CH - UL v. Carteret

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Memorandum of Law in Support of Urban League Plaintiffs' Motion for Imposition of Conditions on Transfer of Litigation to Council on Affordable Housing

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY
(Mount Laurel)

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	]	Cranbury
	]	Monroe
Plaintiffs	]	Piscataway
	]	South Plainfield
vs.	]	
	]	Civil Action
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	]	No. C 4122-73
	]	
Defendants	]	

MEMORANDUM OF LAW IN SUPPORT OF URBAN LEAGUE PLAINTIFFS' MOTION FOR IMPOSITION OF CONDITIONS ON TRANSFER OF LITIGATION TO COUNCIL ON AFFORDABLE HOUSING

INTRODUCTION

The Supreme Court has mandated that the Cranbury, Monroe, Piscataway and South Plainfield cases be transferred to the Council on Affordable Housing. The Supreme Court also held, however, that "the judiciary has the power, upon transfer, to impose those same conditions designed to conserve scarce resources' that the Council might have imposed were it fully in operation." Hills Development Co. v. Bernards, ___ N.J. ___, slip op. at 87 (hereinafter Hills). The Urban League plaintiffs, by these motions, seek to vindicate the Supreme Court's concern about 'scarce resources' by attaching conditions to the four transfers that will preserve the status quo until the Council can act.

The Supreme Court has unequivocally directed that scarce resources must be preserved if their depletion would undermine the Council's task, but it has left the determination of what is scarce and what is necessary to preserve them to this Court, based on the experience and demonstrated expertise that this Court has accumulated since the decision of Mount Laurel II in January, 1983. It is crucial that this aspect of the Hills decision be vigorously implemented by imposing conditions that preserve a realistic opportunity for the construction of Mount Laurel housing, for here more than anywhere else in Hills the Supreme Court confirms its continuing commitment to the constitutional premise that underlies Mount Laurel II, the Fair Housing Act and Hills itself:

> 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; our determination to perform that duty has not changed. Id. at 92.

In two of the four towns -- Piscataway and South Plainfield -- extensive restraints have already been found necessary by this Court, and the new methodological uncertainties and further extensive delays introduced by the Fair Housing Act, L.1985, c.222, require new restraints in all four of the towns now before the Court. We believe that the restraints requested are necessary in all four towns both by virtue of the inescapable development pressures in each of them and also because the evidence of prior conduct suggests that 'scarce resources' are presently in jeopardy. In at least two of the towns -- Monroe and South Plainfield -- the case for conditions is particularly compelling because of an overwhelming pattern of bad faith conduct over the last 2 1/2 years. In Hills, at 89, the Supreme Court emphasized that "the previous actions of the municipality and its officials" was a factor bearing on the need for imposition of conditions.

Before describing the specific restraints needed in each of the four towns, we address a threshold question common to all four, namely, what is the predicted fair share obligation against which scarcity is to be measured. We suggest a reasonable approach to this question in Point I. In Point II, we then note briefly the need for additional discovery relating to the issue of scarce resources, after which we return in Point III to the four transferring towns, and discuss the specific conditions

appropriate to each one in light of the benchmark measure of scarcity suggested in Point I.

Finally, in Part IV, we will bring to the Court's attention an ancillary matter, not anticipated by the Supreme Court in Hills, which we think bears legitimately on the conditions of transfer, and thus is within this Court's jurisdiction to resolve. Specifically, we seek clarification of the ability of the Urban League's present counsel, who are employees of Rutgers - The State University, to continue their representation of the Urban League plaintiffs before the Council in light of the prohibitions of N.J.S.A. 52:13D.

POINT I

IN DETERMINING THE NEED TO PRESERVE SCARCE RESOURCES THE COURT SHOULD USE AS A BENCHMARK FAIR SHARE THE NUMBER PRODUCED BY THE URBAN LEAGUE METHODOLOGY, WITH APPROPRIATE UPWARDS OR DOWNWARDS ADJUSTMENTS WHERE NECESSARY TO CONFORM TO THE BROAD POLICIES OF THE FAIR HOUSING ACT.

The Supreme Court's opinion in Hills offers little guidance as to how to measure scarcity. In order to know what is scarce, it is logically necessary to know what a municipality's fair share obligation is; the Council, however, has until August 1, 1986, to make such a determination. Since the Supreme Court in Hills clearly understood this methodological timetable, it must have intended that the trial judges make some reasonable estimate, based on their expertise in these matters, as to what the fair share obligation will be. Fortunately, this can be done quite readily as to the four Urban League towns.

The Supreme Court has made it very clear that the Council need not be bound by the fair share methodologies developed in the litigation to date, including the landmark Urban League formula developed in this very case. We submit that this methodology, properly adjusted, nevertheless can serve as a reasonable benchmark against which to measure the need for conditions. There are three specific reasons in support of this position.

First, the Fair Housing Act specifically requires the Council to give "appropriate weight" to, inter alia, "decisions of other branches of government," §7(e), which the legislature must have intended to include the methodological decisions of the three Mount Laurel courts. In addition, the Act specifically acknowledges the relevance of the principal factors in the Urban League formula. See §7(c)(2)(f)[vacant and developable land]; §7(e)[economic growth, development and decline projections]; and §7(c)(2)(g)[financial capacity to absorb housing growth]. It is also significant that the Issue Papers prepared for the Council by the Department of Community Affairs, which formed the basis of the Council's recent series of public hearings on fair share methodologies, used the Urban League methodology as the framework for its discussion of the decisions the Council must make.

It is not surprising that both the Act and the DCA Issue Papers duplicate the broad outline of the Urban League methodology. That methodology represented a studied consensus of most of the planning experts active in the Mount Laurel field as

to what a responsible fair share methodology must involve. While the Act permits the Council to reinvent the wheel, it is unlikely that the wheel's shape could be dramatically changed, for to do so would require straying far from the constitutional principles that ultimately confine both the Court's and the Council's discretion.

Second, the various adjustment and credit devices provided for in the Fair Housing Act do not undercut the Urban League methodology. This Court has amply recognized the need to accommodated the formulaic fair share obligation to such concerns as historical or agricultural preservation (Cranbury), and limits on developable land (Piscataway and South Plainfield). It has, in addition, extensive masters' reports in Cranbury, Monroe and Piscataway which can safely guide a prediction of how (if at all) the fair share obligation would have to be altered because of specific circumstances in these municipalities, and it has a stipulation and other extrinsic evidence which performs a similar function in South Plainfield.

As to credits, which are of potential significance only in Piscataway, not only this Court, see Letter Opinion of July 23, 1985, but also the Supreme Court, see Hills at 64, note 13 (citing with "general agreement" the opinion of Judge Skillman in Morris County Fair Housing Council v. Boonton, No. L-6001-78 P.W., October 28, 1985), and the Attorney General, see Hills Brief at 49-51, have recognized that the credit provision of the Act, §7(c)(1), cannot be construed as Piscataway urges to

virtually wipe out its fair share.

One of the failures of public communication in the Mount Laurel process of the last few years has been the inability to recognize that the fair share numbers produced by the Urban League process are the starting point, rather than the end point, of the fair share process. It is undoubtedly for this reason that the Legislature wrote specific adjustment and credit provisions into the Act. Those involved in the process, however, understand that the Act is essentially descriptive of the process that would have taken place even without legislation (the limitation of housing regions to at most four counties, §4(b), is the only clear exception to this statement). For this reason, this Court can use with confidence not only the Urban League numbers, but also the available compliance reports on whether that number can be realistically achieved, to establish a fair benchmark of the fair share for which scarce resources must be saved.

Third, even if the Court is concerned that the Urban League methodology may be significantly changed by the Council, it is by no means clear that the changes will result in lower fair share numbers for most communities. The Supreme Court's conclusion that the parties will not be bound by the proceedings below, Hills at 82-83, frees the Urban League as well as the municipalities from the fair share determinations of this Court.

The Urban League has already taken advantage of this by arguing to the Council on Affordable Housing, along with the

Public Advocate and a number of other groups, that its fair share methodology should incorporate the concept of "financial need" as well as need derived from the data on substandard housing. "Financial need" refers to those households living in adequate housing but paying too high a proportion of household income to do so. The Fair Housing Act specifically requires affordable housing, §§4(c),(d) and it adopts by reference the federal standard that housing not cost more than 30% of a household's income. §4(c).

By encouraging voluntary planning at the local level, permitting inter-local transfers, and providing substantial new subsidy money, the Fair Housing Act provides compliance techniques that were not readily available to the courts and has the potential to provide for a significantly greater fair share. Moreover, as recognized by the Supreme Court, Hills at 24, the Council enjoys an extra dimension of legitimacy that flows from its creation by the political branches of government, which should enhance its ability to secure compliance statewide. Concern about the limits of judicial power and authority led the Urban League plaintiffs (and other party plaintiffs in these and other cases) not to press the financial need theory when the Urban League methodology was being framed; the more expansive powers given to the Council, and the utterly unassailable logic behind the financial need component of fair share, makes it quite plausible to anticipate that the Council will require a fair share methodology that results in substantially higher fair

shares than previously ordered by this Court.

For all of the foregoing reasons therefore -- the continuing conceptual vitality of the Urban League methodology, the statutory obligation to consider it, the data available to anticipate adjustments to the Council's fair share, the repudiation of an expansive theory of credits, and the possibility of a Council fair share actually higher than the Urban League methodology produced because of the incorporation of "financial need" -- the fair share numbers previously ordered by this Court, sensibly adjusted as the Court would have done anyway, are an eminently fair and reasonable benchmark against which to determine the scarcity of resources.

Use of these numbers is not a rearguard attempt to impose law of the case or collateral estoppel on the parties, cf. Hills at 83-84. As noted above, the Supreme Court must have intended that some benchmark number be used, and the number suggested is actually conservative, especially if the financial need concept is considered. Moreover, as will be discussed below, the point in some of these four towns at which land or infrastructure becomes scarce may be so far below the benchmark figure that the benchmark question is essentially mooted out.

POINT II

A DISCOVERY SCHEDULE AND A HEARING DATE SHOULD BE SET TO DETERMINE THE CONDITIONS TO BE IMPOSED ON TRANSFER.

This Court is well aware of the often rapid development in the burgeoning towns which are the subject of this application. Since the discovery in this case was obtained approximately two years ago, it is crucial that plaintiffs have access to current data.[1] More important, the discovery previously sought did not address the questions posed by the Supreme Court in the Hills decision. As the Court there noted:

> We would deem it unwise to impose specific conditions in any of these cases without a much more thorough analysis of the record, including oral argument in each case on what conditions would be appropriate. "Appropriate refers not simply to the desirability of preserving a particular resource, but to the practicality of doing so, the power to do so, the cost of doing so, and the ability to enforce the condition. Some cases may require further fact-finding to make these determinations. [emphasis added] Id. at 87-88.

There can be no question that further discovery and a full evidentiary hearing is essential in each of the Urban League cases. Prior experience in each of the towns may suggest "the desirability of preserving a particular resource," such as vacant land in Piscataway and South Plainfield and sewage and water capacity in Cranbury and Monroe. Review of the record alone, however, provides a far from adequate means of ascertaining the desirability of preserving other, perhaps equally scarce

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[1] Answers to original interrogatories served on Cranbury, Monroe, Piscataway and South Plainfield were provided in February 1984, with some additional and supplemental responses being provided in the weeks prior to the trial that began in April 1984.

resources or of clarifying the "practicality . . . power . . . cost . . . and ability to enforce" the preservation of such resources. These questions can only be answered after further discovery.

The Urban League respectfully requests that this Court establish a schedule for such discovery and set a hearing date following the completion of same. In order to ensure that the municipalities' ability to satisfy their Mount Laurel obligation is not eroded prior to the hearing, it is further submitted that in the interim restraints are necessary as explained more fully in Point III(A) below.

POINT III

CONDITIONS ON TRANSFER ARE REQUIRED IN EACH OF THE FOUR MUNICIPALITIES IN ORDER TO PREVENT THE DISSIPATION OF SCARCE RESOURCES THAT WOULD HAVE A SUBSTANTIAL ADVERSE IMPACT ON THE ABILITY OF THE MUNICIPALITY TO PROVIDE LOWER INCOME HOUSING IN THE FUTURE.

A. Transfer conditions and temporary restraints. In subsections (B) through (E) below, we describe in detail the conditions on transfer which are essential to the preservation of scarce resources in each of the four towns. As to each of the four municipalities, we also ask that the Court immediately enter temporary restraints imposing the various conditions sought, in order to preserve the status quo until the discovery can be had, the evidentiary hearings can be held and the conditions motions can be decided. Entry of such temporary restraints is squarely within the process contemplated by the Supreme Court in Hills.

While the decision is clear that the Council shall not be bound by the previous Orders entered in a matter (Hills, at 82), it does not relieve any of the parties from such Orders pending review and evaluation by the Council. As a first step, the continuance of the existing narrow and carefully drawn restraints is not only implicit in the decision, but essential to the meaningful transfer of jurisdiction from the Court to the Council. The Supreme Court expressly notes the potential value to the Council of such Orders:

> At the same time, we underscore that the agencies now involved in this field are free to use the records developed in litigation, including any interim orders or stipulations entered, for such purposes as they deem appropriate. (Emphasis added) Id. at 84.

The Council will not be able to avail itself of such "interim orders or stipulations", of course, if they have been discarded before the Council is even in operation. Restraining orders protecting certain sites, for example, will be of little use to the Council if the sites are disposed of before the Council is in a position to evaluate them in the context of the "sound, comprehensive statewide planning" (Id. at 24) envisioned by the Legislature. Indeed, lifting those restraints before the Council has had the opportunity to decide whether they should be lifted would amount to exactly the kind of usurpation of the Council's function by the judiciary that the Supreme Court has so firmly rejected.

Moreover, continuation of these restraints is consistent with the Supreme Court's directive to impose "such conditions as

the trial courts may find necessary to preserve the municipalities' ability to satisfy their Mount Laurel obligation." (Id. at 30) This Court was doing no more than imposing just such conditions at the time it entered the restraining Orders. It was established then that the protection sought by means of the restraints was vital to the municipality's realization of its fair share. The fair share number contemplated by the Court at that time was substantially less than that which may reasonably be anticipated from the Council, of course, reflecting substantial compromise on plaintiffs' part to which they are no longer bound. Moreover, there has inevitably been a reduction of already limited resources since the entry of those restraints; in part, because of their very limited scope.[2] The continuation of these restraints represents only a preliminary, but a crucial, element of the order to be entered pursuant to the Supreme Court's mandate.

Although it seems self-evident that the decision requires such Orders to remain in effect pending action by the Council, the letters of Phillip Paley, Esq., attorney for Piscataway

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[2] The extent to which resources have been diminished because of wilful noncompliance with the restraints in issue requires further discovery. As set forth in the certification of John M. Payne, Esq., submitted herewith, there have already been incidents of such wilful noncompliance in Piscataway. The Court is fully aware also of the repeated wilful violations in South Plainfield, which are referenced in the certification of Eric Neisser, Esq.

Township, dated February 25 and March 5, 1986, and James F. Clarkin, III, Esq., attorney for the Piscataway Board of Adjustment, dated March 13, 1986, attached to the Certification of John M. Payne, submitted herewith, unfortunately demonstrate the need for further clarification. Accordingly, it is respectfully requested that this Court expressly continue the existing restraints in effect in Piscataway and South Plainfield as part of temporary restraints pending determination of the motions.

In the remainder of this Point, we address the specific additional conditions which we seek first to have entered as temporary restraints pending determination of these motions and then, after appropriate discovery and hearing, converted into ongoing conditions on the transfer of these cases to the Council on Affordable Housing. Of course, discovery will indicate what further conditions may also be "appropriate."

B. Cranbury.

Cranbury Township comes before this Court without any prior allegation of bad faith. Absence of bad faith, however, does not defeat an application for conditions. Moreover, prior acts of Cranbury, although not amounting to bad faith, nonetheless suggest that the status quo will not be preserved unless conditions on transfer are imposed by order of this Court.

The central problem in Cranbury is limitation of infrastructure. By its own admission, and based on data that is now at least 15 months old, Cranbury can accommodate at most 675

new homes within its sewer system and 620 within its water system. Mallach Certification, ¶ 9; Cranbury Compliance Plan, at 49, 54. Assuming that new homes require both water and sewer, the effective upper limit therefore is slightly over 600 new units, approximately 75% of the fair share number produced by the Urban League methodology, without any consideration of the market units that might be necessary to support provision of this fair share. Moreover, as indicated in Point II above, fresh discovery may disclose even further limits on this capacity.[3]

The need for preservation of this limited capacity is therefore obvious. Cranbury's past conduct, moreover, increases the urgency of the Urban League's request. It is clear that development pressure in Cranbury is on the rise, and that Cranbury is unlikely to resist it (so long as Mount Laurel housing is not involved). Two substantial large-lot single family home subdivisions -- Shadow Oaks and Cranbury Commons -- are presently under construction, and the Township either has approved or is on the verge of approving the first stage of the Sudler Company's large commercial development. Cranbury's Master Plan permits development of more than 3,000 additional multifamily units east of US Route 130.

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3 There is also the continuing possibility that Cranbury's present diversion allocation, upon which the present water capacity is figured, will be reduced. See Payne and Mallach Certifications.

Cranbury's conduct is also relevant in a different way. To date in these protracted Mount Laurel proceedings, the Township has chosen to rely on the mandatory set aside approach to compliance, which requires four market rate units for each Mount Laurel unit built. (It has also proposed at least 95 units of 100% affordable housing, less than 15% of its total fair share, to be built by a non-profit local group, but planning for these units has been in abeyance for many months, raising doubts about the likelihood of their eventual construction.) Even though neighboring Plainsboro Township devised a substantial compliance package that required only 60 units of new market-rate construction, Cranbury has shown little interest in these more creative solutions. Thus, it is reasonable to predict that most of Cranbury's fair share, whatever it is, will be tied to a mandatory set-aside, thus increasing five-fold the number of units for which adequate sewer and water provision must be made.

Thus, whether one uses Cranbury's Urban League fair share as a benchmark, or the phased fair share of 536 Mount Laurel units recommended by the Master for the first phase of compliance, or even the 241 units recommended by the Township in its clearly unacceptable 18-year phasing proposal, the loss of the limited amount of water and sewer available "is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." Hills at 87.

Nor is this conclusion altered by the fact that it is probably technologically feasible for Cranbury to expand its

water and sewer systems in the future. While Cranbury's compliance report discusses a number of ways in which this might be done, there are no certain plans and no realistic cost estimates. All of southern Middlesex County and adjacent areas are growing rapidly, and the necessary regional solutions are unlikely to come either quickly or cheaply. When the existing infrastructure is used up there may be realistic constraints on all future development, including Mount Laurel development, that are beyond the capacity of the Court or the Council to solve. The Urban League plaintiffs are entitled to have what little is left remain available to them when the Council proceedings are concluded.

For all of the foregoing reasons, the Court is asked to condition Cranbury's transfer as follows:

CRANBURY CONDITIONS

1. Except as provided below, no further commitment of water or sewer access in Cranbury should be permitted, either to residential or non-residential users.

2. The Township may furnish either water or sewer to a maximum of five single family homes per year (or an equivalent amount to non-residential use, which would reduce the amount allocable to residential use), recognizing that such modest growth has little bearing on Mount Laurel compliance.

3. The Township may permit additional residential or non-residential use financed exclusively by the developer thereof, provided that a portion of the new infrastructure, or a cash equivalent, is reserved for subsequent Mount Laurel developments.

4. To the extent that any water or sewer infrastructure development is financed by the Township, one unit of existing capacity shall be released from the proposed restraint for every two units of new capacity created. The effect of this is to reserve one half of any new capacity for Mount Laurel purposes.

5. No new infrastructure development, private or public, should be permitted in the limited growth area of the Township. The Urban League plaintiffs do not seek general restraints related to preservation of developable land in Cranbury, because a substantial surplus of such land exists. However, much of Cranbury's vacant land is located in the limited growth area and Cranbury has vigorously asserted its desire to preserve this land for agricultural use. As a result, there should be little burden on Cranbury from this restraint, and it assures the Urban League plaintiffs that whatever public or private energies can be brought to bear in Cranbury will be in the growth area, where an ultimate benefit to Mount Laurel development can accrue.

C. Monroe.

For most of the last three years of this litigation, Monroe and South Plainfield have been in close contest for the "worst faith" award. It goes without saying that Monroe's past conduct demonstrates that, absent restraints, it will do everything within its power to avoid its Mount Laurel obligation.

Monroe, like Cranbury, has ample amounts of vacant land, although a very large portion of it is in the limited growth and

agricultural areas. Even more so than Cranbury, Monroe has shown little interest in effective solutions other than the mandatory set aside, and there is little likelihood that it can successfully invoke any of the Fair Housing Act's adjustment opportunities, since it has already permitted substantial amounts of high density, non-Mount Laurel housing and is in the process of approving more.[4]

In addition, Monroe has not only permitted but encouraged substantial development within its limited growth area in recent years. Although this Court declined the Urban League plaintiffs' request at the trial in 1984 to increase Monroe's fair share based on its de facto expansion of the growth area, the Council on Affordable Housing will have an opportunity to reconsider this issue. The growth/limited growth area basis for fair share planning, derived from the State Development Guide Plan, formally expired on January 1, 1985, see Mount Laurel II, 92 N.J. at 242, and the Council in any event has considerably greater flexibility than the Court had to plan development areas flexibly. Indeed,

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[4] The Whittingham age-restricted development, with 2400 residential units, was at the focus of one bad faith episode in Monroe in July, 1985. In addition, the Township amended its zoning ordinance in August and began granting development approvals in November, 1985, for the very large Forsgate mixed-use development that will include 700 luxury townhouses as well as commercial development adjacent to Exit 8A of the Turnpike. Neither of these projects, which total 3100 residential units, will provide any lower income housing or a financial contribution to Mount Laurel development.

DCA has already suggested to the Council that it consider permitting Mount Laurel development generally in limited growth areas. Issue Papers, at 12.

Accordingly, it is realistic to anticipate based on Monroe's past preference for 4:1 development projects and its utter disregard of the limited growth area concept that the Township will need to provide for several thousands of housing units altogether. It is unlikely in the extreme that its fair share as determined by the Council will be substantially less than the 776 produced by the Urban League methodology.

There are two consequences of this likely result, each of which requires a condition on transfer. First, like Cranbury, Monroe has severe limitations of infrastructure. Second, unlike Cranbury, the pattern of pending construction exemplified by the Whittingham and Forsgate developments noted above threatens to saturate the housing market in Monroe, thus calling for overall development limits until the Council acts on Monroe's petition for substantive certification.

In Monroe, it appears that there is essentially no sewer capacity left, and the Monroe MUA is presently considering a major expansion that would be financed by a consortium of developers. (Further discovery on the status of this plan is needed.) Once this contemplated expansion is financed and built, the system is unlikely to be expanded again in the near future. It is obvious that if Mount Laurel developers do not participate in that expansion there will be "a substantial adverse effect,"

Hills at 87, on subsequent Mount Laurel development after the Council acts. Therefore, it is essential as a condition on transfer that the Township either refrain from expanding its MUA capacity, or that it reserve an appropriate portion of any such expansion for the Mount Laurel developers who will eventually satisfy its fair share. Monroe could finance this portion of the expansion itself, or it could vest development rights in one or more Mount Laurel projects now so that the developer could participate immediately.

Monroe's other problem is potential market capacity. Assuming exclusive reliance on the 4:1 set aside technique (as we believe is appropriate, given the Township's past behavior), Monroe will need to build a substantial amount of market housing. However, it lies a fair distance away from the burgeoning Route 1 corridor to the west, and it must therefore compete with a great deal of closer housing in Plainsboro, South Brunswick, East and West Windsor and, eventually, Cranbury. It is also abutted to the northeast by Old Bridge Township, which has just committed itself to development of over 17,000 units of relatively inexpensive market-rate housing over the next twenty years as part of a settlement with the Urban League plaintiffs approved by this Court on January 24, 1986.

Because of factors such as this, if Monroe has already allowed a substantial amount of market-rate housing such as that proposed by Forsgate, it is reasonable to have concern about how strong the market for non-Mount Laurel housing will be in three

or four years, when the Council finishes and housing is finally ready to be built. Accordingly, the Urban League plaintiffs submit that no development larger than 50 units should be permitted until the Council grants substantive certification. It is respectfully submitted that under the circumstances here and taking into account the callousness with which Monroe has conducted its defense for the past 2 1/2 years, this restraint is both reasonable and necessary.

Monroe's transfer also requires one special condition, perhaps at the margin of preserving scarce resources, but nevertheless justified within the spirit of the Supreme Court's opinion. As this Court knows, Monroe has refused to honor the Court-appointed Master's request to be paid for her services and has not yet made payment even though ordered by this Court and even though its appeal of that order to the Appellate Division was unsuccessful.

The Master's conscientious assistance to the Monroe Council enabled it (despite the Mayor's opposition) to prepare a draft compliance plan which will be part of the record laid before the Council on Affordable Housing for its discretionary use. Because of the Master's skillful efforts, and her own report analyzing Monroe's compliance opportunities, it is likely that the Affordable Housing Council will find the record of great use, even if it does not accept it in toto as a housing element worthy of substantive certification. It would be inequitable in the extreme for Monroe to have the benefit of Ms. Lerman's efforts in

its behalf without having properly compensated her. Since there is no remaining question about Monroe's legal obligation to pay, its doing so should be an absolute pre-condition to transfer.

D. Piscataway.

Unlike Cranbury and Monroe, the serious problem in Piscataway is vacant land, as it has been since the date of this Court's first restraining order, entered on June 7, 1984 and continued to this date in the form of the December 11, 1984 restraining order and the Judgment of September 17, 1985. The Urban League plaintiffs seek continuance of these restraints, and possible expansion of them to additional land to be identified after current discovery is completed.

As to the restraints previously issued and presently in effect, we think there can be little serious argument that they should be maintained as a condition of transfer. The need for such restraints was fully argued to the Supreme Court and a situation such as Piscataway's was clearly in the Court's mind during oral argument and when it provided for conditions in the Hills opinion.

The need to possibly expand the list of restraints has two justifications. First, we respectfully submit that this Court's prior fair share determination was based on an incorrect legal standard and is too low. Second, the Urban League made concessions about developable land in order to facilitate the February 1985, hearing to which it is no longer bound.

This Court, in its July 23, 1985 letter opinion, established Piscataway's fair share as 2215, based on Ms. Lerman's report of vacant, developable land and appropriate densities. Although the Court did not require Piscataway to use any particular technique to comply with this fair share obligation, the logic of its fair share calculation was that compliance would be achieved mainly, if not exclusively, by a 4:1 mandatory set-aside. The Urban League plaintiffs respectfully submit that the Court's approach was erroneous. As we argued then, the proper fair share finding for Piscataway should have been 3744, the number produced by the Urban League formula. Had the number been correctly established, the parties could then have explored ways in addition to the mandatory set aside to achieve compliance, adjusting the compliance fair share downward only if it could be shown that the full fair share could not be accommodated even with a combination of set asides and other techniques.

Since the fair share process must now be redone before the Affordable Housing Council, the Urban League will have another opportunity to obtain what it believes is the correct fair share in Piscataway and its opportunity to do so becomes a critical element of the present motion for conditions. We submit that the proper "benchmark" fair share, against which to measure scarcity, is 3744. From this, it follows that any additional suitable land that can be identified must be restrained from development until the Council acts.[5]

Whether such land can be identified requires additional discovery. For instance, the Urban League originally suggested eight sites, totaling approximately 167 acres, as suitable for Mount Laurel development, but did not pursue these sites when Ms. Lerman voiced some doubt about them. This concession was made in an attempt to reduce the complexity of the February, 1985 hearing and to speed a final determination of the Piscataway case. (Piscataway, it will be recalled, took the opposite approach, prolonging the hearing unreasonably by objecting to each and every site recommended by Ms. Lerman, whether or not there was a credible basis for doing so.)

As a result of the decision in Hills, at 83, we are no longer bound by these concessions, but in the interim the largest two of the sites that we might now seek to restrain (numbers 14 and 30) may have been committed to non-Mount Laurel development. Even if this is so (a question to be explored in discovery), there appears to remain at least fifty additional acres in

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[5] Even if the municipality chooses to meet some of its fair share by compliance techniques other than the mandatory set aside (an approach the Urban League plaintiffs have consistently supported), keeping potentially developable land available is important. The municipality's choice cannot be known until it submits its housing element, based on the Council's fair share number. Moreover, a desire to avoid development on some sites may encourage the municipality to explore alternative compliance devices that are less profligate of land, but the municipality will have no incentive to do so if the fair share is lowered long before the compliance process begins. This was the heart of our objection to the fair share determination made by the Court.

smaller sites, and there may be additional small sites that were ignored earlier in the spirit of compromise.

These small sites merit more attention now than they did when the case was to be resolved by this Court, because the Fair Housing Act makes substantial subsidies available that will permit 100% Mount Laurel developments rather than 4:1 set-asides. Thus, a site that might be marginal if an internal market subsidy were required could be considerably more attractive with public financial assistance. Assuming, for instance, that only fifty additional acres are available, they might support between 250-500 Mount Laurel units in the normal density range of 5-10 units per acre.[6]

As with the other towns involved, it is important for the Court to assess the need for restraints in the light of the probable magnitude of the fair share determined by the Council. It is highly unlikely that the Council's fair share methodology will yield a small fair share for Piscataway, because Piscataway has substantial employment opportunities and, in absolute terms,

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[6] For preliminary restraint purposes (see Point IIIA above), we obviously cannot restrain as yet unidentified sites. It is our position that the previous restraining orders, covering Ms. Lerman's list of suitable sites as approved by this Court in the September 17, 1985 Judgment, remains in effect. Because of the factual uncertainties surrounding the sites on Mr. Mallach's original list that were not thereafter included in Ms. Lerman's list, we do not seek interim restraints on those sites, but will defer this question until after the completion of appropriate discovery, when these sites can be combined with any request for restraints on newly-identified sites.

a substantial amount of buildable land. Moreover, Piscataway's developed character makes it an inappropriate candidate for the various adjustments specified in the Fair Housing Act and, as explained in Point I above, it is virtually a certainty that it will not be eligible for any significant credits. (What small credit it may receive will be set-off against that portion of the fair share which cannot be met by new construction on vacant land.)

One additional aspect of the land restraints in Piscataway bears brief mention, in anticipation of questions that will shortly arise. The restraining orders presently in effect permit individual sites to be released only if they are approved for development with a Mount Laurel setaside. This procedure has already been used to permit the Hovnanian Society Hill development to go forward, and there are several similar proposals that may come forward soon, including an additional Hovnanian development and two projects of the Lackland Brothers. In addition, as the Court is aware, the Urban League and the owner of site 3 have agreed to release the site for non-Mount Laurel development upon payment to a trust fund that would be used to support an equivalent number of Mount Laurel units elsewhere in Piscataway. Some of these releases can be handled by consent orders, but as to others the Township may be unwilling for political reasons to join in such an order.

It is the Urban League's position that the consent of the municipality is not needed to release a site from restraint, at

least when the municipality's conduct is not directly controlled by the dissolving order.[7] Thus, if a restrained site is approved for development by the planning board or any other municipal agency, the municipality cannot thereafter complain if the Urban League relinquishes its objections to that approval on conditions such as payment into a Mount Laurel trust that do not directly involve the municipality. To allow the municipality to withhold "consent" at that point is to squander that scarcest of resources -- actual Mount Laurel compliance. Since dissolving restraints on lesser conditions that preserve a scarce resource clearly flows from this Court's undoubted power after Hills to impose restraints, we urge the Court to include in its conditions order a provision that will clarify the circumstances under which restraints can be dissolved to effectuate a clear Mount Laurel purpose.

E. South Plainfield.

Pending Council issuance of a substantive certification for the Borough, plaintiffs believe this Court should issue a three-part order:

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[7] Under some circumstances, we believe that actual Mount Laurel development could be ordered without the municipality's consent as a condition for releasing a restraint. This would be the case where, as might occur in Piscataway, the site is suitable and the proposed development is far short of fulfilling even the most cautious estimate of the ultimate fair share obligation. This issue need not be faced until it arises in a specific factual setting, however.

a) restraining amendment or repeal of Ordinance Nos. 1009 and 1010;

b) restraining development on any currently vacant contiguous piece of land of 1 acre or larger, regardless of current ownership or subdivision;

c) restraining any municipal land sales and requiring that proceeds of previously contracted sales be deposited in court.

Repeal of ordinances. Surely one of the most bizarre twists imposed by the Supreme Court's decision in Hills is that South Plainfield should now be able to capitalize on its extensive investment in bad faith by transferring to the Council after entering voluntarily into a settlement of this litigation and adopting, albeit under protest, fully compliant ordinances. The extreme paradoxes of the situation affords little rational guidance as to what the limits on South Plainfield's future conduct should be. Nevertheless, given South Plainfield's unbroken history of non-compliance, it is essential to establish forthwith that South Plainfield has an obligation to keep its Mount Laurel ordinances in force.

The Urban League methodology would have required South Plainfield to provide for a fair share of 1725 units. All parties conceded (and continue to accept) that South Plainfield could not under any reasonable circumstances attain that number. The parties therefore stipulated to a fair share of 900 units (itself a compromise of the 1000 units that the Urban League

originally bargained for) and they further stipulated that South Plainfield could come into compliance with a zoning ordinance that would produce only 600 units of Mount Laurel housing. It is that ordinance, representing a tremendous concession on the part of the Urban League plaintiffs, that must be kept in place.

Because of the extreme disparity between South Plainfield's formulaic fair share and its "compliance" ordinance,[8] it is obvious that the Council could not find the fair share number to be any less without risking a constitutional violation of its own. Indeed, as indicated in the certification of Alan Mallach, the Council may well determine that the fair share is substantially higher. Accordingly, there can be no ultimate harm to South Plainfield if the ordinances remain in effect, even if some Mount Laurel projects obtain vesting as a result; whatever vests will be at best a portion of the ultimate Council determination.

One further consideration lends force to our arguments. The Supreme Court in Hills permits this Court to consider "previous actions of a municipality" in determining conditions. As set forth in the Neisser certification, and as well known to this Court from its involvement in the prior proceedings, South

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8 Indeed, the ordinance in fact provides for a maximum of only 453 units by rezoning for private development. The remaining units are projected in the Morris Avenue senior citizen development, which cannot go forward unless the municipality honors its commitment to assist in financing the project.

Plainfield flaunted three separate court orders to adopt these ordinances after its voluntary Stipulation in May 1984, and the Borough Council finally acted only after this Court and counsel for the Urban League plaintiffs expended large amounts of wholly unnecessary labor bringing about compliance.

Given the overwhelming probability that South Plainfield will eventually have to adopt similar, if not identical, ordinances, the Court is justified in keeping the present ordinances in effect in order to avoid the burden that will otherwise result from the unfortunate likelihood that South Plainfield's prior bad faith refusal to comply will be repeated in the future. Keeping the ordinances in effect is considerably less onerous as to innocent third-party property owners than the alternative, which is a total restraint on development.

We thus submit that continuance in force of the ordinances is an appropriate condition on transfer. A fortiori, continuation of the ordinances at least until the hearing on this application is warranted.

Developable land. The reasons for the requested restraint on development of vacant land parallel those applicable to Piscataway. See Point III(D) above. As detailed in the Neisser Affidavits of August 28 and November 7, 1985 and the certification submitted with this motion, all aspects of the current Judgment as to South Plainfield are a result of compromise by the plaintiffs as well as the Borough, a compromise embodied in the voluntary Stipulation of May 10, 1984. As the

Mayor of South Plainfield has explained at a public meeting, the Borough has a capacity far greater than the stipulated 900 fair share. His statement lends credence to the view that even the Borough honestly believes that a good number of sites not included in the Stipulation are appropriate for residential development.

Moreover, as noted in the Neisser Affidavits, the plaintiffs consciously conceded several sites that they fully believed then to be developable, in the interests of concluding what they believed was a good faith settlement. The Supreme Court has clarified that the Council and the parties in transferred cases are no longer bound by interim stipulations; in any case the parties here never stipulated that other sites were not also developable. The ordinances which the plaintiffs ask this Court to retain will only provide 453 lower income units, without the Borough-supported senior citizen site, and 603 if the Borough chooses to go ahead with that project. This Court should, therefore, after full discovery and appropriate evidentiary exploration, restrain development of any vacant site in the Borough that could profitably be used for Mount Laurel development, to preserve the Borough's capacity to satisfy whatever number above 603 is ultimately determined to be the Borough's obligation.

A one-acre limit might sound inappropriate in some contexts. However, the Stipulation and Judgment include provision for development of the Elderlodge site on 1.46 acres in South

Plainfield. That six-story development, as incorporated in the current zoning, would provide a total of 100 units of which 20 would be affordable to lower income households. The Elderlodge project demonstrates that with careful planning even very small sites can make a not insignificant contribution to the fair share obligation in South Plainfield.

Land sales and proceeds. The third restraint -- on land sales or on use of the proceeds of those sales -- is necessary to preserve municipal options for realistic compliance with whatever proves to be South Plainfield's fair share obligation. The land, no matter in whose hands, would, of course, be subject to the development restraints requested above. But the municipality, which has the constitutional obligation, may wish to meet its fair share through other than 4:1 set-asides. In that case, municipally controlled land, or the financial proceeds of its sale, would be most valuable. The Borough has repeatedly told both the Court and the plaintiffs that it is fully committed politically to development of the Morris Avenue senior citizen project. See Neisser Affidavit of November 7, 1985, Para. 9. In the Stipulation, the Borough agreed both to provide the land and the necessary financial support for that project. The plaintiffs sought and obtained restraints on municipal land sales in the summer of 1985 both because the municipality had sold pieces within the Pomponio Avenue site, which it had failed to re-zone in a timely manner, and because the Borough had not yet taken any steps to carry out its financial obligation towards the Morris

Avenue site, or indeed to complete purchase of the remaining private parcels there. Present contracts for sale would produce in excess of $1.3 million, a portion of the subsidy that would be necessary for this project. Although the Borough may not ultimately choose to build that project, as it has said repeatedly it wishes, in order to avoid extra market unit development, it should be required to preserve what it has, so it will have that option when the Council has concluded its processes.

It might be said that restraints on municipal sales or on use of their proceeds is inappropriate in light of Section 11(d) of the Fair Housing Act which provides: "Nothing in this act shall require a municipality to raise or expend municipal revenues in order to provide low and moderate income housing." Two points are worth noting. First, the Act speaks to expending revenues, not to using resources, and thus it would appear that a municipality could be required to use municipal land.

Second, the proposed restraints on sale or use of sale proceeds are not intended to "require" the Borough to use the money for any purpose. It is simply to preserve, as the Supreme Court commanded, the municipality's capacity to comply with the Council's ultimate mandate. If the Borough concludes when it learns the Council's fair share, as it did when it learned the Court expert's probable fair share and the plaintiffs' compromise fair share, that it would be advisable to spend municipal money, for example on the Morris Avenue senior citizen project, to avoid

the extra growth imposed by a 4:1 solution, then it should have the necessary resources to accomplish that municipally chosen goal. By limiting land sales or use of the funds derived therefrom, the Court would simply be maximizing the municipality's options to comply with the Council.

A distinction should be made, in fairness, however, between the sales already under contract and those not yet so bound. Innocent third parties have been forced to deposit the full amount of the purchase price by the Borough's unfair time-of-the-essence resolution of last August. Neisser Certification, Para. 12. They should no longer be deprived of the benefit of their bargain. The plaintiffs have long urged that the title be closed and the proceeds placed in escrow. On March 14, 1986, the Borough informed the plaintiffs that on February 24 the Borough Council had finally authorized such escrow accounts to finalize pending land sale transactions. We believe all pending transactions should be finalized and all proceeds placed in a special account with the Court pursuant to Rule 4:57. We are prepared, as we have been for six months, to sign consent orders permitting such action. In contrast, we believe that all land not yet subject to a contract should simply be kept in the Borough's inventory. This will provide the Borough with both land and money options to satisfy its ultimate fair share.

POINT IV

COUNSEL FOR THE CIVIC LEAGUE SHOULD BE PERMITTED

TO CONTINUE ITS REPRESENTATION BEFORE THE COUNCIL.

Plaintiff Civic League respectfully requests a determination by this Court that its counsel, the Constitutional Litigation Clinic of Rutgers Law School (the "Clinic"), be permitted to continue its representation before the Council. Plaintiff recognizes that this is an unusual request, but it is necessitated by the unusual circumstances of this case.

The Conflicts of Interest Law, N.J.S.A. 52:13D provides in pertinent part that:

> b. No State officer or employee or member of the Legislature, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for, or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before any State agency; * * *

It is assumed that the Council will be considered a "state agency" for purposes of this statute. There are no reported court decisions regarding the status of Rutgers Law School or other educational clinics for purposes of this statute, nor has any determination ever been made specifically concerning the Constitutional Litigation Clinic. A 1977 advisory opinion regarding the Rutgers Women's Rights Clinic, however, gives rise to the possibility that plaintiff's counsel could be deemed "state officers or employees" subject to the provisions of the cited statute and thus precluded from continuing their representation of the Civic League.

The basis for that informal and non-binding opinion is certainly open to question. It is plain that the evil sought to to be avoided by the Conflicts of Interest law does not -- and could not -- exist here. Its primary purpose is to regulate and control "the activities of legislators, State officials and employees in their private business and commercial contractual dealings with the State." Attorney General's Formal Opinion No. 18 (1979). As the Court noted in Knight v. Margate, 86 N.J. 374 (1981):

> There can be no equivocation on the point that the New Jersey Conflicts of Interest Law, as most recently amended, vitally serves a significant governmental purpose. The paramount objective of the Conflicts of Interest Law in general is to ensure propriety and preserve public confidence' in government. Its prohibitions, applicable to a wide spectrum of public officials and employees, include accepting gifts for favors, outside representation on a matter dealt with in an official capacity, and voting on subjects in which the official has a pecuniary or personal interest." (Citations omitted) Id. at 383.

Here, the Clinic plainly has neither a personal nor a pecuniary interest in the proceedings before the Council. Counsel's only interests are in assuring adequate representation for its client and provision of an adequate opportunity to instruct law students in the techniques for handling a complex case. As this Court is aware, the Clinic is not even receiving a fee in connection with its representation of the Civic League, a nonprofit organization representing the interests of lower income households. Quite simply, the evils that motivated the Legislature to act do not exist when university-employed attorneys represent a client while providing an educational experience to law students.

In any event, even if this Court were to assume for argument's sake that a clinic professor or instructor, is within the purview of the cited statute, the unique circumstances of the Mount Laurel litigation distinguish this problem from other settings. It is respectfully submitted that the question of the Clinic's continued representation of the Urban League before an administrative body that did not even exist at the time the Clinic was retained is clearly beyond the scope of that statute.

Here, unlike the the situation facing the Rutgers Women's Rights Litigation Clinic in 1977, a statute was enacted creating the agency in question after the retention of the Clinic and after years of litigation. Indeed, even after the creation of the Council it was not clear until the Supreme Court's decision in Hills that any of the Urban League matters would be transferred there.

In fact, the Civic League's inability to compensate a private attorney may effectively preclude its continued participation in this action. As set forth in the certification of Jeffrey Fogel, Esq., submitted herewith, it appears that the ACLU may be unable to obtain substitute counsel for the Civic League if the Clinic is not permitted to continue its representation.

It is well established that a Court has jurisdiction to rule on a conflict of interest issue arising during the course of litigation. It is especially appropriate for this determination to be made by the trial court where, as here, that Court fully

appreciates the myriad complexities which must be mastered if there is to be adequate representation.

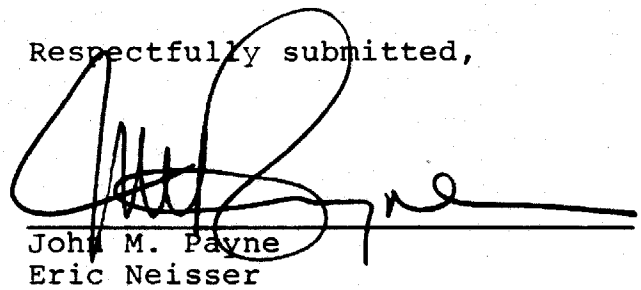
In Hovons, Inc. v. Secretary of Interior, 711 F.2d 1208 (3d Cir. 1983), the United States Court of Appeals for the Third Circuit held that even where continuing representation would violate disciplinary rules, disqualification is "never automatic" and it would be denied where it would be "neither just nor fair to the parties involved." Id. at 1213. Here, of course, there can be no serious question of any disciplinary rule violation. Moreover, as set forth above, only the most narrow and technical construction could give rise to a claim of violation under the New Jersey Conflicts of Interest Law. Even if such construction were imposed, however, it is respectfully submitted that under the circumstances here, disqualification should not follow.

CONCLUSION

For the reasons stated, it is respectfully requested that the Court impose conditions on the transfer of these cases to the Council on Affordable Housing, enter interim restraints and establish a discovery schedule in connection therewith, and authorize the Constitutional Litigation Clinic of the Rutgers Law School to continue its representation of the Urban League in the transferred proceedings.

Dated: March 20, 1986

Respectfully submitted,



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