ML Piscataway 6-March-85

Post Trial Memorandum
Submitted on Behalf
of the Twsp. of Piscataway
re: Amending Mallach's report
and applying conclusions to
Piscataway.

pgs = 17

MLCC0534D

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL., Plaintiffs, VS. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY/OCEAN COUNTY DOCKET NO. C-4122-73 MOULST LAUREL

POST-TRIAL MEMORANDUM SUBMITTED ON BEHALF OF THE TOWNSHIP OF PISCATAWAY

KIRSTEN, FRIEDMAN & CHERIN
A PROFESSIONAL CORPORATION
17 Academy Street
Newark, New Jersey 07102
Attorneys for Defendant,
Township of Piscataway
201-623-3600

During February, 1985 this Court extended leave to Piscataway Township to address a report entitled "An Analysis of the Freehold Township Mount Laurel Settlement Proposal: The Problem of Fair Share Credits", by Alan Mallach, the expert retained by the plaintiff Urban League (now "Civic League") of Greater New Brunswick. This memorandum seeks to analyze Mr, Mallach's report and apply his conclusions to Piscataway.

FACTUAL BACKGROUND;

Piscataway's area approximates 19 square miles. Per "the 1980 censjis*, Piscataway[1]s population was 42,223; accordingly, Piscataway's population density exceeds 2,200 persons per square mile, substantially more than double the statewide 1980 population density (983 persons per square mile).

Piscataway[1]s 1984 present need, both indigenous and reallocated excess, has been calculated to be 678 units by use of the prevailing fair share methodology (hereinafter referred to as "the methodology"). Piscataway[1]s prospective need was calculated at 3,066 units; the 1984 fair share number, therefore, is 3,744 units. In addition, another 448

Correct

units were staged for future rezoning. Therefore, Piscataway's total fair share obligation imposed by the methodology requires provision for 4,192 affordable housing units, in the aggregate.

Throughout trial, Piscataway has argued that the above calculation is unreasonable, for the following reasons, among others:

A. The methodology assigns a 20% increment to each municipality to compensate for those municipalities lacking sufficient vacant developable land. Obviously, as Piscataway has insufficient vacant developable land to meet its fair share, the application of the 20% increment is inappropriate in its case.

B. Piscataway is the site of the largest campus of Rutgers, the State University, and houses thousands of students in dormitories, single-student apartments, and family housing units. Piscataway sought credits against its fair share for such housing. While substantially disagreeing, plaintiff did accede to a "credit" to Piscataway[1]s fair share number, representing the 348 family housing units, to be applied against Piscataway[1]s requirement to provide for "low income[11] housing units.

C. Nearly 4,000 garden apartment units exist within the Township, not less than 2,400 of which are currently affordable by moderate income households. These affordable units are substantially occupied by lower income households; at least one census district, comprised wholly of garden apartment units, bears a median household income dramatically lower than the regional median. In addition, the median household income for tenants of multi-family units in Piscataway approximates $18,000, some $12,000 below the median household income for single-family units in the Township.

D. Approximately 1,200 single family residences within the Township are affordable by low income households.

While Piscataway contends that credits are appropriate for each category referred to above, Piscataway also suggests that the very existence of those categories demonstrates its historical commitment to the Creation of a housing stock comprising numerous types of residential dwellings suitable for occupancy by a variety of income and earning classes.

How does one determine what an affordable is?

ARGUMENT

MODIFICATIONS;

Clearly, all parties agree that Piscataway lacks sufficient vacant developable land to accommodate its fair share number. In light of that situation, Piscataway respectfully contends that the application of the 20% increment is inappropriate.

One further modification is relevant. The methodology assumes that 82% of presently existing substandard and overcrowded units are occupied by lower income households. This percentage is overstated by at least 25% and should be reduced. The effect of this modification, adopted by Judge Skillman in the Ringwood decision, is to reduce Piscataway's indigenous need by more than 100 units. Mr. Mallach*s report clearly suggests that this modification should be adopted by the Court; Piscataway supports this position.

ADJUSTMENTS:

The above modifications will produce a fair share number before consideration of "credits" and "adjustments". An analysis of both "credits" and "adjustments" forms the bulk of Mr. Mallach's report on Freehold Township, treated below.

Mr. Mallach describes two areas of potential adjustment: first, adjustment for past non-exclusionary performance; second, adjustment to fair share allocations in consideration of settlement.

ADJUSTMENT FOR PAST PERFORMANCE;

As to adjustment for prior non-exclusion, Mr. Mallach[1]s report states:

> "A sense of fairness suggests that there is merit to the idea that a community which has permitted a wide variety and type of housing in the past, prior to the Mount Laurel Decision and its strict standards, receive some recognition for that history.™

Mr. Mallach[1]s analysis addresses the comparison between municipal median household income and regional median household income, comprising a step in the methodology. He concludes that that comparison does not sufficiently reach the "sense of fairness" which he seeks. Piscataway agrees. Piscataway[f]s median household income is 102% of the regional median income, a rather close ratio. In and of itself, that factor suggests that Piscataway is comprised of a substantial number of households of low and moderate income and confirms Piscataway's ante-Mount Laurel commitment to the creation of a variety of housing types.

not necc. (illegible)

Mr. MallachVs report discusses "at least three different factors" which he deems relevant in determining the extent to which a fair share number should be adjusted:

A. First: The extent to which past performance has created housing units which are currently available or which will shortly become available to lower income households. In Piscataway, at least 2,400 garden apartment units are currently affordable by moderate income households; 1,200 existing single family units and 348 student family housing units are currently affordable by low income households. The housing units in these categories comprise 32% of all Piscataway housing, without consideration of other existing units affordable by households of moderate income. This data, considered together with Piscataway's median income multiplier of 1.02 and the census data preferred to above, demonstrates clearly that a substantial proportion of affordable housing units are occupied by households of low and moderate income. In addition, Piscataway has voluntarily rezoned substantial acreage to accommodate hundreds of anticipated Mount Laurel units. Clearly, Piscataway has credibly sought to have existing affordable housing made available to lower income households.

B. Second: The extent to which a municipality's past performance was a response to prior litigation seeking to make available affordable housing for lower income households. Prior to Mount Laurel I{Piscataway had zoned hundreds of acres to permit the construction of high density (15 units to the acre) residential development in several areas of the Township7] Further A in direct response to Mount Laurel I, substantial tracts of land formerly zoned for residential development were rezoned to permit residential development at higher densities, and substantial acreage was rezoned to permit housing at a density of 10 units to the acre.I In addition, in direct response to Mount Laurel II, the Township commissioned a fair housing analysis, previously marked in evidence in these proceedings, and specifically rezoned one additional site for high density residential development consistent with Mount Laurel standards.

C. Third: The extent to which a municipality's past performance was "extraordinary". In Piscataway, garden apartments alone comprise more than 30% of the Township's housing stock; when the Rutgers family housing units are included, the ratio exceeds one-third. Upon development of the now vacant sites zoned for high density residential use, the proportion of high density housing in Piscataway

will obviously be even greater.

Piscataway has clearly demonstrated that it has both a substantial percentage of rental housing and a median income near or below the state or regional median. Accordingly, a substantial adjustment to Piscataway's fair share is not only appropriate but mandated by Mr. Mallach's report and his conclusions.

ADJUSTMENT FOR SETTLEMENT;

Mr. Mallach next analyzes potential adjustments ~~based upon~~ settlement^Piscataway respectfully submits that, as applied to it, a defendant in the "Mount Laurel II" litigation, such analysis is misplaced, for a number of reasons.

First, in its 1976 decision, the Court concluded that Piscataway had fully met its obligation to house indigenous low income households; to suggest that Piscataway should have sought a settlement of an obligation which it did not have is to be rather impractical- Second, Piscataway's 1976 fair share obligation was based upon an allocation process found inappropriate by the 1983 Mount Laurel II Court. Piscataway has long contended that it is inequitable and unjust to expect it to have accommodated an obligation which no one could have predicted prior to

April, 1984, when the fair share methodology was refined into substantially its present complexion. Third, a settle-, ment would have aborted Piscataway's contention that a municipality with insufficient vacant developable land should not be compelled to comply with a fair share number designed to accommodate municipalities with no land limitation and, therefore, unreasonable as to it. This contention fully conforms with the reasoning of this Court expressed in AMG, etc., vs. Township of Warren, authorizing any municipality to seek to reduce its fair share number because it lacks sufficient vacant developable land.

Mr. Mallach's report concludes by recommending that Freehold Township receive a thirty percent reduction in its fair share number.

The recommendation compels a comparison between Freehold Township and Piscataway, to determine whether a similar adjustment is appropriate. Freehold Township boasts a median household income which is 135% of the regional median; Piscataway's comparative statistic is 102%. Eighty-two percent of Freehold Township's housing is single family owner occupied? [less than two-thirds of Piscataway's housing is single family owner occupied.] Piscataway's proportion of tenant occupied dwellings, exceeding one third, is

sinfilar to the state wide proportion, thirty-eightjpercjent. Furthermore, it is unlikely that the Freehold Township population density approaches that of Piscataway, which, as earlier pointed out, is more than twice the overall state density.

This Court should not overlook the penalizing effect of the non-adjusted application of the fair share methodology. If the purpose of the process is to extend to each community a fair proportion of lower income households, how can the Court logically conclude that extraordinarily wealthy communities who have historically zoned for nothing but low density single family housing units are now obliged to rezone for fewer than TOO Mount Laurel households?* If Piscataway had zoned its vacant land in 1960 for low density single-family housing as those communities did, does the Court have any doubt that Piscataway[1]s number would be dramatically lower? And if Piscataway had so zoned, is it not likely that those jobs created because Piscataway's zoning permitted such development might not have come to Central New Jersey (and, perhaps, not to New Jersey it-

---

* Saddle River and Mendham, to name two.

self)? Would New Jersey have been the richer? Does not the fact that Piscataway has not been accused of over-zoning for industrial and commercial uses even by its most severe critics reasonably demonstrate a basic fairness in the Township's land use regulations requiring substantial reductions in its current Mount Laurel obligations? Does Piscataway[1]s pre-1980 commitment to the establishment of a broad variety of land use now require that every vacant and suitable acre in Piscataway be "Mount-Laurelized"?

The answers to these questions have extraordinary significance to a State which many observers feel is now characterized by "wall to wall people." Piscataway has previous argued that the numbers derived by the methodology are simply too high for reasonable implementation. To some extent, the proposals to "adjust" and "credit" the fair share numbers proposed by a staunch advocate of the methodology should be viewed as methods to reduce the numbers to levels closer to reason without impeaching the basis of the methodology itself.

The above justifies a substantial adjustment to Piscataway's fair share number, at least to the extent recommended for Freehold Township, if not to a greater extent.

CREDITS;

The last part of Mr. WallachVs report deals with the concept of "credits"; only the first two sections of his analysis bear on Piscataway.

Mr. Mallach concludes that no "credit" should be provided for group housing facilities. His conclusion is reached in the context of a single group housing facility located in Freehold Township; the number of occupants of that facility are not indicated. In contrast, Piscataway hosts substantial numbers of college dormitories housing thousands of students. The quantum of such extensive "group quarters" should be given some consideration by this Court in terms of providing either a credit to, or an adjustment of, Piscataway's fair share obligation.

The second "credit" referred to in the Mallach report deals with garden apartment units in Freehold Township, fewer than one-third of which are considered affordable to moderate income households, Mr. Mallach does not extend any credits for those 247 affordable units, but his report does recommend credits for certain lower income units located within a mobile home park which are affordable within low or moderate income guidelines and likely to

remain affordable for the immediate future.

Two thousand four hundred garden apartment units within Piscataway are affordable by moderate income households, according to the uncontroverted testimony. Piscataway has in force and operating a rent leveling ordinance, administered by a rent leveling board, which places ceilings on annual rent increases. Therefore, most of the affordable apartments will continue to remain affordable to Mount Laurel households. The census data clearly demonstrates that the median income of apartment dwellers in Piscataway is substantially less than that of single family residential households and within moderate income guidelines. This suggests that substantial credits for existing apartment units should be extended to Piscataway in the determination of its fair share number.

FURTHER COMMENTS;

Two other areas deserve specific attention. First, the voluntary rezoning of substantial acreage, all deemed suitable for high density residential development by the Court appointed expert, underscores Piscataway's commitment to generate a variety of housing within its borders. While an adjustment for past performance, as Mr. Mallach

points out in his report, may be difficult to quantify, certainly Piscataway[1]s entitlement to such adjustment is demonstrably clearer by such voluntary rezoning*

Second, with respect to the issue of settlement generally, it should certainly not be sufficient to inquire merely whether the municipality has settled or not. The tacit assumption, of course, is that it is more "reasonable" for a municipality to settle then to litigate. That assumption is correct only if the parameters of any proposed settlement are "reasonable." One test of reasonableness may well be to compare proposed settlement offers with existing settlements in other municipalities.

Most settlements which have been reached require the settling municipality to zone for a mere fraction of the fair share number. For example, Parsippany-Troy Hills, whose fair share number was computed to be 3100, settled (with the Office of the Public Advocate) upon a fair share number of 1500, permitting existing residential development to count as credits for 1200 of that number, and, therefore, rezoning for only 300 acres. If the Office of the Public Advocate concluded that such a settlement conformed to the public interest, why does the plaintiff persist in seeking a resolution requiring substantially greater rezoning for

Piscataway? Settlement might be an appropriate criterion only where the parties can effect reasonable compromises, on both sides.

At no time has Piscataway postured regarding settlement. Piscataway's position has been consistent: based upon whatever criteria, standards, modifications or adjustments apply, Piscataway has fairly complied with the mandates and the restrictions of Mount Laurel II. Piscataway has consistently argued that the application of the methodology to a community as densely populated as Piscataway with its limited vacant acreage will create untoward, unacceptable, unworkable and impractical results.

At least one municipality has "settled", only later to seek to vacate the settlement. Piscataway is hardly in that posture. Piscataway took a leading role in the presentation of the defense on remand and has argued vehemently that its unique characteristics require unique treatment.

Throughout the trial, plaintiff's witnesses have contended that it is important to treat of Mount Laurel development with a view towards conservatism. Indeed, methodological alternatives were chosen because they produced more conservative numbers. Keeping in mind the

necessity (as recognized by the Mount Laurel II Court) to retain appropriate planning strictures, and to develop Mount Laurel housing reasonably consistent with the character of the community so as not to subvert that existing character by overly dense development, Piscataway[1]s existing zoning ordinance reasonably complies with the Mount Laurel IX mandate.

Accordingly, Piscataway[1]s fair share should be determined conservatively, based upon consideration of Piscataway[1]s limited vacant land and diverse housing stock.

Piscataway, further, respectfully renews its request that the Court visit the Township, examine the vacant sites discussed at length during the course of the trial and view the existing housing stock. Piscataway remains convinced that such an examination will compel the conclusion that the Township has not treated of its zoning powers so as to be deemed "exclusionary" in any respect.

Respectfully and sincerely,

PHILLIP LEWIS PALEY

March 6, 1985