CH = UL v. Carteret (Cranberry, Monroe, South Plainfield, Piscataway) Dec. 17, 1985

Urban League respondents letter brief in response to ~~[illegible]~~ brief filed by ~~Attorney~~ General on Dec. 11. Seeking Transfer of case to COAH

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December 17, 1985

Supreme Court of New Jersey
Hughes Justice Complex
CN-970
Trenton, New Jersey 08625

Re: Urban League of Greater New Brunswick v. Borough of Carteret (Cranbury, Monroe, Piscataway, South Plainfield), A-124, A-127, A-129, A-131

Attn: Stephen W. Townsend, Clerk

Honorable Justices of the Supreme Court:

Pursuant to Mr. Townsend's letter of December 6, please accept this letter brief on behalf of the Urban League respondents in answer to the brief filed by the Attorney General on December 11 in the above captioned matters. The Urban League respondents wish to respond to five points contained in the Attorney General's brief, and also to note an additional matter regarding Cranbury Township that could not have been raised earlier.

Manifest injustice. The Attorney General apparently concedes that the Urban League case, the oldest one now before this Court, is one of the most plausible ones for retention in the trial court, since he speaks of the likelihood that pre-1983 cases will not be transferred. See Brief of Intervenor-Respondent Attorney General of New Jersey at 87 [hereafter Brief]. He also

implicitly agrees in the alternative that at least Monroe and South Plainfield should not be transferred since both towns easily meet his test of "the egregious case where the movant's conduct demonstrates an utter lack of good faith and intent to use the Council proceedings simply to avoid or interminably delay satisfaction of the constitutional mandate for provision of low and moderate income housing." Brief at 31. With these conclusions we, of course, agree.

Against these conclusions, however, the Attorney General argues broadly for denial of transfer and he summarizes the "essential error" of the collective respondents' argument on manifest injustice (he does not address the arguments of any party individually) as "consider[ing] only one side of the balance, the convenience of litigants and the perceived overriding need to avoid any delay whatsoever in implementation of the Mt. Laurel mandate." Brief at 21 (emphasis added). This mischaracterizes the position of the Urban League respondents.

We agree that the time allowed to the Affordable Housing Council for start-up is generally reasonable as applied to more recently filed cases. We also believe, however, that there is manifest injustice in the clearest sense in subjecting very old cases, very near the point of complete resolution, to this delay, no matter how reasonable it may be in other applications. After 11 1/2 of litigation, an additional delay of two years or more (six months of which has already been irrevocably lost while

these transfer proceedings have occurred) can hardly be described as "any delay whatsoever." Avoiding this additional, unnecessary delay can hardly be described as for the mere "convenience" of the litigants, particularly the class of inadequately housed low and moderate income households represented by the Urban League respondents.

It is true that the Legislature eliminated from the final version of the Fair Housing Act the so-called "expedition" standard for transfer. The expedition standard, however, was concerned with whether transfer would move the case along more rapidly than in the courts, which is surely not the issue now before this Court. However, the Attorney General seems to assume that by writing out the expedition standard, considerations of time cannot be used at all, or at least cannot be "of controlling significance." Brief at 21. This is in error. The Legislature at various times considered a variety of different factors that might bear on transfer, but eventually decided against detailed specifications and used the well-known "manifest injustice" standard as an open-ended collective description to achieve the same end. See Brief at 12-14. Under proper circumstances, we submit, any factor or combination of factors reasonably related to manifest injustice can be "controlling." As stated in our December 4 brief, we believe that manifest injustice in our case turns in part on what we have called "relative delay" -- the expedition possible if the case remains in court in relationship

to the nearness to completion and the unnecessary, time-consuming duplication of effort that would be occasioned by transfer. This standard is not foreclosed by the legislative history of the Act.[1]

The builder's remedy moratorium. The Attorney General indirectly acknowledges the force of the argument that the §28 moratorium has no constitutionally adequate purpose by suggesting a new purpose. He suggests that the moratorium is intended to permit municipalities time to apply for the new subsidy money made available by the Act, see §§20 & 21, and to arrange transfer of some of its fair share to other municipalities as permitted by §12.

In context this reasoning is somewhat suspect since the Attorney General did not suggest it in his brief below nor did he point to any legislative history supporting this purpose. The matters implicated by the builder's remedy are of constitutional

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[1] The Attorney General also criticizes the respondents collectively for doubting the expertise of the Affordable Housing Council. Brief at 28n, 41-42. We trust that this Court understands our point, even if the Attorney General purports not to. The Council will undoubtedly gain expertise in affordable housing mechanisms over time, just as the trial courts have gained it since January 1983. But indiscriminate transfer will require the lower income Urban League plaintiff class to languish while the Council gains its expertise, while the trial court could have resolved virtually all of our cases had the transfer motions not suspended the process. There is, moreover, the inevitable expertise that derives from being intimately familiar with the facts of these complex cases, expertise which will be irretrievably lost upon transfer.

urgency, and ought not be decided by the standard of "the Legislature could have meant this" that is used in equal protection challenges to routine economic and social legislation.

Even if it be assumed, against the evidence, that this is what the Legislature meant, the rationale fails. First, the Attorney General misconstrues the statutory language when he suggests that §28 imposes a moratorium on all "inclusionary housing developments sponsored by profit-making entities, which developments typically create four units of market price housing for each unit of affordable housing." Brief at 85. By this reading, the Urban League respondents, who are concededly not subject to the moratorium, would be barred from having rezoning for inclusionary developments sponsored by profit-making developers made a part of their remedy. In the four Urban League towns now before this Court, a large portion of the remedy suggested by the towns themselves or likely to be found feasible by the Master is in the form of inclusionary developments; the Attorney General's reading of §28 would in effect impose a moratorium on us that the Legislature expressly did not intend. The Urban League respondents' right to an effective remedy in these cases vested as of January 20, 1983, when this Court remanded solely for further remedial proceedings rather than reconsideration of the question of constitutional violation, "[which] has already been amply demonstrated." 92 N.J. at 350. To construe §28 against its plain language, as the Attorney General does, would plainly make it

unconstitutional as applied to the Urban League respondents.

The Attorney General's analysis of the purpose of §28 also fails as applied to the builder plaintiffs who are without doubt subject to the moratorium. Apparently, the Attorney General believes that during the moratorium period, a defendant municipality can satisfy its fair share in other ways, using the §§20-21 subsidies and the §12 regional contribution agreements. When the moratorium expires and the builder-plaintiff claims its remedy, there might be no remedy to grant since some or all of the fair share could already have been accommodated.

By cutting out a subsequent award of a builder's remedy to a plaintiff who has indisputably earned it, this analysis of the legislative intent makes a mockery of the builder's remedy and renders §28 even more certainly unconstitutional than asserted in our prior brief. In both Cranbury and Monroe Townships, the two Urban League cases where the builder's remedy is in issue, the builder-plaintiffs have satisfied the threshold conditions for award of the builder's remedy established by this Court in Mount Laurel II, see 92 N.J. at 279, by succeeding in Mount Laurel litigation and offering to build a substantial amount of lower income housing. To suspend their remedy for a legitimate purpose (although, as argued previously, we do not think that there is one) is at least debatable; to suspend it for the purpose of defeating a vested remedy altogether is constitutionally ludicrous.

The Council's power to award the builder's remedy. The Attorney General does not respond directly to our concern that, absent a builder's remedy in the Affordable Housing Council, the Council procedures are circular and will not provide an adequate incentive to private parties to enforce the constitutional mandate against unwilling municipalities. Brief of Urban League Respondents, Point III(A), at 59-70. However, he does suggest generally that §§29-31 of the Act provide such incentives. Brief at 16, 27. Implicit in these references is acknowledgement that the problem we have identified requires amelioration.

The cited sections require that, beginning in August 1988, municipalities have in place a housing element in their master plans as a precondition to any municipal zoning. Since unregulated land use may safely be regarded as anathema to local governments, this requirement appears to furnish a very powerful incentive for compliance. Unfortunately, this incentive proves no more effective than immunity from litigation in the Superior Court, and for essentially the same reasons.

The Attorney General's facial argument, as we understand it, is this: §29 of the Act requires that the housing element comply with the standards of §10, the same standards applied to a housing element submitted for substantive certification pursuant to §13. Section 30, moreover, requires that beginning in August 1988 the zoning ordinance be "substantially consistent" with the housing element. Finally, §9(a) seems to contemplate that both a

housing element and implementing zoning ordinances will be adopted through second reading in order to move for substantive certification. Thus, if all works properly, the municipality will, by 1988, have a housing element and ordinance adopted in conformity with Fair Housing Act standards, or be vulnerable to a challenge that its entire zoning ordinance is ultra vires, even for non-Mount Laurel purposes.

The process just described, however, assumes voluntary, good faith compliance by the municipality with the substance as well as the form of the statutory requirements. Unfortunately, we believe that the well-established municipal hostility to Mount Laurel compliance requires that a more skeptical view of the possibilities be taken. Absent a builder's remedy in the Council, for example, there is nothing in §§29-31 that compels a municipality to draft a sound housing element or a compliant zoning ordinance, so long as the ordinance conforms to the element. It is true in theory that these unsound, non-compliant efforts are vulnerable to attack in the substantive certification process, but at explained in our brief at pages 59-70, there is no incentive for a private party to bring such an attack.

A more imaginative avoidance strategy is also possible. First, it should be noted that §30 tracks the general format of the Municipal Land Use Law and allows a municipality to depart from substantial conformity with its master plan elements by a simple majority vote of the full authorized membership of the

governing body. Second, while §9(a) seems to require adoption of ordinances conforming to the master plan as a precondition to substantive certification, §14(b) clearly grants a municipality 45 days after substantive certification to adopt its fair share housing ordinance, and §13 gives them six years to move for substantive certification.

If these provisions mean what they say, then a municipality could adopt a compliant housing element, depart from it by absolute majority vote with a non-compliant zoning ordinance (which would be valid against ultra vires attack under §30 and the Municipal Land Use Law) and then present a more compliant proposed zoning ordinance based on the compliant housing element to the Council when and if it decides to move for substantive certification during the six year period. In this posture as well, the concerns about unenforceability demonstrated in our prior brief remain valid.[2]

In any event, the history of avoidance following both Mount Laurel I and Mount Laurel II counsels this Court not to accept

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[2] Moreover, an obvious problem with even the most benign view of the Attorney General's suggestion is that the impact of the zoning requirement does not attach until 1988, leaving an unjustifiable two-year hiatus which can hardly be described as de minimis. If this were the only problem, however, it could be cured by providing the administrative builder's remedy as suggested in our prior brief until such time as the municipality complied with §§29-31. As demonstrated in text, it is clearly not the only problem.

vague and generalized assertions of good faith voluntary compliance. To be constitutionally acceptable, the legislative scheme must contain iron-clad assurances that there will be actual compliance, assurances that the Attorney General's brief fails to provide. We reiterate that an administrative builder's remedy, or something that is the functional equivalent, must be read into the Act for it to survive.

Credits. The Attorney General argues that §7(c)(1), properly construed, is constitutional. He thus implicitly accepts our argument that the section as literally worded is fatally overbroad. Unfortunately, however, the Attorney General does not clearly address the question of terminology upon which solution of this problem turns. He mentions current and prospective fair share need, and a need for an "inventory of existing housing . . . currently available to meet this need," Brief at 50, and for "an accurate count of current . . . housing units already existing in a municipality so that the municipality will be correctly allocated only its fair share of any additional housing that may be needed in the region, id. at 51 (emphasis in original). It is possible to read these passages as agreeing with us that the credit must be limited to units first developed during the current fair share period, so that these units are not double counted.[3] But the Attorney General

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[3] To further clarify our position on this issue, we are attaching as a supplemental Appendix to this letter brief that

does not explicitly disavow the statutory error of permitting existing adequate, affordable housing units to be counted towards satisfying the unmet need for additional housing units of the same character. This issue must be clarified for the statute to be constitutional.

Severability. The Urban League respondents did not address the question of severability in their prior brief. We agree with the position of the Attorney General that the Fair Housing Act was intended by the Legislature to be severable and that severance is specifically feasible with regard to the unconstitutional moratorium provision.

In connection with the moratorium problem, it bears noting that the Legislature originally intended that the Attorney General bring a declaratory judgment test of the moratorium provision immediately upon enactment. This procedure was eliminated in the Governor's conditional veto, but nevertheless indicates that the Legislature believed that the moratorium could be severed.

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Affidavit of Alan Mallach, the Urban League respondents' housing and planning expert, concerning calculation of credits pursuant to §7(c)(1). This affidavit was submitted to the trial court in opposition to the Cranbury, Monroe and Piscataway motions to transfer. An essentially identical affidavit had been filed earlier in opposition to South Plainfield's motion. Neither affidavit was provided to the Court in the appellants' appendix on this appeal. Cf. Rule 2:6-1(a).

It should also be noted, however, that several of the Urban League respondents' challenges to the constitutionality of the Act do not lend themselves to severance, because they go to crucial omissions in the overall statutory scheme. This includes the failure to provide an adequate builder's remedy or comparable enforcement incentive, the failure to provide for a system of interim restraints when matters are pending before the Council, and the overbroad credits provision.

Conditional transfer of the Cranbury litigation. The Urban League respondents did not file a reply brief, but now seek the Court's leave to note very briefly our position on matters raised for the first time in Cranbury Township's reply brief, received on December 13. Since Cranbury states its agreement with a number of positions taken in our December 4 brief, we think it essential to clarify the extent of our remaining disagreement.

Cranbury states in its Reply Brief, p.2, that it could accept conditional transfer with law of the case, provided that the Affordable Housing Council would not be barred from making adjustments to the previously determined fair share of 816 units. We agree that law of the case leaves open the possibility that the fair share would be phased, but we do not agree that it could be adjusted. We would vigorously oppose any argument, before either the Court or the Council, that portions of the fair share phased beyond 1990 cease to exist. The phased portion of any 1984-1990 phased share must be met after 1990 in addition to any

separately-calculated 1990-1996 fair share.

Cranbury's novel proposal concerning credits, Reply Brief at pp.6-8, is not based on anything suggested in the Urban League respondents' brief. Cranbury proposes a method for adjusting fair share. Our concern is that once fair share is numerically determined, §7(c)(1) will be used to wipe it out by crediting existing units against additional need. Given our view of law of the case reiterated above, Cranbury's adjustment proposal is moot.

Cranbury argues that the builder's remedy issues become moot upon transfer of the case to the Council, Reply Brief at p.8, and reads our brief as conceding this point. This is in error. We specifically argued that the power to award the builder's remedy administratively was essential, Urban League Respondents' brief at 55-74 , and that the builder's remedy as heretofore recognized in the trial court should be preserved as to the builder-plaintiffs in our case, id. at 74-75.

Cranbury's present argument does identify one inadvertent omission in our earlier brief, however. If the case is transferred for expedited mediation and review, it would be concluded by October 1986, two months before the expiration of the §28 moratorium. It is our position that the moratorium is inapplicable to expedited Council review, both because it expressly applies only to court-ordered remedies, and because there is no need to wait for the development of full Council

standards and procedures, or for newly drafted housing elements, when continuing disputes are transferred with law of the case intact.

Finally, we remind the Court that Cranbury's acceptance of some of the points in our conditional transfer argument constitutes agreement with us only as to secondary issues. We have not relinquished our primary argument that the manifest injustice standard completely prohibits transfer of this case.

Respectfully submitted,

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Eric Neisser
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On behalf of the ACLU of New Jersey

Copy: Urban League appeal service lists
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