memorandum of law in support of Respondent's motion to dismiss

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SUPERIOR COURT OF NEW JERSEY
Appellate Division

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs-Respondents	Docket No. A-5394-84T1 (Monroe Township)
v.	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants-Appellants	MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

It is well settled that a final judgment, to be appealable as of right, must be final as to all issues and all parties. As the court pointed out in Frantzen v. Howard, 132 N.J. Super. 226, 227-28 (App. Div. 1975), "piecemeal reviews, ordinarily are anathema to our practice, as expressed in the rules which require the final disposition of all issues at one hearing on the trial level followed by orderly appellate review. The interruption of the litigation at the trial level, by the taking, as here, of an unsanctioned appeal' disrupts the entire process and is wasteful of judicial resources."

The Order of the Court under appeal simply directs payment by Monroe Township of fees owed to the Court-appointed Master and the Township attorney and planning consultant. It is clearly not

a final judgment as to all issues relating to Monroe, not mention as to all parties.

Even if the order were somehow appealable as of right, the appeal must be dismissed for lack of jurisdiction because appellants failed to comply with R. 2:4-1 of the Rules Governing Appellate Practice, which provides in pertinent part:

> (a) Appeals from final judgments of courts ... shall be taken within 45 days of their entry.

Here, notice of appeal was filed 77 days from the entry of the Order. Thus, notice of appeal was filed beyond the time limit required for appeals from final judgments. No motion for extension of time to appeal under R. 2:4-4 was ever filed. Thus, the appeal must be dismissed for lack of timeliness.

The appeal fares no better under respondents' view that the Order is interlocutory. As such, it is barred for failure to comply with R. 2:5-6 of the Rules Governing Appellate Procedure. It is further barred by the express terms of the Supreme Court's decision in So. Burlington Cty. NAACP v. Township of Mount Laurel, 92 N.J. 158 (1983).

R. 2:5-6 holds that application for leave to appeal from interlocutory orders shall be made by serving and filing with the court a notice of motion for leave to appeal within 15 days of the entry of such order. Appellant did not file such a motion. Rather, defendant filed a notice of appeal beyond all applicable time limits. Thus, the Court should dismiss the appeal, even if viewed as interlocutory, for failure to comply with the Rules.

Finally, this appeal is barred by the express holding of the Supreme Court in Mount Laurel II, in which the Court stated:

> [t]he municipality may elect to revise its land use regulations and implement affirmative remedies under protest.' If so, it may file an appeal when the trial court enters final judgment of compliance. Until that time there shall be no right of appeal ... Proceedings as ordered herein (including the obligation of the municipality to revise its zoning ordinance with the assistance of the special master) will continue despite the pendency of any attempted interlocutory appeals by the municipality.

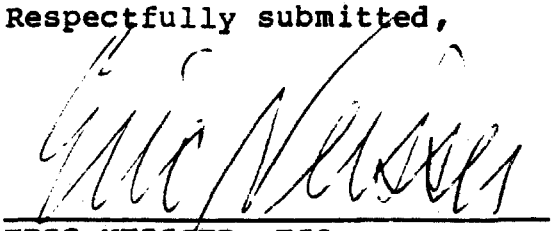
92 N.J. at 285 (emphasis added).

Monroe Township seeks to impede compliance with the dictates of Mount Laurel II by refusing to comply with the lawful orders of the court and by raising untimely and improper appeals. As the Court pointed out in Mount Laurel II, "confusion, expense and delay have been the primary enemies of constitutional compliance in this area. This problem needs the strong hand of the judge at trial as much as the clear word of the opinion on appeal." Id. at 292.

Plaintiff respectfully requests that this Court provide that clear word by dismissing this appeal.

Dated: October 21, 1985

Respectfully submitted,



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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs-Respondents	Docket No. A-5394-84T1 (Monroe Township)
vs.	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants-Appellants	

BRIEF OF RESPONDENT
URBAN LEAGUE OF GREATER NEW BRUNSWICK

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TABLE OF CITATIONS

PROCEDURAL HISTORY

Respondent Urban League accepts the appellant's procedural history, as supplemented by the September 26, 1985 letter-brief of respondent Hintz.

STATEMENT OF FACTS

Respondent Urban League accepts the appellant's statement of facts as supplemented by the September 26, 1985 letter-brief of respondent Hintz.

LEGAL ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE THE ORDER BELOW IS NOT APPEALABLE AS OF RIGHT, THE NOTICE OF APPEAL WAS UNTIMELY AND NO MOTION FOR LEAVE TO APPEAL WAS FILED

Respondent Urban League hereby incorporates the argument set forth in its Memorandum of Law in Support of its Motion to Dismiss, filed simultaneously with this brief.

II. THE TRIAL COURT ORDER OF MAY 13, 1985 DIRECTING PAYMENT TO THE MASTER FOR ASSISTING THE TOWNSHIP IN SUBMITTING A PLAN TO COMPLY WITH ITS CONSTITUTIONAL OBLIGATION TO PROVIDE FOR LOWER INCOME HOUSING IS CLEARLY WITHIN THE COURT'S DISCRETION, WHATEVER BUDGETARY APPROPRIATIONS MAY OR MAY NOT HAVE BEEN MADE BEFORE ITS ENTRY

This brief will be short because the appeal is clearly frivolous. The trial court clearly had the authority to appoint the Master and to require the Township to pay for her services.[1]

In So. Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 281-285, 456 A.2d 390 (1983) (hereinafter Mount Laurel II), the State Supreme Court unequivocally approved the use of a Court-appointed special master to assist municipal officials in developing constitutional zoning and land use regulations, once the court has determined that the municipality's existing

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[1] Respondent Urban League only addresses the propriety of the Order insofar as it directs payment by the Township for the Msster's services. Respondent Urban League has no direct interest in payments to the township's attorney and planning consultant and thus takes no poosition on those aspects of the Order.

ordinance does not satisfy its Mount Laurel obligation to provide a realistic opportunity for its fair share of the regional lower income housing need. The Court specifically recognized the potential values of a master's advice and assistance in determining remedies for the noncompliance of a municipality's zoning ordinance with the constitutional requirements set forth in that opinion. Id. at 286.

Although a court may use its discretion in deciding whether to make the appointment, such an appointment is usually desirable (and thus the court's discretion should be exercised in favor of an appointemnt) where the revision of land use regulations is required, espcially if the revision is substantial. Id. at 282. "[W]e intend that the appointment of masters be viewed by the court as a readily available device, one to be liberally used." Id. at 283.

It is undisputed that the zoning pratices of the Township of Monroe have been found to be in violation of Mount Laurel. Id. at 346, referring to Urban League of Greater New Brunswick v. Borough of Carteret, 142 N.J. Super. 11 (Ch. Div. 1976). The Township, in fact, is one of the very defendants before the Court to which the court's ruling were addressed. Moreover, after remand and an 18-day trial on region and fair share, Judge Serpentelli, by letter-opinion dated July 27, 1984, found that Monroe Township had a fair share obligation of 774 lower income units and that its then existing zoning ordinance was unconstitutional in that it failed to provide a realistic

opportunity for production of those units. This ruling was incorporated in a Judgment dated August 13, 1984 directing the Township to revise its ordinances appropriately within 90 days and appointing Carla Lerman as Master.

Thus, looking simply to the Supreme Court's pronouncements in Mount Laurel II, it cannot be questioned that the court possessed the authority in this case to appoint a master. This conclusion is further supported by the provision of N.J. Court Rule 4:4-41 for reference to a master upon approval by the Chief Justice. The fact that the Mount Laurel II opinion was itself written by the Chief Justice dispels any possible doubt as to the validity of the Order of appointment in this case.

Indeed, the Township of Monroe does not question the authority of the trial court to appoint a master in this matter. It simply questions the court's authority to order the municipality to pay for the required services of the master. The court's authority in this regard, however, is likewise without question.

New Jersey Court Rule 4:41-2 states: "The master's compensation shall be fixed by the court and charged upon such of the parties or paid out of any fund or property as the court directs." (Emphasis added). In applying this rule to Mount Laurel cases, including this case, the Supreme Court specifically directed that such payments are to be made by the municipalities involved. "The master's compensation shall be paid in its entirety by the municipality, and is due upon entry of final

judgment. Partial payments may be directed to be made in the court's discretion as the master's work progresses." 92 N.J. at 281, n.38 (emphasis added).

This language could not be more forthright and unambiguous. In fact, the statement is phrased in terms not simply suggesting that the municipality pay the master's compensation, but in fact requiring such payment by the municipality. It was the court's deliberate determination here that the municipality should bear this expense, and as the court directed, the municipality should make the payments forthwith. If not, the court has authority to issue a writ of execution against the Township, as provided in N.J. Court Rule 4:41-2.

Appellant Monroe Township claims that the Court cannot require it to pay the fees for the Court-appointed master despite Rule 4:41-2 because N.J.S.A. 40A:4-57 provides that no municipality can expend any money that had not been properly appropriated by the council or board within its annual budget. Essex County Board of Taxation v. City of Newark, 73 N.J. 69, 372 A.2d 607 (1977) disposes of this groundless contention.

That case involved a court-authorized re-evaluation of the city's property assessments. The City refused to appropriate the necessary funds and said that it could not pay the fees because doing so would violate the statute requiring such an appropriation. The Court noted that the purpose of the statutes "requiring appropriations in advance of expenditures is to foster sound municipal management of finances by prohibiting undisclosed

or irresponsible expenditures." Id. at 610. The Court further stated that by its actions it was insuring that the purpose of the statute was, in fact, adhered to, because the Court was supervising the expenditure, thereby insuring that public funds were not being misused. The Court stated:

> That policy is not subverted by the action here proposed. This is not a case of a municipality undertaking an expenditure not undergirded by an appropriation but rather a municipality refusing to make an expenditure which the law renders mandatory. Moreover, our judicial review of this matter, resulting in the steps we now take to compel compliance with a legislative mandate, affords at least that amount of protection customarily supplied by adherence to the appropriation procedures. Id.

In Warren v. Hudson County, 23 N.J. Misc. 252 (1945), the Court rejected the argument that the town could not pay attorney's fees because no appropriaton was made, on the grounds that the town must then make an emergency appropriation, which the statute allows for. The Court said:

> If plaintiff's claim was not foreseen at the time of the adoption of the budget or if adequate provision was not made in the budget for this purpose, an emergency appropriation might be made after judgment is entered, N.J.S.A. 40:2-31. Whether an emergency appropriation is made or not, the amount will have to be provided in next year's budget (citations omitted). In either event, the lack of an appropriation will not defeat the plaintiff's right of recovery in this suit. Therefore, this separate defense is frivolous and will be stricken. Id. at 257.

The same result was arrived at in the case of In re Salaries Probation Officers Bergen County, 58 N.J. 422 (1971), in which the Court held that the county must pay the salaries of the

Court-appointed probation officers. To avoid violating the statute which says that no payments without a prior appropriation can be made, the Court said that the County could simply make an emergency appropriation that would serve to comply with the statutes.

Based on the intent of the budget statutes to insure sound spending of public tax revenues and the cases cited, the Township of Monroe is required to make an emergency appropriation according to Court order to pay the fees of the Master. In doing so, the Town will not be violating the budget statutes. The Court, by its ruling, has insured that public monies are being properly spent, and the town, by making an emergency appropriation, would be following the correct procedure as required by statute.

It should be noted that in another decision, Essex County Board of Taxation v. City of Newark, 139 N.J. Super. 264, 353 A.2d 535 (1976), the Appellate Division held that if the town did not make the emergency appropriation as required by the Court, then the Court could jail or fine for contempt the recalcitrant public officials. Additionally, as noted earlier, Rule 4:41-2 authorizes a writ of execution to insure payment.

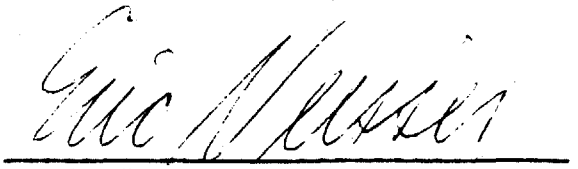
We respectfully request that this Court promptly and forcefully clarify to Monroe Township and its elected officials that they, too, like all other litigants, are subject to the Constitution and the laws of this State.

CONCLUSION

For the reasons stated herein and in the Memorandum of Law in Support of Motion to Dismiss, the respondent Urban League of Greater New Brunswick respectfully requests this Court either to dismiss the appeal or to affirm the Order appealed from.

Dated: October 21, 1985

Respectfully submitted,



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Counsel wish to note the invaluable assistance in the preparation of this Brief of Fran Farber-Walter, Eileen Gavin McKenna, Kathy Hecht, and Steven Hallett, Rutgers Law School, Class of 1987.

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October 22, 1985

Ms. Donna Tarr
Clerk's Office
Superior Court, Appellate Division
CN 006
Hughes Justice Complex
Trenton, NJ 08625

Re: Urban League v. Carteret (Monroe Township)
Docket No. A5394-84T1

Dear Ms. Tarr:

Enclosed please find the original and four copies of the Respondent Urban League's

(1) Motion to Dismiss
(2) Affidavit of Eric Neisser, Esq.
(3) Memorandum of Law in Support of Motion to Dismiss
(4) Brief of Respondent Urban League

and our Affidavit of Service on all participating parties as well as the trial judge and master. Please find enclosed our check for $5.00, as this is our first filing on this appeal.

Please note that I did not file anything in response to respondent Hintz' motion to dismiss, because I never received a copy of it, and was first made aware of it by reading the appendices to his brief on the merits, which I did not receive until October 17, by which time I had already drafted my separate motion to dismiss. I suggest that the two motions could be submitted together to the panel for joint consideration.

Very truly yours,

Eric Neisser

Eric Neisser

encls
cc/All Counsel

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THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants-Appellants	MOTION TO DISMISS

Based on the annexed affidavit of Eric Neisser, Esq. and the Memorandum in Support submitted herewith, the respondent Urban League of Greater New Brunswick moves this Honorable Court to dismiss the above-captioned appeal for lack of jurisdiction.

Dated: October 21, 1985

Respectfully submitted,

Eric Neisser

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vs.	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants-Appellants	AFFIDAVIT OF ERIC NEISSER, ESQ.

STATE OF NEW JERSEY)
: ss.
COUNTY OF ESSEX)

ERIC NEISSER, being duly sworn, deposes and says;

1. I am co-counsel for the Urban League of Greater New Brunswick, plaintiffs below and respondents before this court.
2. The order appealed from was entered in the Superior Court on May 13, 1985.
3. The Notice of Appeal was served on August 7, 1985.
4. No motion to extend the time to file a notice of appeal was filed.
5. No motion for leave to appeal has been filed.
6. No motion for stay of the Order has been filed.

ERIC NEISSER

Sworn to before me this
22 day of October 1985.

Jonathan M Hyman
Attorney at Law
of New Jersey