII claim easily meets both.

1. Defendants cannot deny that that claim meets the substantiality' test.

Here, the Urban League's Title VIII claims easily meet the substantiality test set forth in Southeast Legal Defense Group v. Adams, 436 F. Supp. 891, 894 (D. Or. 1977); that is, they are not

"obviously frivolous," wholly "unsubstantial" nor "obviously without merit." Although a determination of plaintiffs' Title VIII claim on the basis of the record below is neither feasible nor desirable at this point, for the reasons set forth by Justice Stevens in Maher, the Urban League has provided incontrovertible statistical evidence in the form of census data which shows that defendants' exclusionary zoning practices had an adverse impact on a greater percentage of nonwhites than whites. Plaintiffs have demonstrated that, according to the 1980 census, minority populations in defendant municipalities were far smaller than the eleven county regional average and that those minority populations were isolated in ghettos within defendant municipalities. In fact, although for purposes of this application the Urban League need not prove its Title VIII claim, this census data gives rise to a prima facie case that most of the defendants do not even attempt to refute.[13]

The responses of those defendants which do not concede plaintiffs' Title VIII claims are as dismally inadequate as their responses to the constitutional mandate of Mount Laurel I. Piscataway, for example, pounces on the fact that in Exhibit A to plaintiffs' main brief the black population was 6162 and in Exhibit A of plaintiffs' supplemental brief it was 5425. Since plaintiffs

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13 North Brunswick, Cranbury, South Plainfield, Monroe, East Brunswick, Old Bridge and South Brunswick do not contest the Urban League's statistical analysis.

already addressed this disparity; i.e., the latter figure explicitly does "not includ[e] personnel at Camp Kilmer"; Piscataway demonstrates nothing more than its own careless review of plaintiffs' papers.

Piscataway further contends that, "To suggest that small neighborhoods of several hundred people reflect discrimination in a community whose current population approximates 50,000 is ludicrous." Piscataway attempts to gloss over the fact that fully 45% of the black residents of Piscataway were segregated in just three of these "neighborhoods" according to the 1980 census. (Plaintiffs' Supplemental Brief, p. 8) Whether Piscataway is "proud" of its black residents is beside the point, as are Phillip Paley, Esq.'s personal memories of the Court's tour of Piscataway.[14] The United States Supreme Court had held that segregated areas, like those demonstrated here, deprive the residents of such areas of "important benefits from interracial association." Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 210 (1972).

It is respectfully submitted that defendants here have markedly

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14 Indeed, since the Court set forth its findings and observations in its Letter Opinion of July 23, 1985, Mr. Paley's "recollection" of that inspection is of dubious relevance. As set forth in the Court's Letter Opinion, that inspection was made in order to ascertain site suitability. There is no basis in that Letter Opinion for Piscataway's bald assertion that, "The Court saw no physical evidence of the physical discrimination which plaintiff suggests is visible." (Piscataway Brief, p. 10)

failed to rebut the "substantiality" of plaintiffs' Title VIII claims which would require showing that such claims were "obviously without merit" or "frivolous." Most defendant municipalities do not even dispute the statistics provided by the Urban League. To the extent they endeavor to do so, defendants merely evidence their own unfamiliarity with the pertinent law. Finally, plaintiffs respectfully submit that if any defendants actually doubted the substantiality of these claims, dismissal of such claims should have been sought in the proceeding below.

2. Defendants cannot dispute that plaintiffs' Title VIII claim "arises from the same nucleus of operative facts" or is "based upon related legal theories" as the state claim on which plaintiffs prevailed.

As set forth in paragraph one of plaintiffs' original complaint, the "common nucleus of operative facts" here consisted of the "zoning and other land use policies and practices of defendant municipalities which, by effectively excluding housing plaintiffs can afford, prevent them from residing in these municipalities ..." Plaintiffs were "low and moderate income persons, both white and nonwhite". It is significant that in the complaint, plaintiffs relied upon the same facts for their Title VIII claim and their state constitutional claim.[15]

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15 These facts included specific statistics as to the minority composition of defendant municipalities. Paragraph 26, for

In Mount Laurel I, published shortly after the commencement of the instant lawsuit, the New Jersey Supreme Court made it perfectly clear that relief under the state constitution included relief for "low and moderate income persons, both white and nonwhite." This decision rendered development of a separate record with respect to the nonwhite members of plaintiff class superfluous. Had the New Jersey Supreme Court rejected the state constitutional claim regarding lower income whites, plaintiffs here could have proceeded with their subsumed Title VIII claims.[16] It is respectfully submitted that in view of the New Jersey Supreme Court's determination, the nucleus of operative facts for the two claims were not only "common", that is, overlapping in part; but merged in that the facts supporting plaintiffs' Title VIII claim were completely included in the facts underlying the state constitutional claim.[17]

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example, provides:

> Most of the black and Puerto Ricans who work in Middlesex County are employed in low and moderate wage jobs. Of the blacks and Puerto Ricans who work in Middlesex County, more than 40 percent live outside the county, 37 percent live in New Brunswick and Perth Amboy, and only 21 percent live in the 23 defendant municipalities.

16 Had plaintiffs sought relief for upper income nonwhites as part of their Title VIII claim, defendants would be correct that such claim was not subsumed in the state constitutional claim. It is a matter of record, however, that they did not do so.

17 See footnote 5, Mount Laurel II, in which the Court

Moreover, the "common nucleus of operative facts " test cited by Justice Stevens in Maher and employed by the Bung's Bar & Grille Court is the same test used to decide whether a federal court may assert pendent jurisdiction over a state claim. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). This test, accordingly, does not require that the federal and state claims will prevail, respectively, on precisely the same record. Rather, the test is merely whether the proofs for each claim derive from a "common nucleus" so as to permit the exercise of jurisdiction over both by the same court. It is respectfully submitted that this is a test plainly satisfied here.

In the alternative, plaintiffs need only establish that their state constitutional claims and their Title VIII claims are "related legal theories." The state and federal legal theories relied upon by plaintiffs were not only related, but the latter was included in the former pursuant to Mount Laurel I. The federal discrimination claim, applied only to lower income minorities, was subsumed in the state claim regarding exclusion of all lower income persons.

Finally, it is respectfully submitted that the federal and state claims of the Urban League plaintiffs are "related legal theories" just as the claims in Bung's Bar & Grille were related legal theories. Here, like there, plaintiffs' federal statutory

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discusses the racial implications of its decision.

claim was predicated on discrimination. Here, like there, the state claim upon which plaintiffs prevailed was based upon the police power of the state over zoning matters. There, the Court expressly held that those legal theories were related and it is respectfully submitted that the same conclusion is required here.

IV. DEFENDANTS FAIL TO OVERCOME THE PRESUMPTION THAT PREVAILING PLAINTIFFS IN CIVIL RIGHTS CASES SHOULD BE AWARDED ATTORNEYS' FEES

A. A Prevailing Plaintiff is Entitled to Attorneys' Fees Unless "Special Circumstances" Render Such an Award Unjust

It is well established that requests for attorney's fees sought in connection with the vindication of civil rights, like those sought here, are to be dealt with liberally. As the United States Supreme Court held in Hensley v. Eckerhart, 461 U.S. 430 (1983), citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968):

> The purpose of Section 1988 is to ensure 'effective access to the judicial process ' for persons with civil rights grievances. Accordingly, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' (Citations omitted.) Id. at 1937, 429.

The New Jersey Courts have interpreted this standard generously. In Jones v. Orange Housing Authority, 559 F. Supp. 1379 (3d Cir. 1983) Judge Stern observed:

> While the language of Section 1988 indicates that the award of attorneys' fees is within the Court's discretion, it is clear that this discretion is narrowly circumscribed. Attorneys' fees must be awarded to the prevailing party unless 'special circumstances' render the award of fees unjust, and cases in which such special circumstances have been found have been few and very limited.' (Emphasis added; citations omitted.) Id. at 1383.

None of the defendant municipalities here has shown the requisite "special circumstances." Nor can defendants dispute the applicability of this standard to New Jersey state courts. In Carmel v. Hillside, 178 N.J. Super. 185 (App. Div. 1981), Judge Pressler explained that the Piggie Park standard was fully binding upon the

state courts. The Carmel plaintiffs appealed the denial of attorneys fees where, like here, their successful litigation had included a state cause of action as well as a federal civil rights claim. Holding that the trial judge had mistakenly exercised his discretion in declining to award fees, the Carmel court concluded:

> The standard to be applied by the federal courts in determining whether or not to allow counsel fees under 42 U.S.C.A. § 1983 has been prescribed by Newman v. Piggie Park Enterprises, Inc., holding that, consistent with the policy of federal civil rights legislation, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. (Citations omitted.) Id. at 189.

The Court rejected defendant's "special circumstances" arguments, including the demand that plaintiffs be denied fees because, like the Urban League plaintiffs, they were represented by the American Civil Liberties Union rather than a private attorney. Judge Pressler then noted that the only "special circumstances" before the Court "militate[d] for rather than against a counsel fee award." Referring to the conceded invalidity of the ordinance challenged in Carmel, the Court tersely observed:

> There appears to be no satisfactory explanation for the failure of the municipality thereupon to have repealed the ordinance instead of subjecting itself, plaintiffs and the courts to the time, expense and effort required in the prosecution of this action to final judgment. Id. at 190.

Since Mount Laurel I was decided shortly after the commencement of this litigation, it is respectfully submitted that the municipal defendants here were similarly on notice as to the invalidity of

their respective ordinances. Here, as in Carmel, there is no "satisfactory explanation" for their subsequent failure to repeal those ordinances. Instead, like the Carmel defendants, they wasted the time and limited resources of the Courts as well as the Urban League plaintiffs.[18] It is respectfully submitted that the enormity of that burden, compared with that imposed in Carmel, is another "special circumstance," "militat[ing] for rather than against a counsel fee award."

B. The Piggie Park Standard is Applicable to Title VIII Cases.

Defendant municipalities contend that the test under which fees are awarded in Section 1988 cases is not applicable to Title VIII cases.[19] As discussed at greater length above, the legislative history of the Fees Act expressly notes its pertinence to Title VIII claims. Moreover, the courts have consistently applied that standard to such claims. In Jeanty v. McKey & Poague, 496 F.2d 1119 (7th Cir. 1974), for example, the Court of Appeals for the Seventh Circuit cited Piggie Park in awarding fees under Title VIII:

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18 "The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts." Mount Laurel II at 200.

19 Piscataway, for example, insists that, "Furthermore, the admittedly expansive interpretation of Section 1988 remains much broader than interpretations of Section 3612 in addressing applications for fee awards." Piscatway Brief, p. 6. Defendant neglects to provide any authority for its assertion.

> The court has the authority under 42 U.S.C. § 3612(c) to award attorney fees when the plaintiff, as here, is financially unable to assume them. The general policy behind the award of attorney fees was set forth by the Supreme Court in Newman v. Piggie Park Enterprises, Inc. Although that case was under Title II of the Civil Rights Actof 1964, 42 U.S.C. § 2000a-3(a), the language is equally applicable to a Title VIII action:
>
> > When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.
> >
> > * * * * * *
> >
> > If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.
>
> (Citations omitted; emphasis added.) Id. at 1121.

The only additional requirements for fee awards under Title VIII, compared to awards under the Fee Act, are those explicitly set forth in the statute itself; i.e., that the party awarded a fee be a prevailing "plaintiff" and that it be unable to assume responsibility for its own fees. It is undisputed that the Urban League satisfies both criteria.

South Brunswick argues that these additional criteria suggest that Congress intended to impose a higher standard for an award of fees under Title VIII. (South Brunswick Brief, p.1) This speculation is belied by the legislative history of the Fees Act, supra, as well as the widespread judicial deference to that history

as reflected in the case law.

Moreover, contrary to South Brunswick's contention, prevailing plaintiffs are awarded fees far more readily than prevailing parties. This has been well documented in Tamanaha, "The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation," 19 Harv. C.R.-C.L. Law Rev. 109 (1984):

> The Supreme Court's interpretation of "prevailing party" has resulted in different treatment of a party depending on whether it is a prevailing plaintiff or a prevailing defendant. When a plaintiff prevails, a presumption exists in favor of a fee award. When a defendant prevails, a presumption exists, in effect, against such a fee award.
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> * * *
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> First, courts have defined when a plaintiff "prevails" in a much broader manner than they defined when a defendant "prevails." Plaintiffs have prevailed and been awarded fees when they succeeded on only some of the issues raised; when a case has been settled before trial or when a consent decree terminated the litigation; when no formal relief was granted to the party seeking fees; and when the case was not entirely concluded, but the court found a probable violation of law.
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> * * *
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> Second, when a plaintiff prevails, courts have determined that the plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." <u>This position creates a strong presumption in favor of prevailing plaintiffs. Just what amounts to "special circumstances" is not certain, but their existence is very rare</u>.

It is respectfully submitted that South Brunswick's unsupported contentions that the burden should be on plaintiffs to prove entitlement to fees, rather than on defendants to show "special circumstances" why such fees should be denied, is simply wrong as a

matter of law.

Piscatway's reliance on Shannon v. U.S. Dept. of Housing & Urban Develop., 409 F.Supp. 1189 (E.D. Pa. 1976) is similarly fallacious. The "businessmen" plaintiffs in Shannon, who sought to prevent rather than facilitate the construction of subsidized housing, alleged merely that defendant failed to comply with Section 3608(d)(5) of Title VIII. The court was constrained to deny their demand for attorneys' fees because it found that such an award could not be predicated on the cited provision. Plaintiffs here, unlike the Shannon plaintiffs, sought relief pursuant to §3601 et seq. In Smith v. Anchor Building Corp., 536 F.2d 231 (8th Cir. 1976), the court found no impediment in a claim thus phrased to an award of fees under §3612(d). There, however, the matter was remanded because there was no evidence as to plaintiff's inability to assume her own fees. Here, such evidence is not only before this Court, but it is uncontested.

There is no reason for treating Title VIII claims differently than other civil rights claims. Indeed, its status as one of the earliest civil rights fee shifting statutes clearly shows the particular determination of Congress to prevent discrimination in the crucial area of housing. Defendants attempt to refute the explicit legislative history, the Supreme Court cases and the multitude of upper court decisions by unsupported speculation and easily distinguished cases. Defendants have failed to set forth any "special circumstance" -- as that term has been defined by the

courts rather than as defendants would like this court to define it -- justifying the denial of fees and costs here. It is respectfully submitted, accordingly, that the Urban League plaintiffs' request for costs and fees should be granted.

V. THE URBAN LEAGUE PLAINTIFFS PREVAILED IN THIS ACTION AND IN DOING SO VINDICATED THE PUBLIC INTEREST NOTWITHSTANDING THE SUBSEQUENT ENACTMENT OF THE FAIR HOUSING ACT

The Civic League plaintiffs prevailed under Mount Laurel II and are seeking costs and fees incurred in connection with that matter and the resultant remand. Much of defendant municipalities' vociferous opposition to this application consists of self-righteous assertions that they, and not the Urban League, actually represented the "public interest". Some municipalities even contend that the Urban League was not even the prevailing party here. Cranbury and South Brunswick, for example, contend that they in fact represented the public interest throughout these proceedings and that their prior resistance has been, in effect, retroactively legitimatized by the enactment of the Fair Housing Act.[20]

Other municipalities, such as Piscataway and South Plainfield, insist that their belief that they were acting in the "public interest" should shield them from liability here.[21]

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20 "Since Cranbury has always argued for a lower number and now appears to have obtained it, how can it be said that Urban League [sic] is the prevailing party." Cranbury Brief, p.7. "The relief ultimately achieved in the present case will be the direct result of the application to the Defendants of the New Jersey Fair Housing Act. It is relief which would have been given even if Plaintiffs'[sic] had never initiated the present litigation." South Brunswick Brief, p.2.

21 "...but for the defendant municipalities such as this defendant, the Borough of South Plainfield who in earnestly, honestly and steadfastly defending their rights to oppose local

It is respectfully submitted that both arguments are untenable as a matter of law. The subsequent enactment of the Fair Housing Act does not change the Urban League's status as prevailing party with respect to Mount Laurel II. Moreover, even if defendants' resistance to the mandate of Mount Laurel I had been a good faith attempt to promote what they perceived to be the public interest, such good faith would not operate to deprive the Urban League plaintiffs of attorneys' fees to which they would otherwise be entitled.

A. Assuming, arguendo, that defendant municipalities' refusal to comply with the constitutional mandate set forth by the New Jersey Supreme Court in Mount Laurel I and Mount Laurel II resulted in the Fair Housing Act, and that such Act is in the public interest, the Civic League plaintiffs are nonetheless "prevailing plaintiffs" entitled to attorneys' fees.

It is significant that while defendant municipalities argue that the instant request is effectively pre-empted by the Fair Housing Act, none of them provides any authority for this novel proposition. Here, defendants argument must fail because the Fair Housing Act does not retroactively deprive the Urban League of its

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zoning by judicial fiat, the Fair Housing Act would never have become a reality." (South Plainfield Brief, p.5)
"Piscataway, a middle-class, blue-collar community, hardly has an interest in excluding racial or economic minorities...[it] has a strong interest in proper aspects of land use planning... For example, Piscataway seeks to improve traffic flow throughout the Township; if this desire means housing must be constructed at a lesser density, that may well have to happen." (Piscataway Brief, p. 9)

status as a "prevailing party" in Mount Laurel II. Nor, as a matter of law, may defendants here avoid liability for attorneys' fees by virtue of subsequent legislation, especially since the stated purpose of that legislation is to implement the mandate of Mount Laurel II.

The Urban League plaintiffs were prevailing parties in Mount Laurel II, as cogently defined by the Third Circuit in Hughes v. Repko 578 F.2d 483 (3d Cir. 1978):

> ...in the context of an award [of attorney's fees] sought after the entry of a final order, a prevailing party on a particular claim is one who fairly can be found by the district court to have essentially succeeded on such claim. Id. at 486-487.

As set forth in detail at footnote 2 of plaintiffs' main brief, the Urban League obtained substantially all of the relief sought in its original complaint in Mount Laurel II. Plaintiffs requested broad injunctive relief which was not only granted but given constitutional stature by the New Jersey Supreme Court. Modification of this Court's determination as to the specific means of effectuating that relief, such as adjustments to the interim fair share numbers by the Council on Affordable Housing, cannot detract from this unprecedented success.

Plaintiffs also "prevailed" in the litigation on remand before this Court. First, since the proceeding on remand was an integral part of the proceedings culminating in Mount Laurel II, the Urban League maintained its prevailing party status for the duration of the remand. Second, in those proceedings the Urban League obtained

substantial relief not only in terms of affordable housing actually produced or committed but in terms of the development of a comprehensive approach to such housing, which was substantially adopted, albeit in modified form, by the Affordable Housing Council. It is well established in this circuit that where a plaintiff has already obtained substantial relief, she must be considered a "prevailing party" even if, unlike here, there is a subsequent determination denying relief.

It is respectfully submitted that Bagby v. Beal, 606 F. 2d 411 (3d Cir. 1979) is controlling here. There the plaintiff merely obtained a hearing in connection with her suspension without pay from her nursing position. She was found to have been a prevailing party for purposes of a fee award under §1988 despite a subsequent determination that the suspension had been justified. The Bagby Court held:

> There is no question that appellee essentially succeeded on her due process claims. The district court found in her favor and ordered that she be afforded a hearing. She already has received this hearing and no action taken by this court can change the fact that she has accomplished the objectives of [her] litigation'. (Citations omitted.) Id. at 415.

Here, too, plaintiffs have already accomplished the objectives of [their] litigation". Indeed, as noted by the Hills court, these objectives are to be furthered by the Fair Housing Act:

> No one should assume that our exercise of comity today signals a weakening of our resolve to enforce the constitutional rights of New Jersey's lower income citizens. The

> constitutional obligation has not changed; the judiciary's ultimate duty to enforce it has not changed; our determination to perform that duty has not changed. What has changed is that we are no longer alone in this field. The other branches of government have fashioned a comprehensive statewide response to the Mount Laurel obligation. (Emphasis added.) Slip op. at 92.[22]

With the exception of South Plainfield,[23] defendants do not deny that the Urban League plaintiffs were among those whose arduous struggles against exclusionary zoning lead to Mount Laurel II , benefitting not just plaintiffs, but defendant communities as well. It is clearly established that such benefit to the community is a factor to be considered in determining whether attorneys fees are to be allowed. As the Court noted in Wilson v. Chancellor, supra:

> ....the [United States Supreme] Court distinguished the situation in Bradley from a suit between private individuals because the plaintiffs, in seeking to desegregate the Richmond, Virginia schools, had rendered substantial service to the school board and the community at large by bringing the school board into compliance with its constitutional mandate and by securing the benefits of a nondiscriminatory educational system to the community. The same considerations apply here. Plaintiffs have been influencial in securing important First Amendment freedoms for both teachers and students, and in insuring the school

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22 Although the extent, if any, to which the parties here may claim credit for the Fair Housing Act is irrelevant for purposes of the within application, it is noteworthy that the Hills Court describes the Act as a response to Mount Laurel II.

23 "As a matter of fact, the defendant municipalities' resistance after Mount Laurel I was the direct cause of the Supreme Court's handling of the zoning matters in Mount Laurel II." (South Plainfield Brief, p.5)

board's compliance with the constitutional guarantees." (Emphasis added.) Id. at 1230.

Here, as in Wilson and Bradley, the Urban League has rendered substantial service to defendant municipalities and their residents by bringing the defendants into compliance with their constitutional mandate and by securing the benefits of nondiscriminatory affordable housing to the community.It is respectfully submitted that here, as in those cases, plaintiffs should be awarded fees.

B. The Urban League Plaintiffs Should Be Awarded Attorneys Fees Even If Defendant Municipalities' Refusal to Comply With the Mandate of Mount Laurel I Had Been in "Good Faith".

Defendant municipalities' contentions as to their "good faith" in refusing to comply with the constitutional mandate of Mount Laurel I should not be considered in determining plaintiffs' request for fees. The situation here is analogous to that in Rutherford v. Pitchess, 713 F.2d 1416 (9th Cir. 1983). There, as in the case at bar, plaintiffs were required to seek judicial enforcement of a previously articulated constitutional obligation. Specifically, the Rutherford plaintiffs sought to hold public officials in contempt of a judgment ordering them to make "constitutionally required improvements" to the county jail.

Notwithstanding the court's finding that defendants in Rutherford had made good faith efforts to comply with the injuction after the initiation of contempt proceedings, it held that such efforts would not be considered in setting attorneys' fees:

If civil rights plaintiffs were faced with

> a rule under which attorney's fees were reduced for good faith efforts by defendants to comply with judgments after initiation of contempt proceedings, they would have less incentive to monitor compliance with judgments that protect important constitutional rights and to bring enforcement actions.
>
> * * * *
>
> The rule we adopt today will provide incentive for defendants to comply with civil rights judgments and for plaintiffs to monitor compliance and bring enforcement proceedings when appropriate. Id. at 1421.

It is respectfully submitted that in the context of this litigation, a rule encouraging defendants to comply with judgments - including consent judgments - and encouraging plaintiffs to monitor them has been and remains absolutley crucial. If not for diligent monitoring by the Mount Laurel II plaintiffs, there may well have been no "realistic opportunity" for affordable housing in New Jersey today. Plaintiffs here, like plaintiffs in Rutherford, deserve recompense for their efforts in safeguarding important constitutional rights. The history of this litigation, moreover, leaves little doubt as to the necessity of continuing vigilance.

The alleged "good faith" of the defendants here, furthermore, is at the very least more problematic than that of the Rutherford defendants. This Court is well aware of the innumerable applications for enforcement of litigant's rights compelled by defendant municipalities' recalcitrance. The Mount Laurel II Court noted with strong disapproval the many years during which defendant municipalities evaded their Mount Laurel obligations. In view of defendants' persistent bad faith here, there can be no question of an impediment to a full award of fees to plaintiffs, as there was in

Rutherford.

Nor does defendants' municipal status present an obstacle to an award of fees, contrary to the specious reasoning of Piscataway and South Brunswick. Congress sensibly anticipated that local governments might violate the civil rights laws and expressly rejected the proposition that these governments be immune from the consequences of such violations:

> The Senate Judiciary Report on Section 1988 stated: [I]t is intended that the attorney's fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or from the state and local government...Likewise, the corresponding House Report stated: "The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against government officials or entities." Note, "Surveying the Law of Fee Awards Under the Attorney's Fee Award Act of 1976", Notre Dame Law Review, Vol. 59:1293 at 1305.

As Piscataway observes, it is taxpayers who pay such awards. As the drafters of the Fees Act well knew, however, taxpayers are also voters. In that capacity they may avoid future such fee awards by judiciously selecting representatives whose notion of "public interest" comports with the Constitution.[24]

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24 Witt, "The Civil Rights Attorneys' Fees Award Act of 1976," 13 Urb. Law. 589, 603 (1981) notes that the fact that taxpayers are to pay such an award is not a "special circumstance" showing the award is unjust. See also Inmates of Allegheny County Jail v. Pierce, 716 F.2d 177 (3d Cir. 1983) where the Third Circuit held in pertinent part:

> Accordingly, we hold that there was no abuse of discretion in requiring Allegheny County,

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a publicly funded governmental instrumentality, to pay an attorney's fee to NLS, a publicly funded legal service organization. (Emphasis added.) Id. at 180.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Urban League plaintiffs' requests for costs and fees, including experts' fees, should be granted in an amount to be determined following the submission of affidavits of services.

Dated: 11/7/86

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On Behalf of the American Civil Liberties Union of New Jersey

The assistance of Sean Coughlin, Jamie Plosia, Marian Wise and Paul Zelenty, students at Rutgers Law School-Newark, is gratefully acknowledged.