

memorandum of law in support of
Δ's motion to transfer to COAH

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SUPERIOR COURT OF
 NEW JERSEY
 CHANCERY DIVISION
 MIDDLESEX COUNTY
 Civil Action
 No. C-4122-73

Plaintiff

URBAN LEAGUE OF GREATER
 NEW BRUNSWICK, et al.,
 Plaintiffs,

vs.

Defendant

THE MAYOR AND COUNCIL OF
 THE BOROUGH OF CARTERET,
 et al.,
 Defendants,

vs.

BOROUGH OF SOUTH PLAINFIELD
 BY ITS MAYOR AND COUNCIL,
 et al.,
 Defendants.

LAW DIVISION
 MIDDLESEX COUNTY
 No. 56349-81

Docket No. C-4122-73

CIVIL ACTION

MEMORANDUM OF LAW IN
 SUPPORT OF DEFENDANT'S
 MOTION TO TRANSFER
 ACTION TO COUNCIL ON
 AFFORDABLE HOUSING

Defendant, Borough of South Plainfield, moves to request the Court's permission to transfer the action as against it to the Council on Affordable Housing. Defendant, Borough of South Plainfield, also requests that the Court dissolve the restraints as to the issuance of building permits, site plan and subdivision approvals and consummating land sale or

exchanges of Borough owned lands, all said items as they pertain to non-Mount Laurel inventoried lands.

The legislation just enacted and entitled "Fair Housing Act" provides the basis for the defendant's requested relief:

"16. For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation. If the municipality fails to file a housing element and fair share plan with the council within five months from the date of transfer, or promulgation of criteria and guidelines by the council pursuant to section 7 of this act, whichever occurs later, jurisdiction shall revert to the court."

FAIR HOUSING ACT

Section 16

Senate Bills 2046 & 2334

and

Section 9, FAIR HOUSING ACT, supra

"9.a. Within four months after the effective date of this act, each municipality which so elects shall, by a duly adopted resolution of participation, notify the council of its intent to submit to the council its fair share housing plan. Within five months after the council's adoption of its criteria and guidelines, the municipality shall prepare and file with the

council a housing element, based on the council's criteria and guidelines, and any fair share housing ordinance introduced and given first reading and second reading in a hearing pursuant to R.S. 40:40-2 which implements the housing element.

b. A municipality which does not notify the council of its participation within four months may do so at any time thereafter. In any exclusionary zoning litigation instituted against such a municipality, however, there shall be no exhaustion of administrative remedy requirements pursuant to section 16 of this act unless the municipality also files its fair share plan and housing element with the council prior to the institution of the litigation."

This Court has stated, as indeed it must, that "rezoning under Mount Laurel II doesn't prejudice the town's right to appeal...seeing that the legislature acts as it should act so the courts don't have to..." Transcript pp 10-11, Hearing of November 2, 1984 before Hon. Eugene D. Serpentelli.

The legislature has acted. It has provided a mechanism whereby the defendant Borough of South Plainfield can have its fair share numbers determined not by court appointed masters and experts, but by the Council on Affordable Housing.

The procedure and requested Order to Transfer on behalf of the defendant Borough of South Plainfield is hence in perfect harmony with what this Court has said and with what the New Jersey Supreme Court has said in Mount Laurel II, e.g., "We agree that the matter is better left with the legislature...We note that

there has been some legislative initiative in this field. We look forward to more." So. Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158(1983)@212.

The legislature has now established the mechanisms whereby "every municipality in a growth area...can provide through its land use regulations, a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families."

Those mechanisms which satisfy the constitutional obligations established by Mount Laurel II are adequately set forth in the "Fair Housing Act", the legislature declaring "the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation..." FAIR HOUSING ACT, Legislative Findings (emphasis added).

While the term "builder's remedy" is used in the Act, it is not defined therein. Hence, it is submitted that the Act was not intended to apply only to "builder's remedy" types of exclusionary zoning suits, but to any exclusionary zoning suit such as the instant case before the Court in which a final judgement has not been entered.

For purposes of the Act, "final judgement" is defined to mean a judgement subject to an appeal as of right for which all right to appeal is exhausted.

The judgement as to defendant Borough of South Plainfield entered by the Court on May 22, 1984 contained no right to appeal, indeed Mount Laurel II precluded any and all

interlocutory appeals. "Mount Laurel II", 92 N.J. 158(1983) at pp 290-291.

Finally, the test to be employed by the Court in acting upon this defendant's request to transfer is also set forth in Section 16 of the "Act".

"In determining whether or not to transfer, the Court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation."

It is respectfully submitted that the refusal to permit the requested transfer would be the "manifest injustice" for all of the above set for reasons and the reasons contained in the Certification of defendant's attorney.

The additional relief requested by this defendant comprises the dissolving of the restraints prohibiting the Borough of South Plainfield and its boards, agencies and officials from issuing building permits, site plan and subdivision approvals, consummating the finalization of land sale transactions involving Borough owned land. It is submitted that pending the "substantive certification" by the Council on Affordable Housing of the Borough's housing element that, restraining non-Mount Laurel II lands from development would be improper under all doctrines of equity and fairness to the property owners of the Borough not directly affected by the Court orders Mount Laurel II inventoried lands.

N.M. BERT
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Hence, for all of the aforesaid reasons, the Court is respectfully requested to grant this defendant the relief herein sought.

Frank Santoro
FRANK A. SANTORO
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Borough of South Plainfield

Dated: July 18, 1985