

~~MM~~ ML Piscataway

13-July-1984

Notice of Motion for Summary Judgment
on the Mt. Laurel action with
attached Certification and Memo
~~in~~ Support, as well as order
discouraging Plaintiffs from seeking a
pys = (17) builder's remedy.

ML000549N02M3

KIRSTEN, FRIEDMAN & CHERIN
A PROFESSIONAL CORPORATION

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

----- X

JOSEPH GERICKONT and GEORGE
GERICKONT,

Plaintiffs,

vs.

THE TOWNSHIP OP PISCATAWAY,
a Municipal Corporation of
the State of New Jersey,

Defendant.

----- X

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY/OCEAN COUNTY

DOCKET NO. L-032501-84 PW

CIVIL ACTION

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

TOs RAYMOND R. TROMBADORE, ESQ.
33 East High Street
Somerville, New Jersey 08876
ALL OTHER COUNSEL ON THE ATTACHED LIST

PLEASE TAKE NOTICE THAT on Friday, the 13th day of
July, 1984, the undersigned attorney for Defendant, Township
of Piscataway, a Municipal Corporation of the State of New

Jersey, shall make application before the Superior Court of New Jersey, the Honorable Eugene D. Serpentelli sitting, at 9:00 A.M. in the forenoon or as soon thereafter as counsel may be heard, at the Ocean County Court House, Toms River, New Jersey, for the entry of summary judgment in favor of the said Defendant and against Plaintiffs.

PLEASE TAKE FURTHER NOTICE that the Defendant shall rely upon the annexed Certification and Brief in support of the within application.

Appended hereto is a proposed form of Order for summary judgment, as required by the Rules of Court.

The Defendant respectfully seeks oral argument on this application.

KIRSTEN FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Defendant,
Township of Piscataway

By: 

PHILLIP LEWIS PALEY

DATED: June 14, 1984

KIRSTEN, FRIEDMAN & CHERIN
A PROFESSIONAL CORPORATION

17 ACADEMY STREET
NEWARK, NEW JERSEY 07102
(201) 623-3600
ATTORNEYS FOR Defendant

JOSEPH GERICKONT AND GEORGE
GERICKONT,

Plaintiffs,

v.
TOWNSHIP OF PISCATAWAY, et
al.

Defendants.

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION
: MIDDLESEX COUNTY/OCEAN COUNTY
: DOCKET NO. L-032501-84 PW

: Civil Action
: CERTIFICATION
:
:
:
:
:
:
:
:

Phillip Lewis Paley, of full age, hereby certifies
as follows:

1. I am an attorney of law of the State of New Jersey, and I am a member of the firm of Kirsten, Friedman & Cherin, a Professional Corporation, attorneys for the defendant, Township of Piscataway in the above matter. I serve also as Township Attorney for the Township of Piscataway, and I am in responsible charge of the handling of the within litigation, and of related litigation entitled "Urban

SERVICE LIST

URBAN LEAGUE V, CARTERET
(And All Consolidated Cases)

No. C-4122-74 - Middlesex County, Chancery Division

William C. Moran, Esq.
Luff, Moran & Balint
Iranbury-South River Road
Iranbury, New Jersey 08512

Thomas R. Farino, Jr., Esq.
Thor. Applegarth. & Half Acre Roads
Iranbury, New Jersey 08512

Michael Noto, Esq.
151 Route 516
P. O. Box 607
Old Bridge, New Jersey 08857

Joseph L. Stonaker, Esq.
Stonaker & Stonaker
P. O. Box 570
Princeton, New Jersey 08540

Patrick J. Diegnan, Jr., Esq.
1308 Durham Avenue
South Plainfield, New Jersey 07080

William L. Warren, Esq.
Warren, Goldberg, Berman & Lubitz
112 Nassau Street
P. O. Box 645
Princeton, New Jersey 08540

Richard Schatzman, Esq.
McCarthy & Schatzman
6-8 Charlton Street
P. O. Box 2329
Princeton, New Jersey 08540

Bruce Gelber, Esq.
Janet LaBella, Esq.
National Committee Against Discrimination in Housing
1425 H Street NW
Suite 410
Washington, D.C. 20005

Philip Lewis Paley, Esq.
52 Ross Hall Blvd.
North Piscataway, New Jersey 08854

Arnold K. Mytelka, Esq.
80 Park Place
Newark, New Jersey 07102

Bertram Busch, Esq.
Busch & Busch
99 Bayard Street
P. O. Box 33
New Brunswick, New Jersey 08903

Leslie Lefkowitz, Esq.
1500 Finnegans Lane
P. O. Box 3049
North Brunswick, New Jersey 08902

Phillip Paley, Esq.
Kirsten, Friedman & Cherin
17 Academy Street
Newark, New Jersey 07102

Joseph Benedict, Esq.
247 Livingston Avenue
New Brunswick, New Jersey 08902

Lawrence B. Litwin, Esq.
Scerbo, Kobin, Litwin & Wolff
10 Park Place
Morristown, New Jersey 07960

Carl S. Bisgaier, Esq.
Bisgaier & Pancotto
510 Park Boulevard
Cherry Hill, New Jersey 08034

Eric Neisser, Esq.
John Payne, Esq.
Constitutional Litigation Clinic
Room 338
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102

Guliet D. Hirsch, Esq.
Brener, Wallack & Hill
204 Chambers Street
Princeton, New Jersey 08540

Stewart M. Hutt, Esq.
459 Amboy Avenue - Box 648
Woodbridge, New Jersey 07095

Esq., attorney for Joseph Gerickont and George Gerickont, upon application for summary judgment and the Court having read and reviewed the moving papers and the Briefs of the parties, and having heard legal argument on Defendant's application, and good cause having been shown for the entry of this Order:

IT IS ON THIS DAY OF JULY, 1984,

ORDERED AND ADJUDGED, that the Defendant's application for summary judgment be and the same is hereby granted; and it is further

ORDERED, that judgment in this matter shall be entered on behalf of the Defendant, Township of Piscataway, and against the Plaintiffs, Joseph Gerickont and George Gerickont, without costs.

HONORABLE EUGENE D. SERPENTELLI

PAPERS CONSIDERED:

_____ Notice of Motion
 _____ Movant's Affidavits
 _____ Movant's Brief
 _____ Answering Affidavits
 _____ Answering Brief
 _____ Cross-Motion
 _____ Movant's Reply
 _____ Other

League of Greater New Brunswick v. Carteret, et al., tried before the Honorable Eugene D. Serpentelli, commencing on April 30, 1984. I have represented the Township of Piscataway in this latter litigation at all times subsequent to the decision of the Supreme Court of New Jersey remanding the matter for trial, as reflected at 92 N.J. 158 (1983).

2. I was present before the Court for the pre-trial conference which took place on March 16, 1984. That conference had originally been scheduled for March 2, 1984 and was thereafter adjourned to March 9, 1984. The matter had been set down for trial on March 19, 1984, March 26, 1984, April 9, 1984, and April 16, 1984, all of which trial dates were adjourned because of the pendency of other litigation before this Court. The trial in this matter commenced on Monday, April 30, 1984, and resumed on Monday, May 7, 1984, until the conclusion of the trial (for most purposes) on Thursday, May 31, 1984.

3. The trial, of course, followed extensive discovery which took place by and between all parties involving, for Piscataway, issues related to fair share methodology, compliance, availability of vacant developable land, the existence of environmental constraints against further development, the existence of agricultural properties, and various land use and planning considerations involved in the existing zoning. Depositions of the municipal planner were

JL

OL

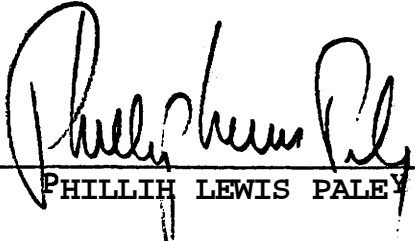
taken for two full days_f and additional conferences were held at the municipal building of the Township Piscataway for the purpose of exchanging information and discussing prospective resolutions to various phases of the trial. In short_f the pre-trial activity was extensive and complex.

4. Plaintiffs¹ complaint in this matter was executed on May 7, 1984, by counsel, after the Urban League trial had commenced. To my best recollection, plaintiff's complaint was served upon the Township within several days thereafter. Plaintiff's counsel did not participate in any manner in the prosecution of the Urban League trial prior to the filing of its complaint.

5. Plaintiffs¹ complaint is the first (and only) complaint seeking a builder's remedy against the Township of Piscataway. The only plaintiff prosecuting the cause of action against the Township of Piscataway was the Urban League (now "Civic League"). To my best knowledge, no other builder or prospective developer has filed any complaint against the Township of Piscataway, as of the date of this certification.

6. Further, to my best knowledge, plaintiffs have filed no application for development of their property with any municipal agency and have submitted no sketch_r drawings, or specific proposal to any municipal official. Plain-

tiffs have submitted material to Carla Lerman, the court-appointed expert, in accordance with leave of this Court and have requested her consideration of that material as part of her anticipated report.


PHILLIS LEWIS PALEY

DATED: June 14, 1984

SUPERIOR COURT OP NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY/OCEAN COUNTY
DOCKET NO. L-032501-84 PW

JOSEPH GERICKONT AND GEORGE :
GERICKONT, :
 :
 Plaintiffs, :
 :
 :
 V. :
 :
 TOWNSHIP OP PISCATAWAY, et :
 al., :
 :
 Defendants. :
 :
 _____ :

MEMORANDUM OF LAW

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
17 Academy Street
Newark, New Jersey 07102
Attorneys for Defendant
THE TOWNSHIP OF PISCATAWAY

(201) 623-3600

PHILLIP LEWIS PALEY
On the Brief

Plaintiffs¹ complaint in this matter contains three counts, each seeking relief directed towards formulating a builders remedy, thereby directing the Township to rezone plaintiff's property to permit an average gross density sufficient to provide a reasonable return to the plaintiffs and to assure feasibility of a substantial amount of low and moderate income housing. By oral Order issued on June 4, 1984, through a multi-party telephone conference, and as reflected in an Order entered June 7, 1984, the Court directed that plaintiffs¹ action be consolidated with a related action, entitled "Urban League of Greater New Brunswick v. Carteret, etc., et al.," (Docket No. C-4122-73), for the limited purpose of allowing the plaintiffs to participate in the ordinance revision aspect of the suit.

The Court's consolidation order expressly determined that plaintiffs should have no right to participate in any phase of the trial, or further post trial proceedings, relating to a determination of the validity or invalidity of the Township's zoning ordinance; a determination whether the Township zoning ordinance is unenforceable; whether a special master should be appointed; or in what matter the special master should be instructed to proceed. The Court did authorize plaintiffs to communicate with Carla Lerman, an expert appointed by the Court, to assist the Court in reaching conclusions concerning the extent of vacant developable land within the Township, in order to have the

expert consider plaintiffs¹ position regarding its land and the suitability of that land for rezoning.

Therefore, the only aspect of plaintiffs¹ complaint requiring adjudication by this Court relates to the question of plaintiff's right to a "builder's remedy". That right stems from the decision of the New Jersey Supreme Court in South Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983), which provides as follows, in pertinent part:

"Builder's remedies will be afforded to plaintiffs in Mount Laurel litigation where appropriate, on a case by case bases. Where the plaintiff has acted in good faith, attempted to obtain relief without litigation, and thereafter indicates the constitutional obligation in Mount Laurel type litigation, ordinarily a builders remedy will be granted, provided that the proposed project includes an appropriate portion of low and moderate income housing, and provided further that it is located and designed in accordance with sound zoning and planning concepts, including its environmental impact." 92 N.J. at 218.

'We hold that where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning. We emphasize that the builder's remedy should not be denied solely

because the municipality prefers some other location for low income housing, even if it is in fact a better site. Nor is it essential that considerable funds be invested or that the litigation be intensive.

"Other problems concerning builders remedies require discussion. Care must be taken to make certain that Mount Laurel is not used as an unintended bargaining chip in a builder's negotiation with the municipality, and that the courts not be used as the enforcer for the builders threat to bring Mount Laurel litigation if municipal approvals for projects containing no lower income housing are not forthcoming. Proof of such threats shall be sufficient to defeat Mount Laurel litigation by that developer." 92 N.J. at 280.

Although the clear assertion of the Supreme Court, as set forth above, is that builders remedies are no longer to be *rara aves*, the Supreme Court takes considerably pains, at 92 N.J. 280-281, to provide for adjustments to such remedies where more than one builder has filed applications for builder's remedies, and to make certain that the municipal planning board is involved in the formulation of the specific remedy, as well as to safeguard a potential pre-deliction for unnecessary litigation based upon denials of variances not related to Mount Laurel objectives. Therefore it is certainly clear that a builder's remedy was not intended by the Supreme Court to be either automatic or blanket, and that certain criteria must be met before a

prospective developer is entitled to this extraordinary relief. Indeed, the Urban League, in submitting a memorandum of law concerning builder remedy priorities in the Urban League litigation, which was forwarded to the Court on ^(Jlay) 22~ (1984)) refers to a number of the conditions imposed by the Supreme Court on the availability of the builders remedy as "significant" (Brief, page 5).

A fair review of the conditions strongly suggests that the builder's remedy was to be limited to those builders who vindicate the constitutional obligation to provide a realistic opportunity for low or moderate income housing, see 92 N.J. at 218, and who succeeds in the litigation, 92 N.J. at 279. Implicit in these pronouncements is the concept that the vindicator or victor, as the case may be, is a party to the litigation, one which presents proofs and participates in all phases of the litigation. Clearly, this is not the case with respect to the plaintiffs in this proceeding.

The Urban League's brief, earlier referred to, adopts a similar conclusion:

"... a builder's remedy should not be allowed to any plaintiff which is not fully consolidated for trial of the constitutional issues in the case. Where considerations of timeliness, prejudice to other parties, or judicial

economy dictate that a late-filing plaintiff not be consolidated, the proper solution ... is to assure that they be given site-specific consideration when and if the remedy stage is reached ... [B]y creating some degree of differential between those who bear the load of litigation and those who ride free, it preserves the significant incentive to the active litigants which the Supreme Court also intended."

While this Court has earlier expressed its concern that groups purportedly acting for the "public interest", such as the Urban League, may lack the resources to see complex and lengthy litigation through to conclusion, the Court is well aware that both the Urban League and the Constitutional Law Clinic of the Law School of Rutgers, the State University, have participated fully in all phases of the remand to date? in those circumstances, the reasoning of the Urban League as set forth above is particularly apt. Counsel has previously argued in open Court that the active participation of groups similar to the Urban League should bar any developer from the award of a builder's remedy and respectfully reiterates that position here.

Furthermore, the defendant respectfully contends that the use of the term "project", see 92 N.J. 279, and "proposed project" see 92 N.J. at 218, limits a builder's remedy to those situations where, at some point, a specific and detailed proposal has been submitted to appropriate municipal officials. This conclusion is buttressed by the reference to "environmental or other substantial

planning concerns" contained at pages 279-280, and the requirement that the project be "located and designed in accordance with sound zoning and planning concepts, including its environmental impact" at page 218. Clearly, the Supreme Court was not concerned with a mere oral presentation regarding a builder's inclination to comply with Mount Laurel, but sought something much more specific than that. Presumably, this attitude is the foundation for various references in the Supreme Court's opinion suggesting that one of the factors to be considered by the trial court is the builders¹ attempts to obtain relief without litigation, quaere, how is a municipality expected to provide any aspect of relief without a detailed proposal for consideration by municipal officials and planners?

In the instant case, plaintiffs failed to participate in the litigation until well after the commencement of trial. Plaintiffs¹ complaint was consolidated with the main case for purposes limited to its right to a builder's remedy, and for no other reason, so that it is difficult to determine what constitutional right plaintiffs can be said to vindicate, even if plaintiffs prevail. Lastly, plaintiff's presentations to the municipality have consisted of one appearance at a public hearing, to the best knowledge of the author, and certainly did not include any written documentation or submission regarding any proposed

KIRSTEN, FRIEDMAN & CHERIN
A PROFESSIONAL CORPORATION

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

----- X
JOSEPH GERICKONT and GEORGE : SUPERIOR COURT OF NEW JERSEY
GERICKONT, : LAW DIVISION
 : MIDDLESEX COUNTY/OCEAN COUNTY
 :
Plaintiffs, :
 : DOCKET NO. L-032501-84PW
vs. :
 :
THE TOWNSHIP OF PISCATAWAY, : CIVIL ACTION
a Municipal Corporation of :
the State of New Jersey, :
 : ORDER
Defendant. :
 :
----- X

This matter having been opened to the Court by
Kirsten Friedman & Cherin, a Professional Corporation, attorneys
for the Defendant, Township of Piscataway, a Municipal
Corporation of the State of New Jersey, Phillip Lewis Paley,
Esq., appearing, in the presence of Raymond G. Trombadore,

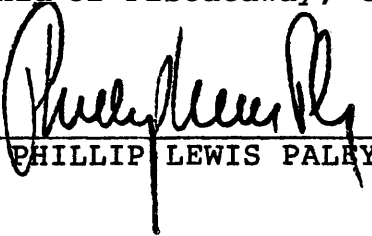
plan or project for the development of high density housing.

Under these circumstances, it is respectfully urged that the plaintiffs are not entitled to relief by way of builder's remedy? since that claim is the only viable claim remaining, pursuant to the Order for Partial Consolidation issued by this Court, the defendant Township is entitled to summary judgment in its favor.

Respectfully and sincerely yours,

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Defendant
Township of Piscataway, et al.

By: _____


PHILLIP LEWIS PALBY