UL v. Carbert,

20-Dec-84

Brief in Support of Motion for Leave to Appeal an Interlocutory Order and for Stay of Enforcement Pending Appeal

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BNote: Duplicate of CA000787G but has Appendix

CA 002273B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	
Plaintiff/Appellee,	Civil Action
vs.	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTARET, et al.,	Sat Below: Hon. Eugene Serpentelli
Defendant/Appellant.	

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL AN INTERLOCUTORY ORDER AND FOR STAY OF ENFORCEMENT PENDING APPEAL

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Defendant/Appellant,
TOWNSHIP OF PISCATAWAY
17 Academy Street
Newark, New Jersey 07102
(201) 623-3600

Phillip Lewis Paley, Esq.,
On the Brief

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APPENDIX

TABLE OF CITATIONS

STATEMENT OF FACTS AND PROCEDURAL HISTORY

During November, 1984, plaintiff/respondent Urban League (now "Civic League") of Greater New Brunswick filed a Notice of Motion for Temporary Restraining Order and Interlocutory Injunction with the Superior Court of New Jersey, Chancery Division (Middlesex/Ocean County) (A1) seeking to enjoin Piscataway from taking any action with respect to any site within its borders designated as "suitable" for Mount Laurel development by the court-appointed expert, Carla Lerman. Together therewith, the Civic League filed a Memorandum in Support of Motion for Temporary Restraining Order and Interlocutory Injunction (A3) and an Affidavit in Support of Motion for Temporary Restraining Order and Interlocutory Injunction of Barbara J. Williams (A10). Thereafter, Piscataway filed a Memorandum in Opposition to Motion for Temporary Restraining Order and Interlocutory Injunction. (A17). Oral argument was thereafter entertained by the trial court.

On December 11, 1984, following the filing of objections to the form of Order submitted (A24),the court below issued an interlocutory order (A32) for temporary restraints and a preliminary injunction providing, among other things, that Piscataway and any of its official bodies, officers or agents may not (a) approve for development any site within the Township of Piscataway designated as "suitable" for Mount Laurel development in the report of

court-appointed expert Carla Lerman, or (b) issue any building permit with respect to any such site, pending a hearing on the aforesaid expert's report.

On December 14, 1984, the Township of Piscataway made a telephone request for stay of enforcement of the aforesaid order pending appeal, which request was denied in an Order dated December 17, 1984. (A35).

POINT I

LEAVE TO APPEAL AN INTERLOCUTORY ORDER FOR TEMPORARY RESTRAINTS AND A PRELIMINARY INJUNCTION SHOULD BE GRANTED IN FURTHERANCE OF THE "INTERESTS OF JUSTICE"

Rule 2:2-4 provides that the Appellat may grant leave, in the "interests of justice", from an interlocutory order where the order, if f: be appealable as of right. The subject order final, be appealable as of right under Rule 2:2 final judgment of a trial division of the Supe: and is therefore an order from which leave to ap granted interlocutorily.

Leave to appeal the within order shoul in furtherance of the interests of justice. Our long recognized that "there is no power, the which requires greater caution, deliberatio: discretion, and which is more dangerous in a do than the issuing of an injunction." Benton v. N.J. Eq. 343, 346 (E&A, 1939).

The potentially harsh effects of relief, and the irreparable harm that may re unwarranted injunction, distinguish it from ot interlocutory orders. In view of this, our cou rules have historically singled out interlo with respect to injunctions as calling for gre

lity in terms of whether or not leave to appeal should be granted. See, generally, In re Appeal of Pennsylvania Railroad Co., 20 N.J. 398, 404-409 (1956).

In any matter where leave to appeal an interlocutory order is sought, the court will strike a balance between (a) the inconvenience and expense of piecemeal review and the public interest in favor of complete trials, and (b) "the dangers of individual injustices which may result from the denial of any appellate review until after final judgment at the trial level." Id. at p. 404.

As the Appellate Division stated in Romano v. Maglio, 41 N.J. Super. 561, 567-568 (App. Div., 1956):

> "We will not grant leave to appeal in order to correct minor injustices, such as those commonly attendant on orders erroneously granting or denying interrogatories or discovery. Redress for such grievances can be had only through an appeal from the final judgment, providing the judgment results from the interlocutory orders complained of. [Citation omitted]. However, we may grant leave to appeal where some grave damage or injustice may be caused by the order below, such as may occur when the trial court grants, continues, modifies, refuses or dissolves an injunction ..." (emphasis added).

Unlike orders with respect to discovery, or orders addressing an incidental legal question that arose during the course of trial, an order providing for temporary restraints and an interlocutory injunction imposes a remedy

in a very practical sense. Moreover, it does so before the taking of testimony has been concluded and before the factual information needed as a basis for conclusions of fact and law and determination of the respective rights and obligations of the parties has been made available to the court. Because a remedy is imposed before the facts are known, the availability of appellate review is especially crucial.

As is pointed out in Piscataway's Memorandum in Opposition to Motion for Temporary Restraining Order and Interlocutory Injunction, (A17), on which Piscataway relies as a part of its argument herein, the remedy sought by the Civic League and imposed by the court below, is in the nature of a blanket prior restraint against any action on the part of Piscataway in connection with applications to develop certain parcels of land within its borders. Piscataway has, in effect, been estopped from exercising one of its primary municipal functions - the power to regulate land use - to its detriment and that of its 43,500 residents, before the trial court has rendered any decision as to the invalidity of its zoning.

The harsh effect of the remedy imposed below on the rights of Piscataway, and on the rights of its residents, without benefit of a hearing, make the instant case one in which "the dangers of individual injustices which may result from the denial of any appellate review until after final judgment at the trial level" (20 N.J. at p. 404) far outweigh any public interest in favor of complete trials.

POINT II

ENFORCEMENT OF THE ORDER BELOW SHOULD BE STAYED PENDING APPEAL TO PREVENT IRREPARABLE HARM TO PISCATAWAY

Rule 2:9-5 permits an appellate court to stay the enforcement of an order of the trial court pending appeal. Such a stay should be granted when necessary to preserve the status quo pending outcome of the litigation, and where there is no showing that the other party to the action will suffer exceptional hardship. See, e.g., Tracy v. Tracy, 140 N.J. Eq. 496, 502 (E&A, 1947).

The temporary restraints and interlocutory injunction ordered by the court below leave Piscataway powerless to perform its normal governmental functions, and deprive it of its right to regulate land use within its borders. Moreover, there are no means by which Piscataway can be compensated for the loss of its rights in the event it ultimately prevails on appeal.

The Civic League, on the other hand, will suffer no harm whatsoever if enforcement of the order below is stayed. As Piscataway's Memorandum in Opposition to Motion for Temporary Restraining Order and Interlocutory Injunction points out, (A17), (and on which Memorandum Piscataway relies as part of its argument herein), the Civic League is not in need of broad injunctive relief in any event. Under a system previously established by the trial court and in effect until entry of the order from which leave to appeal

is being sought, Piscataway was required to notify the Civic League when any application for a site designated as "suitable" for Mount Laurel development was scheduled for discussion, and to provide the Civic League with an opportunity to act to protect its interest. Piscataway has complied fully with this obligation. Moreover, any approval granted by Piscataway with respect to development of any such site would not be effective against the Civic League pending outcome of the litigation.

The system of case-by-case scrutiny previously devised by the court below provides ample protection for the rights of the Civic League. Staying enforcement of the temporary restraining order and interlocutory injunction, and reinstating the system of case-by-case review, certainly will not cause harm to the Civic League pending appeal, and will insure that the rights of Piscataway and its residents and taxpayers do not suffer irreparable harm by having virtually every parcel of vacant property within its borders deemed suitable for higher-density residential development restrained as though a final judgment had been entered.

The reviewing court should be aware that, pursuant to the "consensus methodology" adopted by the trial court in AMG, et cet., v. Township of Warren, (unreported insofar as counsel is aware), a Mt. Laurel case, Piscataway's fair

share number is 4,200 units affordable by households of low and moderate income. Piscataway's total vacant land approximates 1,900 acres. The Civic League asserts that no more than 1,100 of these are suitable for Mt. Laurel development. Piscataway has presented credible evidence to support its entitlement to substantial credits against this fair share number, including, but not limited to, the existence of approximately 1,200 single-family homes affordable by low income families, the existence of approximately 2,600 garden apartments affordable by moderate income families; the existence of 348 family housing units owned by Rutgers, the State University, affordable by low income families (and conceded to be a credit against Piscataway's fair share number the Civic League's expert witness, Alan Mallech); the existence of some 1,700 dormitory rooms on the Busch and Livingston campus of Rutgers, the State University; and the existence of hundreds of single student apartments owned by Rutgers and occupied by students of low and moderate income.* Therefore, if it is probable, arguably, that Piscataway's fair share number may be substantially lower than that which is produced prima facie by the application of the fair share methodology, following the

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* As well as, of course, some 400 acres previously zoned for high-density residential development, all of which are recommended for such developers by the court's experts.

Court's consideration of these factors. This situation suggests that the trial court's blanket restraints are doubly inappropriate, where Piscataway's fair share might well be met by the use of substantially less than the totality of its developable vacant land.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the relief sought by defendant/appellant be granted.

Respectfully submitted,

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Defendant/Appellant,
TOWNSHIP OF PISCATAWAY

By _____
Phillip Lewis Paley

Dated: December 20, 1984

BARBARA J. WILLIAMS, ESQ.
Rutgers Constitutional Litigation Clinic
15 Washington St., Newark, N.J. 07102
201/648-5687

BRUCE S. GELBER, ESQ.
National Committee Against Discrimination in Housing
733 - 15th St. NW, Suite 1026
Washington, D. C. 20005

ATTORNEYS FOR PLAINTIFFS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	Civil Action C 4122-73
	MOTION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION

PLEASE TAKE NOTICE that on 11/14/84 at 9:00 A.M., or as soon thereafter as counsel may be heard, plaintiffs in this action will move for an Order restraining the Township of Piscataway Council, Planning Board, and Zoning Board of Adjustment from approving any application or taking any other action, with respect to any vacant site which is identified on the Vacant Land Inventory (attached as Exhibit A) and which has been identified as being "satisfactory" for Mt. Laurel development in the preliminary report of the court-appointed expert, Carla Lerman, P.P., which would permit development of any site for any use that does not require a minimum 20% set aside of low and moderate income housing consistent with Mt. Laurel II,

92 N.J. 158 (1983).

PLEASE TAKE FURTHER NOTICE that plaintiffs will also move for an Order directing the Township of Piscataway Council, Planning Board and Zoning Board of Adjustment, upon receipt of any application with respect to any site identified in paragraph 1 above, or upon learning of plans to submit such an application, to notify the applicant or property owner of the existence of this Order, and of the landowner's right to move upon short notice to all parties that for good cause shown, restraints be vacated as to their property[ies].

Dated: November 7, 1984

BARBARA J. WILLIAMS
ATTORNEY FOR PLAINTIFFS

BARBARA WILLIAMS, ESQ.
JOHN PAYNE, ESQ.
Constitutional Litigation Clinic
Rutgers Law School
15 Washington, St., Newark, N. J. 07102
201/648-5687

BRUCE S. GELBER, ESQ.
National Committee Against
Discrimination in Housing
733 - 15th Street, N.W., Suite 1026
Washington, D. C. 20005
202/783-8150

ATTORNEYS FOR PLAINTIFFS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-MIDDLESEX/
OCEAN COUNTIES

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, et al.,

Plaintiffs,

vs.

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

Defendants.

Docket No. C 4122-73

MEMORANDUM IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER
AND INTERLOCUTORY INJUNCTION

In this motion, the Urban League plaintiffs seek to preserve their opportunity for adequate and appropriate relief against the defendant Township of Piscataway, by restraining the Township's Planning Board from taking action that might irrevocably divert vacant and developable land in the township to non-Mount Laurel purposes. Such action is threatened as early as September 12, 1984, when the Planning Board is scheduled to hear Reidhal, Inc.'s applications for preliminary and final subdivision approval.

Application of the methodology adopted by this Court in AMG Realty Company, et. al. v. Township of Warren, Docket Nos. L-23277-80 PW and L-67820-80 PW (July 16, 1984) and in its Letter Opinion in this case dated July 27, 1984 yields a fair share obligation for Piscataway Township for the decade 1980 to 1990 that is in excess of 3,800 units of low and moderate income housing. Affidavit of Bruce Gelber, ¶ 3. It is evident, as the Township has repeatedly argued, that there is insufficient vacant and developable land in Piscataway to completely satisfy an obligation of this magnitude. Lerman Report, p.2; Affidavit of Alan Mallach, ¶ 4.

Notwithstanding these facts, the township has undergone substantial growth in the recent past, and continues to experience substantial growth at this time. None of this growth has provided low and moderate income housing opportunities; indeed, by concentrating on commercial and office structures, it has served to exacerbate the need for affordable housing in the township. See Affidavit of Alan

Mallach, ¶ 5. The township's growth policy, which has required the active participation of the governing body and the planning board, vividly demonstrates Piscataway's insensitivity to its Mount Laurel obligation.

The Planning Board of the Township of Piscataway now has before it applications for preliminary and final subdivision approval that would permit construction of single family residences on one-quarter acre lots with no provision for the set aside of low or moderate income housing. Affidavit of Bruce Gelber, ¶¶ 6-8. The Planning Board has scheduled a public hearing on these applications for September 12, 1984, and could act upon the applications at that time.

The Urban League plaintiffs submit that approval of the pending applications will cause it irreparable harm. They therefore ask the Court to restrain all action with respect to these applications, pending completion of the Urban League trial, that would make this parcel unavailable for rezoning as part of a remedy in this case.

The familiar standard which plaintiffs must meet in order to obtain temporary relief was recently restated by the Supreme Court in Crowe v. DeGioia, 90 N.J. 126, 447 A.2d 173 (1982). Plaintiffs must show: (1) a valid legal theory and a "reasonable probability of ultimate success on the merits," id. at 133; (2) irreparable harm, not adequately redressable by money damages; and (3) a relatively greater harm to the plaintiff if relief is denied than to the defendant if relief is granted.

Plaintiffs amply meet this test.

Probability of success. In light of the Supreme Court's decision in Mount Laurel II, 92 N.J. 158 (1983), and this Court's rulings in AMG Realty Company, et. al. v. Township of Warren and this case, it goes without saying that plaintiffs' Mount Laurel theory is legally valid. It is also virtually certain that plaintiffs will prevail on the merits and that Piscataway's zoning ordinance will be found to be in non-compliance with Mount Laurel II. At trial, the township conceded that its zoning ordinance does not provide for a mandatory set aside of lower income housing. In addition, the township acknowledged that, even if its voluntary density bonus provision were fully utilized, it would result in the development of only 462 units of Mount Laurel housing. Because the fair share number for Piscataway resulting from the AMG methodology is in excess of 3800 units, even if that number were reduced to account for "credits" sought by the township, it would still greatly exceed the number of lower income units that may be developed under Piscataway's existing ordinance.

Irreparable harm. Given the probable size of Piscataway's fair share number and the limited amount of vacant and developable land in the township, it is obvious that any action that removes otherwise suitable land from the remedial reach of the Court and its master in the compliance phase of this proceeding will undermine the Urban League plaintiffs' ability to achieve complete relief. In addition, alternative money damages are wholly inappropriate

in a case of this nature.

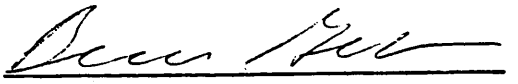
Approval of the pending applications will for all practical purposes make these parcels unavailable for development of Mount Laurel housing. Under N.J.S.A. 40:55D-49(a), a developer's right to an approved "use" becomes vested upon preliminary approval, thus precluding a rezoning from commercial to residential or from single-family to multi-family uses. It also would presumably preclude any revision of the approval to include low and moderate income housing as a component of the proposed development. Although the statute refers to "general terms and conditions," this language has been interpreted to mean any basic or fundamental aspect of the project for which preliminary approval is granted. See Hilton Acres v. Klein, 64 N.J. Super. 281, 165 A.2d 819 (App. Div., 1960), aff'd, 35 N.J. 570, 174 A.2d 465 (1961). Although there is no case law directly in point, whether a proposed development is a Mount Laurel or non-Mount Laurel one would seem to fit within the Hilton Acres concept of a "basic" or "fundamental" aspect of the developer's thinking, and therefore would come within the reach of N.J.S.A. 40:55D-49(a).

Balancing of harms. The defendants, as public bodies, would suffer little, if any, harm should temporary relief be granted, since their role is that of a regulator rather than a principal. Indeed, the absence of prejudice to the township is especially evident here, since the temporary

restraint sought by plaintiffs allows the Planning Board to continue to process and approve the applications, subject only to the plaintiffs' right to request rezoning of the tract as part of the remedy in this case.

Assuming that the developer-applicant is entitled to have its interests considered in the balance, the balance still remains overwhelmingly in the plaintiffs' favor. As a matter of law, the applicant is not entitled to approval simply because its applications are complete and pending; the applications could be disapproved by the planning board on grounds unrelated to the present action. More importantly, however, except for the issues of site suitability and appropriate densities, trial in this action has been completed and the temporary restraints are likely to last at most for a couple of months until a decision is rendered. Plaintiffs thus submit that they fall amply within the requirements of Crowe, having shown a probability of success on the merits, irreparable harm, and a balancing of interest that is overwhelming in their direction. Accordingly, plaintiffs respectfully move for entry of a temporary restraining order regarding the processing and possible approval of the Reidhal, Inc. applications.

Respectfully submitted:



BARBARA WILLIAMS, ESQ.
JOHN PAYNE, ESQ.
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, N. J. 07102
201/648-5687

BRUCE S. GELBER, ESQ.
National Committee Against Discrimination in Housing
733 - 15th Street, N.W.
Suite 1026
Washington, D. C. 20005
202/783-8150

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BARBARA J. WILLIAMS, ESQ.
Rutgers Constitutional Litigation Clinic
15 Washington St., Newark, N.J. 07102
201/648-5687

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National Committee Against Discrimination in Housing
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URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	Civil Action C 4122-73

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION

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

BARBARA J. WILLIAMS, of full age, being duly sworn according to law, on oath deposes and says:

1. I am the attorney for plaintiffs in the above-referenced matter.

2. Pending consideration of the vacant land question in Piscataway, the Township, as the Court is aware, has continued to consider and approve applications on properties that appear to be suitable for Mt. Laurel development.

3. On or about October 24, 1984, developer Lackland Brothers, Inc. petitioned the Site Plan/Subdivision Committee of the

Piscataway Planning Board for preliminary approval of a subdivision application of seventeen (17) lots located on Hillside Avenue in Piscataway Township. The lots at issue, Site #76, are identified on the Township Tax map as Block 561, Lots 11-15 and 18-21, and Block 564, Lots 29-38, currently zoned as R-10. (The Piscataway Planning Board Site Plan/Subdivision Committee Meeting Agenda of October 24, 1984 is annexed hereto as Exhibit C.)

4. As indicated on the agenda of October 24, 1984 (Item 11), the goal of Lackland Brothers is to construct single family dwellings on the property at issue.

5. I have been informed that the application for preliminary approval was accepted by the Site Plan/Subdivision Committee and scheduled to be heard on November 14, 1984 at 8:00 PM at the regularly scheduled meeting of the Piscataway Planning Board, and may be acted upon at that time.

6. According to the Court-appointed expert, Carla Lerman, P.P., this site is "satisfactory" for Mt. Laurel development, and represents a good "infill" site. I have been advised by plaintiffs' expert, Alan Mallach, that this site can be developed with no negative impact on the existing character of the surrounding area. A conventional single-family subdivision of this site, such as the one proposed by developer Lackland Brothers, Inc., would eliminate a suitable site from consideration toward meeting Piscataway's fair share obligation. Site #76 is representative of a large number of "infill" sites, especially in the western part

of Piscataway. Despite its small acreage (approximately 3 acres), sites of this general size and character are uniquely suitable for medium townhouse clusters. Additional benefits in constructing townhouses are efficiency and economic incentives.

7. If the application for Site #76 is approved, it will create for the applicant substantial vested rights in the terms and conditions of the approval and may preclude rezoning of the tract for residential use as part of a remedy in this case.

8. On or about October 24, 1984, developer New Castle Builders, Inc. appeared before the Site Plan/Subdivision Committee of the Piscataway Planning Board, seeking a reclassification as a minor subdivision to subdivide property located on Morris Avenue into two (2) lots. The property, Site #44, is designated on the Township Tax map as Block 745, Lots, 3, 4C, 4E and 4. These lots are currently zoned as R-15 and R-15A, and amount to a 20.97-acre parcel of land. (Exhibit C, supra).

9. I have been advised that the developer plans to prepare preliminary and final site plan applications providing for development of luxury condominiums, without any set aside for Mt. Laurel housing.

10. Site #44 is located adjacent to two cemeteries and directly across from an area zoned for planned residential development, with a set-aside density bonus for Mt. Laurel units.

11. If the application for Site #44 is approved, it will create for the applicant substantial vested rights in the terms

and conditions of the approval and may preclude rezoning of the tract for residential use as part of a remedy in this case.

12. Because the Township of Piscataway has proceeded to receive and approve applications, despite the constraints imposed by the lack of vacant land elsewhere in the Township as identified by the Court-appointed expert, Carla Lerman, P.P., that would be appropriate to meet the Township fair share obligation, plaintiffs continue to be placed in a position of suffering irreparable injury.

13. Any action regarding the vacant land in Piscataway reduces the amount of land available for satisfaction of Piscataway's fair share.

14. The existing situation as to the Lackland Brothers, Inc. and New Castle Builders, Inc. sites is further evidence of the irreparable injury that plaintiffs will suffer if denied injunctive relief.

15. Because it is clear that there is insufficient vacant developable land in Piscataway to meet Piscataway's fair share obligation, it is essential that the Township of Piscataway Council, Planning Board and Zoning Board of Adjustment take no further action that might limit the availability of such land for these purposes.

BARBARA J. WILLIAMS

SWORN TO and SUBSCRIBED
before me this 7 day
of November, 1984.

Attorney at Law, State of New Jersey

AGENDA
PISCATAWAY PLANNING BOARD
SITE PLAN/SUBDIVISION COMMITTEE MEETING
WEDNESDAY, OCTOBER 24, 1984 — 2:30 P.M.

1. CALL TO ORDER.
2. OPEN PUBLIC MEETINGS NOTICE.
3. ROLL CALL.

4. 84-PB-129 RANDOLPH JAHR CONSTRUCTION (CLASSIFICATION)
5. 84-PB-130V 49 Carlton Club Drive (VARIANCE)
6. 84-PB-131V Piscataway, New Jersey 08854 (VARIANCE)
BLOCK 804, LOT 18, ZONE R-10
Subdivide into two lots on the corner of Fisher Avenue and Deerfield Avenue to construct houses for sale.

VARIANCES: Both lots have insufficient area and insufficient width; required is 10,000 square feet and 100 feet; proposed is 7500 square feet and 75 feet.

Ruled complete September 14, 1984.
Action to be taken prior to January 12, 1985.

Requires Middlesex County Planning Board review.
Requires owners authorization.
Requires affidavits of publication and service.

Attorney: Peter Lederman

Application was scheduled for a hearing on October 10, 1984. Applicant asked that this be carried to the November 14, 1984 meeting as the contract was not signed between the parties.

7. 84-PB-134 JOHN F. KASAR & NANCY F. KASAR (CLASSIFICATION)
36 Parkside Avenue
Piscataway, New Jersey 08854
BLOCK 151, LOTS 1-7, ZONE R-7.5
Subdivide into two lots for future development on Parkside Avenue.

Ruled complete October 17, 1984.
Action to be taken prior to December 1, 1984.

Requires up to date proof of tax payment.

*This is a duplicate of a approval granted on Application No. 83-PB-17 on March 28, 1983. Applicant did not record the deed in time.

Attorney: John Lore

EXHIBIT C

8. 84-PB-135 JOHN KASAR AND NANCY KASAR (CLASSIFICATION)
36 Parkside Avenue
Piscataway, New Jersey 0884
BLOCK 155, LOTS 1-8, ZONE R-7.5
Subdivide into two lots to construct houses for on Parkside Avenue.

Ruled complete October 17, 1984.
Action to be taken prior to December 1, 1984.

Requires up to date proof of tax payment.

*This is a duplicate of Application No. 83-PB-16 which was approved March 28, 1983. Applicant did not record the deed in time.

Attorney: John Lore

9. 84-PB-139 FRANK AND TERESA LEE (CLASSIFICATION)
18 Third Avenue
Piscataway, New Jersey 08854
BLOCK 452, LOTS 91 TO 102, ZONE R-10
Subdivide into two lots to sell one lot on Stratton Street South.

Ruled complete October 15, 1984.
Action to be taken prior to November 29, 1984.

Requires proof of tax payment.
Requires Middlesex County Planning Board approval.

10. 84-PB-140 KENNETH MERIN ASSOCIATES (FINAL SITE PLAN)
95 Madison Avenue
Morristown, N.J. 07960
BLOCK 460, LOT 8-1, ZONE M-5.
Construction of 20,874 square foot office building on Old New Brunswick Road.

Preliminary approval was granted September 12, 1984 subject to certain conditions (See attached resolution).

Ruled complete October 15, 1984.
Action to be taken prior to November 29, 1984.

Requires Middlesex County Planning Board approval.
Requires up to date proof of tax payment.

11. 84-PB-141 LACKLAND BROS., INC. (PRELIMINARY SUBDIVISION)
400 North Avenue
Dunellen, New Jersey 08812
BLOCK 561, LOTS 11 - 15 AND 18-21,
BLOCK 564, LOTS 29 TO 38, ZONE R-10.
Subdivide into seventeen lots on Hillside Avenue to construct single family dwellings.

Determination of completeness pending receipt of checklist.

Requires up to date proof of tax payment.
Requires affidavits of publication and of service.
Requires Middlesex County Planning Board approval.
Requires proof of ownership or contract purchaser.

12. 84-PB-142 LACKLAND BROS., INC. (CLASSIFICATION)
400 North Avenue
Dunellen, New Jersey 08812
BLOCK 359, LOT 1A, ZONE R-10
Classification to subdivide into four lots on Myrtle Avenue.

Requires proof of tax payment.
Requires proof of ownership.

13. 84-PB-143 NEW CASTLE BUILDERS, INC. (RE-CLASSIFICATION)
4 Redbud Road
Piscataway, New Jersey 08854
BLOCK 745, LOTS 3, 4C, 4E, 4, ZONE R-15, R-15A
Subdivide into two lots on Morris Avenue to Construct condominimums for sale.

14. ADJOURNMENT.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-MIDDLESEX/OCEAN COUNTIES

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

vs.

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

Defendants.

Docket No. C-4122-73

MEMORANDUM IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Defendant
TOWNSHIP OF PISCATAWAY
17 Academy Street
Newark, New Jersey 07102
(201) 623-3600

PHILLIP LEWIS PALEY, ESQ.
On the Brief

This memorandum is submitted in opposition to plaintiff's motion seeking temporary restraints and an interlocutory injunction against the Township of Piscataway Council, Planning Board, and Zoning Board of Adjustment (collectively "Defendant").

As a preliminary matter, it is noted that contrary to the requirements of Rules 4:52-1(c) and 4:52-2, plaintiff has failed to submit a brief in support of its motion. The memorandum of law attached to plaintiff's motion is one previously submitted by plaintiff in connection with a motion for temporary restraints and interlocutory injunctive relief with respect to specific parcels of land in Piscataway which were identified as "satisfactory" for Mount Laurel development in the preliminary report of the court-appointed expert, Carla Lerman, P.P.; it fails to offer any explanation of why the far broader relief sought by plaintiff in its current motion, i.e. restraints with respect to all parcels declared "satisfactory" for Mount Laurel development, should be granted. Nor does the Affidavit of Barbara J. Williams in support of plaintiff's motion shed any light on the need for the blanket relief sought; it merely focuses on two specific parcels - Sites #44 and 76 - and fails to state any factual or legal basis for restraints with respect to all "satisfactory" parcels.

In order to be entitled to the relief sought, plaintiff must establish, among other things, (a) that if relief is not granted plaintiff will suffer irreparable harm, not adequately redressable by money damages, and (b) failure to grant the relief sought will result in greter harm to plaintiff than a grant of relief will cause to defendant. Crowe v. De Gioia, 90 N.J. 126 (1982). Plaintiff has failed to demonstrate that either of these criteria exist.

First, through its previous orders, this Court has already established a system to protect plaintiff's rights with respect to "satisfactory" parcels of undeveloped land in Piscataway. That system, currently in use, operates on a case by case basis. It permits developers to obtain all necessary approvals in connection with a proposed construction project, but renders those approvals ineffective against plaintiff pending outcome of this litigation. The present system also requires defendant to notify plaintiff when applications with respect to "satisfactory" sites are scheduled for discussion, thereby providing plaintiff an opportunity to take whatever action it deems necessary to protect its interests.

Plaintiff now asks this Court to enjoin defendant from taking any action with respect to any site pronounced "satisfactory" by Carla Lerman, P.P. in her preliminary

report, despite the fact that testimony has not yet been given and a hearing has not been held. Plaintiff also asks this Court to shift the burden of proof to applicant - developers to show cause why the proposed restraints should be lifted.

The extraordinary relief sought by plaintiff is unwarranted. Plaintiff is adequately protected against "irreparable harm" by the system previously devised by this Court and currently in effect, and plaintiff has failed to demonstrate otherwise. In fact, the moving papers submitted by plaintiff illustrate the effectiveness of the present system: plaintiff received adequate notice of the applications with respect to Sites #44 and 76 referred to in the Affidavit of Barbara J. Williams and has had an opportunity to protect its interests in connection therewith. Given the requirements of the present system - notice by defendant and scrutiny by plaintiff - there is little or no risk that plaintiff will suffer "irreparable harm" as long as it takes the steps legally available to it to protect its rights on a case by case basis.

Plaintiff has also failed to demonstrate that the "balance of harm" resulting from a grant or denial of relief tips in its favor. The ability to regulate land use has traditionally been vested in the several municipalities of this State. (See N.J.S.A. 40:55-D-62 and New Jersey Con-

stitution Article IV, Section 6, Paragraph 2). In its exercise of that power, the municipality acts as the voice of its residents and as a representative of the public interest. In that sense, it is a principal, not only a mere regulator. When the power of a municipality to regulate land use is curtailed, its rights as well as the rights of its residents, are impaired. While not directly monetary in nature, the rights of the 43,500 residents of Piscataway and their municipal government representatives are significant and should not be down-played in the manner attempted by plaintiff.

Plaintiff, on the other hand, stands to suffer no harm at all if the relief requested is denied. Under the present system plaintiff is entitled to notice and an opportunity to scrutinize and be heard with respect to any application presented to defendant. Denial of the relief requested will not jeopardize plaintiff's said rights; a grant of the relief requested will leave defendant powerless to perform its functions.

Moreover, the even-handedness of the present system is endorsed in plaintiff's Memorandum of Law. There, in support of its argument that a temporary restraint with respect to specific parcels would not prejudice defendant, plaintiff (at pages 5-6) emphasized the fact that "the restraint sought by plaintiffs allows the Planning Board to

continue to process and approve the applications, subject only to the plaintiff's right to request rezoning of the tract as part of the remedy in this case." If the relief sought by plaintiff in the subject motion were granted, defendant would be stayed from taking any action on applications, and would indeed be prejudiced.

Our courts have long recognized that great care must be exercised in considering applications for injunctive relief. As our Supreme Court stated in N.J. State Bar Assn. v. Northern N.J. Mortgage Associates, 22 N.J. 184, 194 (1956)

> "An injunction is an extraordinary equitable remedy utilized primarily to forbid and prevent irreparable injury. It must be administered with sound discretion and always upon the considerations of justice, equity, and morality evolved by the given case. Canada Realty Co. v. Carteret, 136 N.J. Eq. 550, 556 (Ch. 1945). No court of equity will exercise its power to grant injunctive relief merely upon a showing that the party proceeded against is commiting or is intending to commit an unlawful or improper act. To obtain equitable cognizance there must be imminence of irreparable damage to the property or rights of the plaintiff..."

It has also been widely acknowledged that "there is no power, the exercise of which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction." Benton v. Kerman, 126 N.J. Eq. 343, 346 (E&A, 1939).

The relief sought by plaintiff is indeed extraordinary. It is in the nature of a blanket prior restraint against any action on the part of defendant in connection with applications to develop certain parcels of land within the Township of Piscataway. The severity of the requested restraint vis-a-vis defendant is not justified by any imminent or irreparable harm to plaintiff. In fact, plaintiff has failed to demonstrate that any harm whatsoever will come to it if the requested relief is not granted. Plaintiff is amply protected by the present system of case-by-case scrutiny.

For the foregoing reasons, it is respectfully requested that the relief sought by plaintiff be denied.

Respectfully submitted,

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Defendant
TOWNSHIP OF PISCATAWAY

By _____
PHILLIP LEWIS PALEY

KIRSTEN, FRIEDMAN & CHERIN
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
17 ACADEMY STREET
NEWARK, N. J. 07102
(201) 623-3600

RICHARD E. CHERIN*
HAROLD FRIEDMAN
JACK B. KIRSTEN*
PHILLIP LEWIS PALEY*◊
EDWIN H. STIER
DENNIS C. LINKEN

JOSEPH HARRISON (1930-1976)
MILTON LOWENSTEIN
OF COUNSEL

MARGARET E. ZALESKI
GERARD K. FRECH*
JOHN K. ENRIGHT
SHARON MALONEY-SARLE
LIONEL J. FRANK

*MEMBER N.J. & N.Y. BARS
◊MEMBER D.C. BAR

November 27, 1984

Honorable Eugene Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
Toms River, New Jersey 08754

Re: Urban League of Greater New Brunswick
vs. Township of Piscataway et al.

My dear Judge Serpentelli:

This office, representing the Township of Piscataway in the above-captioned matter, is in receipt of a form of Order prepared by Barbara Williams, Esq., representing the Plaintiff Urban League (now Civic League) of Greater New Brunswick. Pursuant to the Rules of Court, the Defendant Township of Piscataway hereby objects to the form of Order submitted for the following specific reasons:

A. As to the first ordering paragraph, the Township of Piscataway respectfully contends that no Order can restrain any entity but the Township of Piscataway, unless those other entities are designated as parties to the suit. While it is clear that the Zoning Board and the Planning Board received

notice of the Plaintiff's application, and were represented by counsel at the hearing, those entities are not parties to this lawsuit, have participated in no prior proceedings in this cause other than in connection with applications to restrain specific developmental projects, and, therefore, their involvement in this matter has been tangential, to say the least. Accordingly, it is inappropriate to enter an Order applicable to any party but for the Township of Piscataway in this proceeding. Further, as to the first ordering paragraph, the Court did not require that approvals granted pursuant to its Order shall refer specifically to this Court proceeding and to the Order emanating from the Court's ruling of two weeks ago.

B. With respect to the first two ordering paragraphs, the Court was specifically invited to address the question of indemnification of municipal employees (if memory serves, by Michelle Donato, Esq., attorney for the Zoning Board of Adjustment of the Township of Piscataway). The Court is well aware of those provisions of the Municipal Land Use Law requiring that applications filed with either the Zoning Board, Planning Board or the Township Council, as the case may be, must be acted upon within specific time frames. Unless this Court incorporates

within this Order a broad indemnification provision, the Township Council, and all other Boards acting on developmental applications, as well as municipal employees ordinarily responsible for designating applications as approved or disapproved, will be subject to lawsuits by developers for failing to comply with statutory guidelines. Unlike Judges, municipal non-judicial employees and functionaries are not immune from damage suits under 42 U.S.C. Section 1983 (see also 42 U.S.C. section 1988). Accordingly, to the extent that the Court intends to sign an Order imposing any restraints, the form of that Order should include an indemnification provision.

C. While it is clear in my recollection that the Court intended to restrain the Township from approving developmental applications for those sites incorporated within Ms. Lerman's November 10, 1984, report, the Court should note that there are differences between those sites included in that report and those sites deemed as appropriate in the earlier version. While I will argue below that the concept of blanket restraints in this circumstance is generally inappropriate, I do not understand how, upon a brief review of the most recent report, the Court can accept, prima facie, the conclusions contained therein and reject the conclusions contained in the earlier report. No explanation has been provided as to why parcels

included in the earlier report were dropped from the most recent. This situation suggests approaching the subject of interim restraints with substantial caution; it further suggests that the Court may wish to reconsider its earlier conclusion regarding the contents of the November 10, 1984, report.

D. With respect to the final ordering paragraph, the Court most definitely did not impose upon all developers a requirement to object within two days following receipt of the Court's Order. The Court stated, after imposing upon the Township the obligation to serve copies of the Order on all affected property-owners, that any developer might have leave to lift restraints imposed upon two days' notice. The phraseology of the final ordering paragraph suggests that developers may be barred from objecting to the restraint unless they apply to the Court within two days following receipt. This is an impossible and impractical burden to impose on individuals who have not received notice of the restraint and who cannot be reasonably expected to marshall fair objection to the restraints imposed in this most complex matter within 48 hours.

E. I also object to the Court's Order as to site 60 and the few small sites associated therewith. Site 60 consists of a number of acres of diffuse ownership, small parcels being

less than 10,000 square feet in size. If the Court will recall site 60 was the subject of specific testimony by Mr. Nebenzahl during the Trial; an exhibit was prepared delineating site 60 specifically because of its unique nature (I retain possession of that exhibit with the consent of Mr. Gelber). The parcels constituting site 60 are non-contiguous and extend across an area at least one mile in width. Interspersed throughout site 60 is a senior citizens center, municipal park land, property utilized by the Board of Education of the Township, by private owners and by the municipality. From time to time the Township has sold isolated small parcels from among its holdings to indivdiuals wishing to expand their side yards or rear yards or wishing to construct single homes. The impact of a restraint upon that site is out of proportion to the potential utility of that site for the purposes set forth by Plaintiff. This site demonstrates the inequity of a general restraint; numerous applications before this Court will be required by individuals who frequently cannot afford those applications. Therefore, because of the unique nature and disparate ownership of this site, site 60 ought to be excepted from the restraint, or the restraint should not apply to the development of parcels of one acre or less.*

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* The above concern for site 60 in no way suggests that the Township acquiesces in the conclusions reached by Ms. Lerner as to any other site, or suggests that restraints as to any site in the Township are appropriate.

F. Lastly, and with all due respect to the Court, I am concerned that the Court's Order may have resulted from an erroneous view of the extent to which Piscataway Township has rendered cooperation to the Court's expert. I wish to reiterate that no party to this action is served by delay; indeed, Piscataway joined with at least one developer in open Court to request a prompt decision with respect to that developer's parcel, and Piscataway wishes to emphasize its concern that the Court render its decision in this matter as quickly as possible. In light of what I perceive to be an erroneous view by the Court, I would urge the Court to reconsider the entry of the within Order, keeping in mind the standard parameters for any injunctive relief, the existing Orders of the Court dated May 7, 1984, June 26, 1984, and November 5, 1984, and recognizing that the Township has in the past and will in the future provide adequate notice of all developmental applications to Plaintiff. I continue to urge upon this Court the argument that an insufficient showing of irreparability has been presented before the Court to justify the broad and unusual restraint encompassed within this Order, especially on the basis that the Order was issued before counsel had an opportunity to review the document forming the basis for the Order.

If Your Honor wishes to entertain argument with respect to any of the matters raised herein, I will be pleased to make myself available for such purpose at the Court's earliest convenience.

Respectfully and sincerely yours,

PHILLIP LEWIS PALEY

PLP:pmm

cc: All attorneys on the attached list

SERVICE LIST

Phillip Paley, Esquire
Kirsten, Friedman & Cherin
17 Academy Street, Newark, N.J. 07102

Michelle Donato, Esquire
Frizell & Pozycki
P.O. Box 247, Metuchen, N.J. 08840

Guliet D. Hirsch, Esquire
Brener Wallack & Hill
2-4 Chambers Street
Princeton, N.J. 08540

Chris A. Nelson, Esquire
Venezia & Nolan
306 Main Street, Woodbridge, N.J. 08095

Raymond R. Trombadore, Esquire
Trombadore & Trombadore
33 E. Main Street, Somerville, N.J. 08876

Barbara J. Williams, Esq.
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102

Daniel S. Bernstein, Esquire
Bernstein, Hoffman & Clark
336 Park Avenue, Scotch Plains, N.J. 07076

Glen S. Pantel, Esquire
Shanley & Fisher
95 Madison Avenue, Morristown, N.J. 07960

Bruce Gelber, Esq.
National Committee Against
Discrimination in Housing
733 15th Street N.W.
Suite 1026
Washington, D. C. 20005

Lawrence A. Vastola, Esquire
Vogal, Vastola & Gast
10 Johnston Drive, Watchung, N.J. 07060

Lawrence B. Litwin, Esquire
Scerbo, Kobin, Litwin & Wolff
10 Park Place, Morristown, N.J. 07960

Angelo H. Dalto, Esquire
Abrams, Dalto, Gran, Hendricks & Reina
1550 Park Avenue, South Plainfield, N.J. 07080

Donald R. Daines, Esquire
K. Hovnanian Companies of New Jersey
10 Highway 35, P.O. Box 500, Red Bank, N.J. 07701

Jack Dusinberry, Esquire
Barry Mandelbaum, Esquire
141 S. Harrison Street, E. Orange, N.J. 07018

Howard Gran
Abrams, Dalto, Gran, Hendricks & Reina
1550 Park Avenue, South Plainfield, N.J. 07080

Edwin Kunzman, Esquire
Kunzman, Kunzman & Yoskin
15 Mountain Boulevard, Warren, N.J. 07060

BARBARA J. WILLIAMS, ESQ.
Rutgers Constitutional Litigation Clinic
15 Washington St., Newark, N.J. 07102
201/648-5687

BRUCE S. GELBER, ESQ.
National Committee Against Discrimination in Housing
733 - 15th St. NW, Suite 1026
Washington, D. C. 20005

ATTORNEYS FOR PLAINTIFFS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY/OCEAN CO.

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

vs.

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

Defendants.

Civ C 4122-73

MOUNT LAUREL

O R D E R

Urban League plaintiffs having moved for temporary restraining order and interlocutory injunction, the Court having reviewed all papers submitted, having heard the arguments presented in open Court on the return date, and for good cause shown:

IT IS THIS 11 day of ~~November~~ December, 1984:

O R D E R E D that pending a hearing on the final report of Carla Lerman dated November 10, 1984 (attached hereto as Exhibit A), no site found suitable for residential development by Ms. Lerman in the November 10, 1984 final report shall be approved for development by the Township of Piscataway and any of its official bodies, officers or agents, unless the approval

requires a 20% set aside for low and moderate income housing consistent with Southern Burlington County N.A.A.C.P., et al. v. Township of Mount Laurel, 92 N.J. 158 (Mount Laurel II), nor shall use of the site be approved for any other purpose. Any approval granted pursuant to this Order shall contain on its face specific reference to this Order of the Court; and

IT IS FURTHER O R D E R E D that no building permits shall be issued by the Township of Piscataway or any of its official bodies, officers or agents as to the sites found suitable for residential development in Ms. Lerman's final report dated November 10, 1984 (Exhibit A) without Court Order granting such permit upon a finding that the proposed development meets affordability and eligibility standards consistent with Mount Laurel II; and

IT IS FURTHER O R D E R E D except as provided in paragraphs 1 and 2 above that the Township of Piscataway and any of its official bodies, officers or agents are permitted to process and approve development applications, provided that such processing and approval, if any, shall not, until further Order of the Court, create any vested use or zoning rights or give rise to a claim of reliance against a claim by the Urban League plaintiffs or an Order of this Court for revision of the Piscataway Township zoning ordinances, if the Urban League shall claim or the Court shall order rezoning necessary to satisfy the Township of Piscataway's obligation under Mount Laurel II

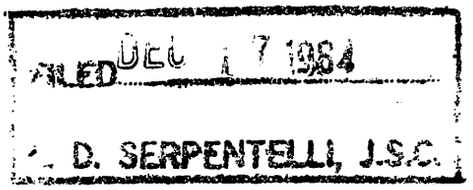
to provide opportunities for the development of its fair share of the regional need for low and moderate income housing; and

IT IS FURTHER O R D E R E D that the Orders of this Court dated May 7, 1984, June 26, 1984 and November 5, 1984 shall remain in full force and effect and shall not be deemed superseded by this Order; and

IT IS FURTHER O R D E R E D that within ten (10) days of the entry of this Order, the Township of Piscataway shall furnish the plaintiffs with the names and addresses of the owners of record of all sites found suitable for residential development in Ms. Lerman's final report dated November 10, 1984 (Exhibit A), and any additional sites deemed suitable for Mount Laurel II housing by plaintiffs' expert, Alan Mallach, in his report of June 8, 1984 (attached hereto as Exhibit B); and

IT IS FURTHER O R D E R E D that Urban League plaintiffs shall within ten (10) days following receipt of the Township of Piscataway list, serve a copy of this Order on all such property owners. Objections to the application of this Order to any particular site in Piscataway will be heard by the Court on short notice of not less than two (2) days.

EUGENE D. SERPENTELLI, J.S.C.



KIRSTEN, FRIEDMAN & CHERIN
A PROFESSIONAL CORPORATION

17 ACADEMY STREET
NEWARK, NEW JERSEY 07102
(201) 623-3600
ATTORNEYS FOR DEFENDANT, TOWNSHIP OF PISCATAWAY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL., Plaintiffs, vs. TOWNSHIP OF PISCATAWAY, ET AL. Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY/OCEAN COUNTY DOCKET NUMBER C-4122-73 CIVIL ACTION ORDER DENYING APPLICATION FOR STAY OF DECEMBER 11, 1984 ORDER

THIS MATTER having been open before the Court on December 17, 1984, by Kirsten, Friedman & Cherin, a Professional Corporation, attorneys for the Defendant, TOWNSHIP OF PISCATAWAY, upon application for an Order granting a stay of the Order of this Court dated December 11, 1984, and the Court having considered the argument of counsel, and good cause having been shown for the